



# **Special Legislation and Megaregion Transit Planning**

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## **List of Abbreviations**

CapMetro	Capital Metropolitan Transportation Authority
DART	Dallas Area Rapid Transit
FTA	Federal Transit Administration
MPO	Metropolitan Planning Organization
MR	Megaregion
MSA	Metropolitan Statistical Area
TBD	Transportation Benefit District
Tex. Transp. Code	Texas Transportation Code
UZA	Urbanized Area
WMATA	Washington Metropolitan Area Transit Authority

# Chapter 1. Introduction

The twenty-first century is facing new challenges in the transportation realm, stemming from disruptive technology shifts, demographic growth in megaregion (MR) areas, climate change impacts, COVID-19, and federal and state transportation policy that is still routed in twentieth century norms, focused around the car. For citizens to thrive and adapt within and between America’s growing MRs without reducing access for rural communities, transportation policy and, most importantly, transportation law—will need to develop new paradigms for the challenges we face in this new century. Already, states have proven their ability to band together to solve multijurisdictional problems, such as the six-state compact to contract for the purchase of rapid antigen COVID-19 tests during the pandemic of 2020.<sup>1</sup> This compact with the Rockefeller Foundation to cooperatively purchase rapid-point-of-care antigen tests gave six states<sup>2</sup> the opportunity to coordinate on policy and protocols with COVID-19 testing. As the American population grows, increasing the already dense interconnections across jurisdictional boundaries, transportation planners and authorities need a streamlined, predictable framework to make effective policy for multijurisdictional mobility.

Transportation law has become highly inconsistent between jurisdictions, making cooperation more challenging. MRs present an opportunity to accommodate equity, congestion, and mobility issues by providing a connected multimodal environment where multiple modes can combine to respond with flexibility to changing needs. One way to improve the situation is to give additional force to existing state constitutional provisions against *special legislation*: a legal term that refers to legislation drafted to apply to only part of a class, usually a particular named person, thing, object, or location (municipality, county) within a given class. This project analyzed provisions within three MR states’ constitutions, legislation, regulations, and litigation surrounding special legislation (also known colloquially as *bracketing*) to map its breadth and determine if it has affected or restricted efficient multimodal mobility options. This report concludes with recommendations on how these provisions should be interpreted to facilitate good transportation policy, as well as some suggestions for how these issues might be reconciled legislatively.

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<sup>1</sup> <https://governor.maryland.gov/2020/08/04/governors-of-maryland-louisiana-massachusetts-michigan-ohio-and-virginia-announce-major-bipartisan-interstate-compact-for-three-million-rapid-antigen-tests/>

<sup>2</sup> Michigan, Massachusetts, Ohio, Virginia, North Carolina, Louisiana, and Maryland

## 1.1. Project Background and Motivation

While the currently identified U.S., MRs occupy less than a quarter of the country (Figure 1.1), they include over two-thirds of the U.S. population, 75% of the national gross domestic product, and most of the major transit routes. Current population projections show this density trend will continue, focusing further economic growth into these MRs.

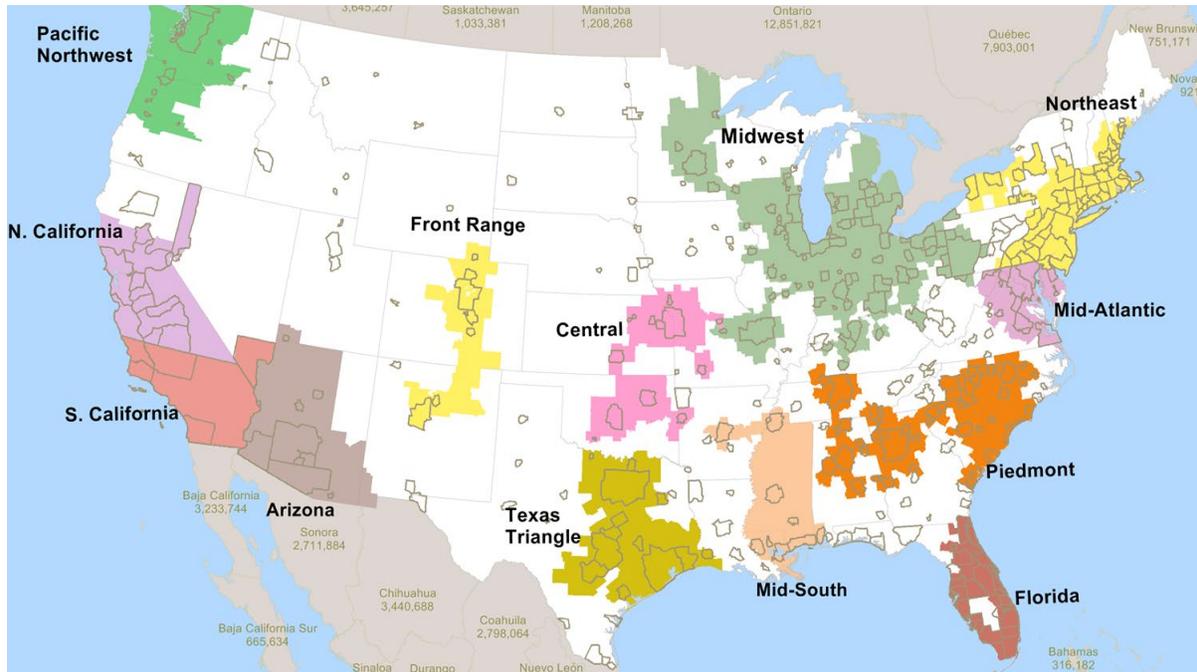


Figure 1.1: Megaregions in the U.S  
Source: FHWA

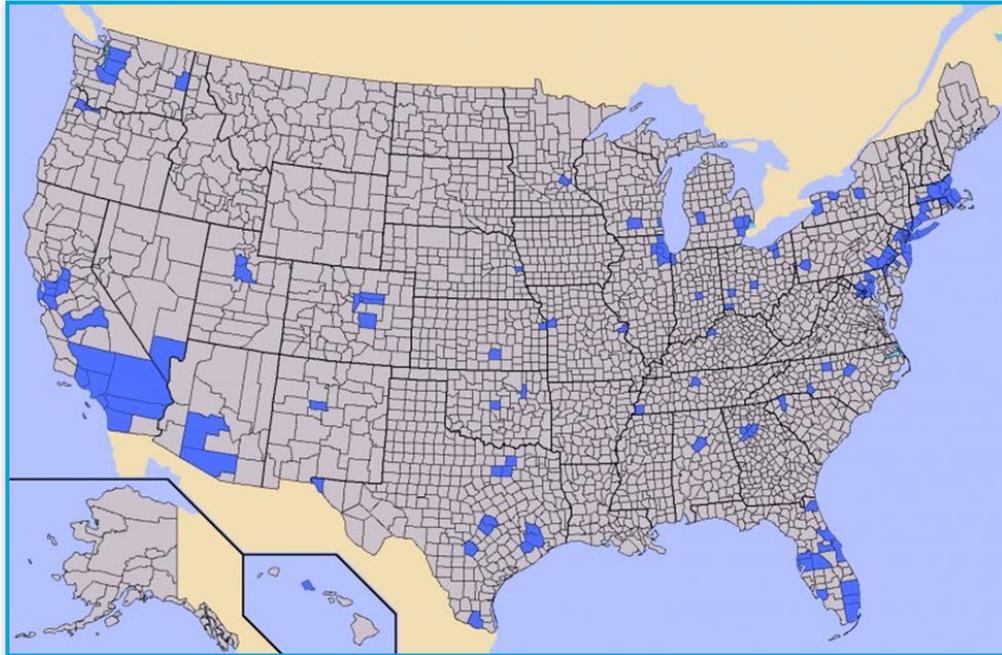
As the U.S. continues to urbanize, the economic ties between nearby metropolitan areas will increase. In 2013, data showed that 50% of the U.S. population lived within 146 counties (Figure 1.2)<sup>3</sup> that map to the Cascadia, California, Arizona, Texas Triangle, Central Plain/Midwest, Piedmont, Mid-Atlantic, and Northeast MRs. Previous studies argued for further research focusing on the U.S. MRs were projected to have almost 70% of the nation’s population growth and 80% of its employment growth.<sup>4</sup> Figure 1.3 provides evidence to support this supposition showing commuting trends that heavily fall within the identified MRs.<sup>5</sup> However, as noted by Hunn and

<sup>3</sup> Source: Hickey, W. and Weisenthal, J. (2013) “Half of the United States Lives in These Counties,” *Business Insider*. <https://www.businessinsider.com/half-of-the-united-states-lives-in-these-counties-2013-9>

<sup>4</sup> [www.America2050.org](http://www.America2050.org) and Margaret Dewar and David Epstein. Planning for Megaregions in the United States. *Journal of Planning Literature*. Vol. 22, Issue 2, 2007

<sup>5</sup> Marshall, Aarian (2016) “Mesmerizing Commute Maps Reveal We All Live in Mega-Regions, Not Cities,” *Wired*. <https://www.wired.com/2016/12/mesmerizing-commute-maps-reveal-live-mega-regions-not-cities/>

Loftus-Otway (Hunn et al., 2019) “*current federal and state transportation planning and financial laws and policies harken back to a less urban, less interconnected America and are not developed to encourage best practices in providing multimodal transportation options.*”<sup>6</sup>



*Figure 1.2: Making the Case for Megaregions—Where One-Half of the U.S. Population Lives*  
Source: Hickey Weisenthal, Business Insider, 2013

The growth of automobile travel has led to this mode outpacing network capacity, encouraged by federal and state transportation funding streams that revolve primarily around the automobile. Disruptive technologies are already increasing congestion through ride-hailing services and last-mile e-mobility, and the coming shift to a connected and automated vehicle landscape are poised to disrupt existing transportation systems further. The underlying transportation law within states is highly inconsistent between jurisdictions, making cooperation challenging. Transit funding falls within this complex ecosystem: reliant on a patchwork of state regulations that create localized transit agencies – often underfunded – and, in some instances have constitutional bars to using state gas taxes for transit provision.

<sup>6</sup> Hunn, L., and Loftus-Otway, L. March 2018. Assessing Changes to Federal and State Law for Megaregion Planning. Part 2: Can MPOs Lead American Megaregion Policy in the 21st Century? URL: <https://sites.utexas.edu/cm2/files/2018/03/Year1-HunnLoftus-Assessing-ChangesPart12.pdf>



## Chapter 2. Special Legislation Overview

### 2.1. Introduction

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Much has changed since the ascendance of the automobile as America's primary mode of transportation in the 20th century. Technological improvements, changing population demographics, and cultural developments have led to an increasing need for diversity in transportation modes. The law and policy governing their development, however, remain locked in an increasingly outdated model of subsidizing roads, with other forms of transportation taking a backseat. Many factors convened to create this situation; economic inertia has made road expansion cheaper in the short term, despite long-term inefficiency, and political expediency has consistently favored short-term solutions. In addition, legal constraints preventing innovation and adaptation remain on the books, with updates being delayed due to political inattention and the influence of entrenched interest groups.

As new Federal laws are enacted, many states have made changes to how their transportation systems are managed and funded. However, some have not updated their laws to reflect new federal priorities and congestion management strategies. The extent to which a state DOT cooperates with other state entities, coupled with the authorization levels for local transportation revenues in state law, reveals how much a state values regional multimodal transit. If one examines the specific transportation modes for which each revenue source or finance mechanism is used, patterns emerge among the states and the MRs to which they belong. State transportation funding and finance policy begins with an examination of how the transportation code is structured by the legislature from the beginning. This is something the average taxpayer or interest group may not think to examine; however, to the legal community and judges, even this may be relevant to legislative intent in a legal analysis. For example, Texas (home to the Texas Triangle MR) prioritizes roads over mass transit, as is evident in the Texas Transportation Code, in which Mass Transit is merely Subtitle K, housed under Title 6 Roadways.

In contrast, Oregon (within the Cascadia MR) code places mass transit districts (Ch. 267 Mass Transit Districts; Transportation Districts) in Vol. 7 Public Facilities and Finance, Title 24 Public Organizations for Community Service. Legal definitions, typically established early in the code

text, usually define urban districts, rural districts, mass transit systems, and metropolitan statistical areas (federally defined MSAs). The way in which state transportation budgets and plans are developed, the revenue sources and transit district powers in place, and the roles states play in local transportation planning can reflect state policy goals and how legislation is crafted from the beginning. By providing a comparative three-MR analysis, this report illustrates the diversity of states' efforts to serve the political will of taxpayers and their public need for transportation, despite a perhaps overly complex intergovernmental transit finance and planning structure.

One could argue that state special legislation and certain actions by the state legislatures limit the ability of the public to participate in decision-making in their own future mobility needs. Improving the legislative and planning process for public transit with a view to meeting the needs of all socioeconomic groups will create long-term economic opportunities and help people escape poverty. Economic<sup>7</sup> progress and equity for all groups has been linked to transportation planning. If certain anti-transit interest groups' desires<sup>8</sup> or legislative policies<sup>9</sup> are being implemented by lawmakers to circumvent the public's ability to influence long-term transit planning and cooperation, this can affect many groups. Planning transit for various modes often requires the creation of a transit district by a resolution and/or a ballot initiative to begin the process, as residents must accept a new tax to fund any new transit authority. The complexity of state laws and state constitutions with restrictive categories built into the creation, funding, and operation of transit districts and planning authorities may make intercounty, intercity, and interstate mobility difficult to fund or plan.

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<sup>7</sup> Thomas W. Sanchez et al., Harv. Univ. Civil Rights Project & Ctr. for Community Change, *Moving to Equity: Addressing Inequitable Effects of Transportation Policies on Minorities*, at 11 (2003) available at <http://www.civilrightsproject.harvard.edu/research/transportation/MovingtoEquity.pdf>

<sup>8</sup> Various groups in the U.S. campaign against transit ballot initiatives. Among them are Building a Better Phoenix (<https://apnews.com/abb611639c6a449fae6fd212f52089f1>); Citizens Against Rail Expansion in Florida (<https://floridapolitics.com/archives/256193-brightline-opponents-sue-federal-officials-approving-train>); Reclaim Our Allocated Dollars (<https://www.austinchronicle.com/news/2010-04-16/1016848/#:~:text=The%20anti-rail%20organization%20Reclaim%20Our%20Allocated%20Dollars%2C%20or,highway%20loop%20around%20Austin%20and%20an%20east-west%20freeway>); Americans for Prosperity (<https://www.phoenixnewtimes.com/news/koch-group-behind-anti-light-rail-campaign-in-phoenix-11336419#:~:text=Americans%20for%20Prosperity%20%28AFP%29%2C%20the%20Koch%20brothers%E2%80%99%20main.in%20southeast%20Michigan%3B%20Little%20Rock%2C%20Arkansas%3B%20and%20Indiana>.)

<sup>9</sup> See discussion of Texas *infra*.

## 2.2. History and Federalist Structure

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The federal system of the United States emerged from many discussions about the role of the federal government, and the need for local autonomy, which contributes to the federalist form of government we have today. These struggles created a structural and well-defined division of power between the federal and the state government that affects how transportation is governed. The founders did not include any enumerated protections for the powers of local governments (counties, cities) in the federal constitution by design. The delegation of power to these smaller government entities can be found only in the state constitutions, which are interpreted by the various state supreme courts.

The federal role within transportation policy and development was initiated in the ratification of the U.S. Constitution in 1789, which gave Congress the authority to establish post roads with post offices, as well as the power to regulate commerce between the states and with foreign nations.<sup>10</sup> However, the prevailing view at that time was that secondary transportation projects (e.g., projects other than post roads and offices) were outside of the scope of federal interest, and purposely excluded from Congressional authority under Article 1, Section 8 of the Constitution. Therefore, the responsibility for any and all other types of transportation projects fell within the purview of state or private control as provided by the Tenth Amendment. The state legislatures have taken on this role, employing every tool available, including state constitutions, targeted local laws, code to structure transit authorities, and constitutional protections of transportation-related monies such as restrictions on fuel tax revenue.

Since the ability of a state legislature to create special laws and control its own domain is a power reserved to the states, it is not mentioned in the Federal Constitution. The special legislation limitation was created at different times in each state (as each state created its own constitution); thus, current events and policy ideas influenced the wording of these constitutions. The temporal variation of each state's constitutional creation leads to certain subjects being named in the text as areas of concern. For example, during the post-civil war era (Reconstruction), there was a general policy interest in promoting economic rebuilding after the collapse of 1873 while limiting the

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<sup>10</sup> U.S. Constitution Article I, Section 8, Clause 3, 7.

legislative power to create special laws favoring certain private investors.<sup>11</sup> In 1866, the first post-war election resulted in the passage of the Fourteenth Amendment, which created federal equal rights for freedmen, and dissolved Confederate state legislatures until new state constitutions were passed in the South. Many of these had to be rewritten after the Civil War to reflect the economic and political realities of Reconstruction, which included restructuring the powers of the three branches of state government.

Given the various historical contexts of each state’s constitutional adoption and text, one can see how, as amendments are added, the document starts to reflect more localized, temporal concerns that may be difficult to alter later by a supermajority of state lawmakers. The state constitutions were created as a snapshot in time, with whatever current events and problems were affecting each state at the time of each constitution’s creation. Indeed, some states were so late to creating constitutions that they decided to model theirs after a neighboring state’s constitution, as in the case of Maryland (1867) copying Indiana’s constitution (1851).<sup>12</sup> Given the historical context and differences between the U.S. and federal constitutions, one can see how amending a state constitution often, over time, can alter the reverence, purpose and character of a state constitution.

### **2.3. State Constitutions and Special Law Prohibitions**

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Although the state constitutions were created well after 1776 to reflect the U.S. Federal Constitution, they were created to place limits on the plenary power of state lawmakers, which included their ability to craft special legislation for the privileged class. Legislation that singles out an individual or specific group for benefits that do not apply to the rest of the population is called *special law* (or *special legislation*). Part of the “checks and balances” the legal system has on the three branches of government is the power dynamic between the legislature and the judiciary and how they defer to each other. Indeed, state cases have clarified the specific limiting role of a state constitution on the legislature in special legislation cases like *Sherwood*:

“The authority of the legislature to choose an objective for legislation is “plenary,” subject only to the limitations that the state or federal constitutions impose. (See *State v. Moyle*, 299 Ore. 691, 699, 705 P.2d 740 (1985) (“In principle, legislative power to select the

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<sup>11</sup> Anthony Schutz, *State Constitutional Restrictions on Special Legislation as Structural Restraints*, 40 J. Legis. 39, 45 (2014).

<sup>12</sup> Dan Friedman (2012). *Applying Federal Constitutional Theory to the Interpretation of State Constitutions: The Ban on Special Laws in Maryland*. *Maryland Law Review*, 71, 411. At 440.

objectives of legislation is plenary, except as it is limited by the state and federal constitutions.”)). That is because the state constitution does not grant the legislature authority but, rather, only limits it.<sup>13</sup>

For example, Article III, Section 56 of the Texas Constitution prohibits the legislature from enacting local and special legislation; that is, it cannot explicitly make legislation that applies selectively in specific jurisdictions.

However, the state of the practice has shown that legislators have historically circumvented these provisions using a technique called “special legislation” or “*bracketing*,”<sup>14</sup> in which they set ostensibly germane requirements such as population and date of creation, with the effect of creating laws that apply only to specific jurisdictions. Date of creation language for example, is often legitimately inserted into laws for various reasons in statutes: to reflect the codification or recodification of statutes; to reflect the “effective date” of a new law – i.e. when a new law generally becomes effective, or binding, either upon a date specified in the law itself or, in the absence of such a date, a fixed number of days (depending on the state) after the final adjournment of the session during which it was enacted or on signature by the governor. Also, since laws may not usually be applied retroactively, all parties need to know which law applied before the new law came into being. However, there are times when dates of creation are used solely for the purpose of creating narrow or even “closed classes” of legal applicability, such as in “special legislation”.

Use of bracketing over long periods has resulted in a patchwork of policies varying by jurisdiction, reducing consistency and making cross-jurisdictional cooperation more difficult. In transportation, this has been used to restrict the activities that transit agencies can conduct and, some would argue, stymie efficient multimodal transportation options. The Texas Triangle, for example, has over eight separate areas within the code governing transit agencies created before specific dates with specific population numbers, which restrict activities and possible funding streams for these agencies. In contrast, other states use these criteria in regulating transit districts—although their laws rarely combine both date of creation and population into one district classification.

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<sup>13</sup> Sherwood Sch. Dist. 88J v. Wash. County Educ. Serv. Dist., 167 Ore. App. 372, 6 P.3d 518, 2000 Ore. App. LEXIS 819 (Court of Appeals of Oregon, May 24, 2000, Filed.)

<sup>14</sup> “Bracketing” is Texas Legislative term that is used to describe creation of a special law.

Special legislation is also sometimes called *local legislation* or *private legislation*<sup>15</sup>, although this can vary state by state.<sup>16</sup> Historically, these targeted laws were used, both in pre-revolutionary England and in the U.S., to solve very local problems or keep important constituents happy. When a law that applies to a particular place or a distinct group of people (a “class”) and that class is in a similar situation to other places or groups, but it is treated differently from other areas or groups, the law may be unconstitutional.

A test is applied by courts to examine if the disparate treatment<sup>17</sup> of the geographic area or class is unconstitutional. The legal test has evolved over time since the founding and generally requires that a court examine the classification to see if it is arbitrary<sup>18</sup> or without a reasonable or legitimate<sup>19</sup> justification. However, in the realm of state laws, each state judicial system controls the test. Within the U.S. Federal Constitution, the Equal Protection Clause dictates government classifications of individuals into groups according to an identifiable characteristic.<sup>20</sup> How each state applies or does not apply the federal constitutional standards to its special law cases affect these cases across the nation.

Under some state constitutions, if a statute is either a local or special law, or both, and it comes within any issue enumerated in the section of the state constitution prohibiting special laws, the

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<sup>15</sup> Private bills were employed by the English Parliament since medieval times to redress grievances that could not be solved by the courts. Private bills granted legal relief for private wrongs and this legal tradition was somewhat carried over to the United States after the Revolution in the form of special legislation. In U.S. practice, there is no legal distinction between public and private bills. “Moreover, because of the longstanding practice of enacting private laws in both England and the United States, it was widely assumed that private or special legislation was necessary to the operation of government.” See historical discussion by Dan Friedman in “Applying Federal Constitutional Theory to the Interpretation of State Constitutions: The Ban on Special Laws in Maryland,” 71 Md. L. Rev. 411, 431 (2012). “Special or private acts are rather exceptions than rules, being those which only operate upon particular persons and private concerns.” Over time, legislatures have transitioned away from the terms “public” to “general,” and from “private” to “special.”

<sup>16</sup> See Dan Friedman\* (2012). Article: Applying Federal Constitutional Theory to the Interpretation of State Constitutions: The Ban on Special Laws in Maryland. Maryland Law Review, 71, 411.

<sup>17</sup> Best v. Taylor Machine Works, 689 N.E.2d 1057, 1105 (Ill. 1997) (striking down a statutory cap on compensatory damages for noneconomic injuries in personal injury actions).

<sup>18</sup> Nichols v. Walter, 33 N.W. 800 (Minn. 1887). Court struck down “arbitrary” classes, concluding the legislation was special.

<sup>19</sup> Citizens Against Range Expansion v. Idaho Fish & Game Dep’t, 289 P.3d 32, 38 (Idaho 2012) (court stated that if the state has a “legitimate interest” in enacting the targeted law, and the classification is not “arbitrary, capricious, or unreasonable,” it is not a special law).

<sup>20</sup> U.S. Const. amend XIV; see Engquist v. Or. Dep’t of Agric., 553 U.S. 591, 601 (2008).

statute is deemed unconstitutional.<sup>21</sup> Generally, a local law is one that applies only to the government of a geographical portion of the state, and a special law is one that applies only to a portion of the state (certain institutions or people) in some other method than geographical. Despite originating as two distinct types of statutes, a local law and a special law are often merged into the same thing in certain states like Texas, which may result in some confusion about the fairness of certain bracketed laws<sup>22</sup> or special laws within the legislature and the courts. This uncertainty in the court system can result in conflicting interpretations in the various states under due process and equal protection review of a statute.

Courts often try to find a way to defer to the legislature and allow population as a class for local laws, although this is not true for all states. If a law is made for only cities of a certain population, it can often be deemed “local” by a court and upheld as constitutional, especially if only one city in the state has that population.<sup>23</sup> For example, in an Arizona case, *Gallardo v. State*—a local law having a local effect—applied to the governing board of any “county with a population of at least three million persons.” Although it only applied to one county, the law was upheld because of the “rational relationship” between size of the county and the size of the community governing college board. Virginia has also allowed local laws that apply to only one geographic area, despite the specificity of the law.<sup>24</sup>

Courts tend to merge local laws and special laws in jurisprudence, as has happened in Texas. However, unlike most special laws, local laws have often been defended on the ground that they address particular problems that apply to the unique location in question. States need to be able to create geographically specific laws to solve local problems, so the courts obliged them.

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<sup>21</sup> Also, some states have evolved to omit the list of enumerated subjects in the state constitutional prohibition. See *Best v. Taylor Machine Works*, 689 N.E.2d 1057 (Ill. 1997). (The Illinois constitutional provision has legally evolved to omit the list of enumerated subjects, but it continues to restrict special laws in favor of general law. Ill. Const. Art. IV, § 13.)

<sup>22</sup> “Bracket laws” and “bracket bills” are both Texas-specific terms for the term “special” law.

<sup>23</sup> In *Gallardo v. State*, 336 P.3d 717 (Ariz. 2014), “local law” was upheld because of the “rational relationship” between size of the county and the size of the community governing college board, despite the Arizona Constitutional prohibition.

<sup>24</sup> *Bray v. Cty. Bd.*, 77 S.E.2d 479, 483-84 (Va. 1953) (upholding a statute even though it applies to only one geographic area).

For example, in Texas, Article III, Section 56 of the Texas Constitution provides that “the Legislature shall not, except as otherwise provided in this Constitution, pass any *local* or special law,” regarding a list of subjects, as well as prohibiting the passage of any local or special law in any case where a general law can be made applicable. The section treats equally local laws (which are limited to a specific geographic region of the state) and special laws (which are limited to a particular class of persons).<sup>25</sup>

## 2.4. Standard of Review for Special Laws

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The U.S. Supreme Court has interpreted the Equal Protection Clause as a protection for individual rights against government power. At the state level, injured parties who sue to invalidate special laws are often taxpayers suing government entities. When a plaintiff or class sues over the unconstitutionality of a special law, it will likely pursue an equal protection argument based on the unjust class-legislation theory. In determining whether the special law is unconstitutional, the court will use a test to see if the “class” criteria is unjust and if the law should be struck down, applying the “*rational-basis review*” as the default standard of review for due process or equal protection questions under the Fifth Amendment<sup>26</sup> or Fourteenth Amendment.<sup>27</sup>

Courts applying rational-basis review seek to determine whether a law is “rationally related” to a “legitimate” government interest.<sup>28</sup> Higher levels of scrutiny are applied only when a suspect or quasi-suspect classification is involved, or a fundamental right is at issue.

This standard is considered the lowest in equal protection cases and is used to show disparate treatment if the “class” criteria are economic and not deemed “suspect” (race, national origin, or alienage). Questions that will then need to be asked would include the following: What “class” would a transit rider in any given county fall into, given the non-racial text in this legislation? How can transit riders find relief if their legislator fails them?

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<sup>25</sup> See *Maple Run v. Monaghan*, 931 S.W.2d 941, 945 (Tex. 1996) (citing George D Braden, *The Constitution of the State of Texas: An Annotated and Comparative Analysis* 273-277 (1977)).

<sup>26</sup> Amendment 5 Criminal Actions—Provisions Concerning—Due Process of Law and Just Compensation Clauses, USCS Const. Amend. 5 (current through the ratification of the 27th Amendment on May 7, 1992).

<sup>27</sup> Amendment 14, USCS Const. Amend. 14 (current through the ratification of the 27th Amendment on May 7, 1992).

<sup>28</sup> *State Compensation Fund v. Symington*, 848 P.2d 273 (Ariz. 1993) (en banc) (striking down a statute as special legislation where it irrationally classified the State Compensation Fund and required it to pay a minimum tax).

Special legislation doctrine is unusually confusing because the standard of review applied to these cases is far from uniform. The general confusion as to which standard of review must be applied by state courts to special legislation (which is primarily determined by the state constitution) appears when courts refuse to defer to the legislature on its chosen criteria for a class.<sup>29</sup> The dominant standard governing special legislation is the same, lax “rational basis test” that applies to federal equal protection doctrine.<sup>30</sup>

In the case of special laws, courts often employ rational-basis review, since race and other suspect classifications are almost never used in state legislation. Generally, if an Act is not rationally related to a legitimate government interest, it will be found unconstitutional and thus invalidated.

Under this rational-basis review standard, a court will be very deferential to the power of the state legislature and it will examine the injured party’s claims under the Fourteenth Amendment’s equal-protection clause. This type of case is common with taxpayer claims against a government or other economic or social legislation that has no racial or other obviously unjust heightened classifications. States are, however, allowed to provide more rights than the federal constitution. Thus, occasionally a state court may add some “bite” to the rational-basis test, examining the facts closer for under-inclusiveness.<sup>31</sup> Although courts have the option to do this, the majority rarely have during the past few decades of jurisprudence.

Most state courts interpreting their special law prohibitions apply rational-basis review modeled on federal equal protection doctrine. Sometimes, these state courts will rule that their special law prohibitions should be judged by the same standards as federal equal protection cases. Under that theory, which is based on the federal Fourteenth Amendment’s focus on racial equality cases, economic legislation, such as the funding of transportation, receives lesser scrutiny in court. By applying federal doctrine, instead of state equal protection theory, state courts have possibly

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<sup>29</sup> See *Island County*, *infra*. in *Washington State*.

<sup>30</sup> See *Coal. for Equal Rts. v. Owens*, 458 F. Supp.2d 1251, 1263 (D. Colo. 2006), *aff’d*, *Coal. for Equal Rts. v. Ritter*, 517 F.3d 1195 (10th Cir. 2008); *Texas Boll Weevil Eradication Found. v. Lewellen*, 952 S.W.2d 454, 465 (Tex. 1997); *Owens Corning v. Carter*, 997 S.W.2d 560, 583 (Tex. 1999); *Utilicorp United Inc. v. Iowa Utilities Bd.* 570 N.W.2d 451, 455 (Iowa 1997) (traditional equal protection analysis); *Johnson v. State Hearing Examiner’s Office*, 838 P.2d 158 (Wyo. 1992) (using its own unique equal-protection analysis adopted from Justice Stevens’ approach in *City of Cleburne*); see also *Schutz* (2014), at 54.

<sup>31</sup> *Schutz* (2014), *supra* note 8, at 54.

eliminated the historical strength of special laws prohibitions and the protections they provide to state taxpayers from suspect legislative actions.

Scholars claim that the courts' inferior treatment of these state constitutional clauses damages the "legal pluralism" within the federalist framework.<sup>32</sup> However, applying a more federal standard to special law cases arguably creates uniformity in a standard of review for equal protection cases in which classes of transportation taxpayers participate. Overall, courts defer to legislatures instead of restraining them.

### 2.4.1. Standard of Review and Class Legislation Tests

In U.S. constitutional law, rational-basis review is the "starting point" standard of review that courts apply when considering constitutional questions, including equal protection or due process cases under the Fifth Amendment<sup>33</sup> or Fourteenth Amendment.<sup>34</sup> Federal courts applying rational-basis review seek to determine whether a law is "rationally related" to a "legitimate" government interest. In examining groups or individual ("classes") that may have been treated unequally, such as a certain county or geographic group, a court would use a *class legislation test* to determine if the injured party was treated differently from others who are similarly situated. The higher levels of federal scrutiny are *intermediate scrutiny* and *strict scrutiny*.

In order for a court to examine a special law, it must conduct a class legislation test to determine if the legislation is general or special in how it applies to certain persons or a class of persons, or to certain districts of a territory or state. If class legislation violates equal protection guaranteed through the Fourteenth Amendment of the U.S. Constitution, it is found unconstitutional.

The lack of uniformity in transportation law and in special law jurisprudence stems in part from our federalist structure. How a court interprets the state constitution on special law varies. Two different class legislation tests have been applied by state courts to special legislation/equal protection cases in the various fifty states: the "*closed class*" test (in which it is unlikely that

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<sup>32</sup> Long, 2012, 60 Clev. St. Rev. 719.

<sup>33</sup> Amendment 5 Criminal Actions—Provisions Concerning—Due Process of Law and Just Compensation Clauses, USCS Const. Amend. 5 (current through the ratification of the 27th Amendment on May 7, 1992.)

<sup>34</sup> Amendment 14, USCS Const. Amend. 14 (current through the ratification of the 27th Amendment on May 7, 1992.)

persons may be added to a class in the future) and the test for detecting “*arbitrarily defined*” classes found in class legislation test cases. In essence, how closely a court examines criteria, such as population or geography, will decide if the law is deemed special and therefore unconstitutional under the state constitution. In the smaller group, courts that examine class legislation very closely apply a higher standard of review than courts that defer to legislatures and find the special law to not be special (i.e., validate the law as constitutional).

In bypassing the equal protection test first, a state court could initially apply its own test to a suspect special law (the closed-class test) in that it would examine first the state constitution’s prohibition on the special law—using a stricter standard of review. This stricter standard would give the injured party more protection than the commonly used “rational” standard. Texas, however, has mostly rejected this closed-class version of the test.

Any law created with certain overly restrictive criteria may have states evaluating their own special laws in their own ways. A state court may opt to apply yet another standard not applied by the federal court system at all. This other, state court standard would be a special laws analysis by the highest state court that is the deemed the expert on interpreting its own state constitution.

In U.S. Supreme Court jurisprudence, when courts engage in rational-basis review, only the most extreme enactments, those not rationally related to a legitimate government interest, are overturned. In constitutional law, the rational-basis test is applied to constitutional challenges of both federal law and state law (via the Fourteenth Amendment). This test also applies to both legislative and executive action. When conducting a highly deferential review of economic classifications, the court will often conclude that a rational basis supports the legislation.

The fifty states lack uniformity in how legislatures enact special legislation in that some states treat particular geographic locations (cities and counties) disparately and call this permitted *local legislation*. Several states treat local laws and special laws the same in jurisprudence, despite treating them differently during the bill drafting phase. Texas claims to treat these two categories of law the same; however, they may have different notice requirements in the bill drafting phase,<sup>35</sup>

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<sup>35</sup> Sec. 57. Notice of Intention to Apply for Local or Special Law, Tex. Const. Art. III, § 57. (This document is current through the 2019 Regular Session, 86th Legislature, 2019 election results, and Constitution heading updates in 2018.)

which could be a nod to the possible equal protection issues raised by such targeted lawmaking involved in local taxing authority with extremely local laws.<sup>36</sup> Historically, local laws were more permissible than special laws since special laws had universal application throughout the state;<sup>37</sup> however, this distinction seems to have faded over time. Currently, in Texas, for most purposes of law drafting, lawmakers treat these two categories essentially the same.<sup>38</sup> Perhaps this is why courts also treat them the same, despite the specific geographic criteria used.

Notice and an opportunity for the public to participate may reduce special legislation involving any corruption in the legislative process, since the public may then readily examine the actions of legislators early in the process. A "local bill" proposes a "local law" that applies to a limited area: for example, constituents from Dallas may not really be interested in a local bill that strictly applies to only Houston. When the legislature posts "notice" during the session that the bill is under consideration by the legislature, perhaps only the Houston constituents will care enough to attend the hearing about the bill. The "local legislation notice" is meant to protect certain groups of the public early on in the process with local bills that become local laws that affect only certain cities, counties, or other municipal subdivisions in which others may not live.

State constitutional restrictions on special law appear to protect individual rights to equal treatment, yet the case law on this varies as much as the fifty states vary from each other. If state constitutions by definition may answer questions of individual rights in ways that are different from the federal constitution, perhaps applying the stricter federal equal protection judicial standards to state constitutional cases is incorrect, as some scholars have suggested.<sup>39</sup>

If we examine each state's case law, there are possibly fifty different standards of review for equal protection cases that examine the meaning of state special law, in that each court is its own domain in state constitutional interpretation. Although our federal Fourteenth Amendment and its equal

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<sup>36</sup> Texas Legislative Council (TLC), Memorandum to Members of the 86th Legislature, from Jeffrey J. Thorne, Deputy Director, Legal Division, January 15, 2019, at page 8 on Local and Special Bills, Notice Requirements for Local and Special Bills, and Bracket Bills (referring to the drafting rules and state Constitutional rules for special bills) URL: [https://tlc.texas.gov/docs/legref/LocBracBill\\_86R.pdf](https://tlc.texas.gov/docs/legref/LocBracBill_86R.pdf).

<sup>37</sup> Wood v. Wood, 159 Tex. 350, 352, 320 SW 2d 807 (1959).

<sup>38</sup> TLC, supra Note 36

<sup>39</sup> Schutz, Supra Note 11 at 39.

protection concepts applies to the states, the state courts determine what a special law “class test” will be and what “standing” will be required by plaintiffs who bring equal protection challenges in each of the fifty states’ courts. One state court may not dictate the laws of another in this legal area. If state courts continue with the majority trend of deferring to legislatures on special law and refuse to strike down unconstitutional laws, then these special laws will stand.

## 2.4.2. Special Legislation Defined

Many states’ constitutions contain a prohibition on special legislation.<sup>40</sup> State constitutions generally prohibit the enactment of special laws where a general law can instead be made applicable.<sup>41</sup> Outside of certain listed topics found in most state constitutions, legislatures will attempt to justify special legislation when a general law cannot be made applicable to the purpose of the bill. State constitutions tend to have two methods for defining and restricting special legislation: a clause that prohibits special laws if general laws could be enacted and a list of subject areas prohibited for the creation of special laws.<sup>42</sup> Although special legislation is considered constitutionally flawed if there is any corruption during the legislative process or any unequal treatment, the judicial branch tends to defer to the state legislature’s judgement if a special law resolves a public policy issue or a problem unique to a geographic location.

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<sup>40</sup> Justin R. Long, *State Constitutional Prohibitions on Special Laws*, 60 *Clev. St. L. Rev.* 719, 767 n. 6 (2012) (citing Ala. Const. art. IV, §§104-111; Alaska Const. art. II, § 19; Ariz. Const. art. IV, § 19; Ark. Const. art. II, § 3, amend. 14, art. V, § 25; Cal. Const. art. IV, § 16; Colo. Const. art. V, § 25; Fla. Const. art. III, §§10-11; Ga. Const. art. III, , para. IV; Haw. Const. art. I, §21; Idaho Const. art. III, § 19; Ill. Const. art. IV, § 13; Ind. Const. art. IV, §§22-23; Iowa Const. art. I, § 6, art. III, §§30-31; Kan. Const. art. II, § 17; Ky. Const. §§3, 59, 60; La. Const. art. III, § 12; . art. IV, pt. 3, § 13; Md. Const. art. III, § 33; Mass. Const. pt. I, art. VI, amend. art. LXII, § 1; Mich. Const. art. IV, §§29-30; Minn. Const. art. XII, §§1-2; Miss. Const. art. IV, §§87-90; Mo. Const. art. III, §§39-42; Mont. Const. art. V, § 12; Neb. Const. art. III, § 18; Nev. Const. art. IV, §§20-21; N.J. Const. art. IV, §7, para. 9; N.M. Const. art. IV, §§24, 26; N.Y. Const. art. III, § 17; N.C. Const. art. I, § 32, art. II, § 24; N.D. Const. art. I, § 21, art. IV, § 13; Ohio Const. art. I, § 2, art. II, § 26; Okla. Const. art. V, §§46, 51, 59; Or. Const. art. I, §§20, 23; Pa. Const. art. I, § 17, art. III, § 32; R.I. Const. art. VI, § 11; S.C. Const. art. III, § 34; S.D. Const. art. III, § 23, art. VI, § 18; Tenn. Const. art. XI, § 8; Tex. Const. art. I, § 3, art. III, § 56; Utah Const. art. VI, § 26; Va. Const. art. I, § 4, art. IV, §§14-15; Wash. Const. art. I, §§8, 12, art. II, § 28; W. Va. Const. art. VI, § 39; Wis. Const. art. IV, § 31; Wyo. Const. art. III, § 27).

<sup>41</sup> *Clean Water Coalition v. The M Resort, LLC*, 255 P.3d 247 (Nev. 2011). Neb. Const. art. III, § 18.

<sup>42</sup> A common example of a lengthy list of areas specifically prohibited for special and local legislation is in Nebraska’s Constitution, which includes, among other areas, “The Legislature shall not pass local or special laws in any of the following cases, that is to say: [1] For granting divorces; [2] Changing the names of persons or places.; [3] Laying out, opening altering and working roads or highways.; [4] Vacating roads, Town plats, streets, alleys, and public grounds.; [5] Locating or changing County seats.; [6] Regulating County and Township offices...” Then it states “In all other cases where a general law can be made applicable, no special law shall be enacted.” Neb. Const. art. III, § 18. This sort of provision is found in the legislative articles of approximately 30 other state constitutions, including that of Maryland, Oregon, Texas, and Virginia. For more detail, see Schutz (2014), *supra* note 8, at 46-48.

Most states, like Texas, put this into their state constitutions. Article III, Section 56(b) of the Texas Constitution provides that “where a general law can be made applicable, no local or special law shall be enacted.”<sup>43</sup>

Since American Revolutionary times, this limitation on the state legislatures was created to protect legislators from being pressured to create laws benefitting only a few privileged persons. This concern about corruption and granting favors became especially realistic after the post-Civil War economic collapse of 1873, when many corporations and privileged individuals were seeking special business favors from state lawmakers.<sup>44</sup>

In addition to the delegation of judicial, legislative, and executive powers to the states, which varies by state, nearly every state constitution has some unique form of restriction on special or local legislation (that is, local law targeted at one particular area or jurisdiction in the state). Requiring state law to affect all members of a given class equally may sometimes be defended on the grounds that it addresses issues that are particular to the location where they apply.<sup>45</sup> Interpretations of these provisions by courts have varied, and state legislatures have managed to circumvent them effectively through bracketing.

Bracketing (or employing a special law) is the practice of specifically creating classes of people or places that are subject to legislation, in such a way as to make the legislation apply only in selected areas or to selected people. In effect, bracketing circumvents restrictions against special legislation by using germane factors to define an affected class as a pretext for legislating in a particular, ostensibly forbidden area. Although special and local laws are regularly employed by legislatures, the courts occasionally step in to check legislative power if a viable plaintiff manages to file suit and prove that the “class” is closed or to which no more objects or people may be added in the future.<sup>46</sup> This closed class will not be constitutional.

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<sup>43</sup> TEX. CONST. art. III, § 56(b). Sec. 56. Prohibited Local and Special Laws, Tex. Const. Art. III, § 56. (This document is current through the 2019 Regular Session, 86th Legislature, 2019 election results, and Constitution heading updates in 2018.)

<sup>44</sup> Schutz, *supra* note 11, at 43.

<sup>45</sup> Schutz, *supra* note 11, at 44.

<sup>46</sup> See, e.g., *Teigen v. State*, 749 N.W.2d 505 (N.D. 2008); *Pebble L.P. v. Parnell*, 215 P.3d 1064 (Alaska 2009); *In re S.B. 95*, 261 P.2d 350 (Colo. 1961); *In re S.B. 9*, 56 P. 173 (Colo. 1899); *Banks v. Heineman*, 837 N.W.2d 70 (Neb. 2013).

In addition, most states are prevented from enacting local and specific legislation that applies selectively to specific jurisdictions. For example, Article III, Section 56 of the Texas Constitution prohibits the legislature from enacting local and special legislation; i.e., it cannot explicitly make legislation that applies selectively to specific jurisdictions. However, as noted in Section 2.3, Texas legislators have in fact used bracketing to create laws that do apply only to specific jurisdictions.

#### 2.4.2.1. Federal Special Legislation and Case Law

On the federal level, special legislation has been passed by Congress in the past, but it is disfavored more now than in decades past and little Supreme Court jurisprudence exists to clarify the equal protection rules specific to federal special legislation.<sup>47</sup> The U.S. Supreme Court, when reviewing special legislation, subjects it only to minimal scrutiny.<sup>48</sup>

Thanks to our federalist structure of government, each state has a State Supreme Court employing its autonomy to interpret its own state constitution. At the state level, the legislative and judicial branches of government approach special laws in different ways. Courts are supposed to serve as a check on the legislative and executive branches, as they are in the federal level of government.

The U.S. Congress has passed possible special legislation in the past, yet federal courts have refused to refer to targeted federal statutes as special.<sup>49</sup> The Supreme Court declined to grant certiorari four times; the most famous case is that of “Terri’s Law,” which was considered by some to be special or private legislation.<sup>50</sup> Terri’s Law was the statute enacted to resolve the fate of Terri Schiavo, a woman who suffered cardiac arrest and fell into a persistent vegetative state. In state court, Schiavo’s parents and husband battled over whether to withdraw her life support. The state court required her hospice home to withhold food and water. In response, the U.S. Congress enacted a statute<sup>51</sup> allowing “any parent” of Terri Schiavo to bring suit in federal district court to

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<sup>47</sup> See discussion on Teri Schiavo case, *infra*.

<sup>48</sup> Evan C. Zoldan, Reviving Legislative Generality, 98 Marq. L. Rev. 625, 629 (2014).

<sup>49</sup> Evan C. Zoldan, Legislative Design and the Controllable Costs of Special Legislation, 78 Md. L. Rev. 415, 425 (2019).

<sup>50</sup> Schutz, *supra* note 11, at 39. (Schiavo case pp. 424-426). See Schutz’s discussion of Schiavo case, “special legislation is broader than, and includes, ‘private legislation’. Private legislation is legislation introduced for the relief of a particular named individual. Unlike special legislation more generally, private legislation always names a particular individual, is titled “for the benefit” or “relief” of a particular named party, and, in Congress, is restricted under legislative rules applicable only to private laws.

<sup>51</sup> Act for the Relief of the Parents of Theresa Marie Schiavo (“Terri’s Law”), Pub. L. No. 109-3, 119 Stat. 15 (2005), provides that the United States District Court for the Middle District of Florida has jurisdiction to review *de novo*

address this decision.<sup>52</sup> In a targeted manner, Terri’s Law applied only to “any parent” of Schiavo and essentially allowed for parties to relitigate the previously adjudicated issues and effectively set aside years of state court litigation over Schiavo’s true will.<sup>53</sup> In specifically providing that the law was limited to one event and providing relief for only two people, Terri’s Law afforded a special exemption from the general preclusion rules that apply to all other lawsuits in district court. This targeted law granting federal jurisdiction over the Schiavo case was deemed a “special Act” by the court, and was ruled unconstitutional in the Eleventh Circuit court.<sup>54</sup> In ruling the federal special law unconstitutional, the court noted that it could not “exercise any other jurisdictional bases to override a final state judgment.”<sup>55</sup> Overall, special legislation is rare in the federal realm.

#### 2.4.2.2. Plenary Power Belonging to the Legislature

The authority of the legislature to choose a purpose and classification for legislation is *plenary*, which means that the power is subject only to the limitations of the state or federal constitutions. In truth, the judiciary is the check on the legislature’s plenary power because it may analyze legislative intent and deem a newly passed law completely invalid and unconstitutional. As this report outlines, courts vary by state on exercising this power.

Any state transportation code will cover certain topics, but the structure of each state’s code is telling in how the state prioritizes powers and privileges of a transit authority. Transportation codes begin with legal definitions. Definitions sections legally define terms such as governmental authorities, local authority,<sup>56</sup> MSA<sup>57</sup>, urbanized area (UZA), special district, urban transit district,<sup>58</sup> mass transit system, county, municipality, township, local toll authority, urban public

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whether “any right of Theresa Marie Schiavo under the Constitution or laws of the United States relating to the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain her life” had been violated, *id.* 1, “notwithstanding any prior State court determination and regardless of whether such a claim has previously been raised, considered, or decided in State court proceedings,” *id.* 2. Further it directs the District Court to “entertain and determine the suit without any delay or abstention in favor of State court proceedings, and regardless of whether remedies available in the State courts have been exhausted.”

<sup>52</sup> *Ibid.*

<sup>53</sup> [Judicial Relief for the Parents of Theresa M. Schiavo], 109 P.L. 3, 119 Stat. 15, 2005 Enacted S. 686, 109 Enacted S. 686 (March 21, 2005).

<sup>54</sup> *Schiavo ex rel. Schindler v. Schiavo*, 404 F.3d 1270, 2005 U.S. App. LEXIS 5073, 18 Fla. L. Weekly Fed. C 378 (United States Court of Appeals for the Eleventh Circuit March 30, 2005, Filed).

<sup>55</sup> *Id.* At 18.

<sup>56</sup> RCW 47.04.010 (15).

<sup>57</sup> OMB determines MSAs, a federal term, 40 CFR Sec. 60.31e

<sup>58</sup> Tex. Transp. Code 458.001(4)).

transportation system,<sup>59</sup> and public transportation.<sup>60</sup> Note that transit “authority” may have different meanings depending on where it is within the code and how the code applies to it by chapter.

## 2.5. What Does Special Law Mean for Transit?

### 2.5.1. Public Awareness of Injustice Before Suit and Standing to Sue

Public awareness of transportation inequities or lack of transit services is key to stimulating transit users to take actions to improve their mobility if the legislature has failed to do so. This is a problem unique to transportation and explains why these cases are rare. How can an injured group know when it has standing to sue over a special law? How can an injured group recognize and quantify the injury (lack of access to transit) enough that it can reach the point where it can sue? In order to sue, a person or group must have “standing” to file the suit.

Often years can go by during which a group needing transit options begins to realize how few options there are. Whether a group needs new transit options or loses what options they have, by the time a group realizes how the lack of service affects them geographically and economically, it may have missed a crucial window of time during which the long-range regional planning and funding of infrastructure was set in place. Standing to sue is a large hurdle and prevents taxpayers from seeking redress in courts if legislatures refuse to hear them. The only other recourse is to vote out the legislators who do not support transit users.

As an example, in Baltimore, Maryland (in the Mid-Atlantic MR), constituents and transit interest groups are bringing attention to structural problems of the Maryland Transit Administration and its deleterious effect on the mobility of Baltimore citizens.<sup>61</sup> In truth, the problem has occurred over years of transit policy and lawmaking. In raising public awareness, pro-transit groups can engender more legislative scrutiny of a legislature. The structure of the code raises geographic considerations that the public can use to initiate legislative scrutiny of transit-related laws that appear to have limited impact. If groups realize that more than one or two legislative districts are

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<sup>59</sup> RCW 47.04.082.

<sup>60</sup> Tex. Transp. Code 458.001(1).

<sup>61</sup> Sigaran, Jaime, “Op Ed: Why Baltimore Needs its Own RTA to Achieve Real Transit Justice,” Streetsblog USA, July 1, 2020.

impacted by long-term regional transit planning, other constituents would have more reason to pay attention.

If any group or political subdivision feels it is being singled out for unequal treatment in the realm of transportation and/or transit finance or planning, what recourse do they have? Considering the standing requirements to sue, will they even be able to bring a lawsuit if a state law is indeed deemed a special law? The courts may not give such a locality or group any relief if they cannot bring suit.

State transportation legislation, on its face, does not usually mention a “suspect class.” If a class, such as population or an urban geographic boundary, does not attempt to differentiate between people on the basis of race, sex, alienage, or national origin, it will not be deemed a “suspect class” and will not have heightened scrutiny by a court. Nor will a special law lacking a class of gender or age be subject to intermediate scrutiny, which means that a court will likely apply the rational-basis test to any equal protection claim resulting from state transportation laws in this realm.

The United States Supreme Court has often had difficulty deciding whether certain kinds of state action actually single out certain persons or groups of persons for special treatment.

Equal protection cases over racial segregation, state legislative reapportionment, affirmative action, and gender discrimination have the assumption that a discriminatory “effect” is a necessary element of the equal protection claim.<sup>62</sup> However, if, as has historically happened, state courts initially defer to the legislature on special law,<sup>63</sup> proving that a state action is race-conscious will be hard to do if the law does not appear on its face to single out any identifiable group of persons for special disadvantage because of their race.<sup>64</sup> The Supreme Court majority has interpreted the

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<sup>62</sup> Melissa L. Saunders, *Equal Protection, Class Legislation, and Color Blindness*. 96 Mich. L. Rev. 245, 247.

<sup>63</sup> *Haman v. Marsh*, 237 Neb. 699, 702, at 712, 467 N.W.2d 836, 841, 1991 Neb. LEXIS 146, \*1 (Neb. March 29, 1991): Although each state has its own jurisprudence, courts normally start at a place of deference to legislative intent: “If the purpose of a legislative act is unclear and the legislature declares a public purpose which is not invalid on its face, this court will give strong consideration to the intent of the legislature, but if the act is clearly contrary to the constitution, the court must declare the act unconstitutional regardless of the proclaimed legislative intent.”

<sup>64</sup> See racial gerrymandering cases with race and equal protection issues: *Vera*, 116 S. Ct. at 1974-96 (Stevens, J., joined by Ginsburg and Breyer, JJ., dissenting); 116 S. Ct. at 1997-2013 (Souter, J., joined by Ginsburg and Breyer, JJ., dissenting); *Shaw II*, 116 S. Ct. at 1907-22 (Stevens, J., joined by Ginsburg and Breyer, JJ., dissenting); 116 S. Ct. at 1923 (Souter, J., joined by Ginsburg and Breyer, JJ., dissenting); *Miller*, 515 U.S. at 929-33 (Stevens, J.,

Equal Protection Clause as giving all persons a substantive constitutional right not to be treated differently by the state on the basis of their race, whether or not this results in one being singled out for any special disadvantage because of his race.<sup>65</sup> If the theory against special laws is to prohibit the state from singling out any person or group of persons for special benefits or harms without an adequate “public purpose” justification,<sup>66</sup> then any racial arguments must be well organized with evidence to progress in a court setting.

State high courts typically interpret special legislation clauses as offering the equal protection of the federal Equal Protection Clause, which leads to the courts adopting deferential stances toward the legislatures. Special laws may also benefit or alleviate harms for political minorities or certain groups. By nature, all laws have categories. However, special laws may have categories or “classes” so specific in criteria that the class size becomes very small and unique when compared to other groups, persons, things, objects, locations, municipalities, or counties. When this occurs, parties may seek redress in the courts to prevent unequal treatment of various parties from continuing under this law. Special legislation is a complex area of law in which the Equal Protection Clause may be applied by various courts in various jurisdictions, resulting in a lack of uniform standards in each state.

State constitutions generally prohibit the enactment of special laws where a general law can instead be made applicable.<sup>67</sup> Outside of certain listed topics found in most state constitutions, legislatures will still attempt to justify special legislation when a general law cannot be made applicable to the purpose of the bill—for example, laws with specific criteria relevant to certain groups of people or geographic locations. Some scholars see this practice as fraught with corruption and others see this practice as necessary for good government.<sup>68</sup>

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dissenting); Hays, 515 U.S. at 750-52 (Stevens, J., concurring in the judgment); Shaw I, 509 U.S. at 658-75 (White, J., joined by Blackmun and Stevens, JJ., dissenting); 509 U.S. at 676 (Blackmun, J., dissenting); 509 U.S. at 676-78 (Stevens, J., dissenting); 509 U.S. at 679-87 (Souter, J., dissenting).

<sup>65</sup> Id.

<sup>66</sup> Haman v. Marsh, 237 Neb. 699, 702, at 721, 467 N.W.2d 836, 841, 1991 Neb. LEXIS 146, \*1 (Neb. March 29, 1991) (court stating a public purpose is primarily for the legislature to determine)

<sup>67</sup> Clean Water Coalition v. The M Resort, LLC, 255 P.3d 247 (Nev. 2011); Neb. Const. art. III, § 18.

<sup>68</sup> Schutz, supra note 11, at 45.

### 2.5.2. Population, Geography, and Closed Class Legislation in Transportation

Closed classes may occur if a state combines dates with population, or other methods of narrowing range for the class. A court will employ a test to see if the class will be “closed” or restricted in size at a certain time—meaning no objects may be added to the class in the future.<sup>69</sup> Sometimes a classification will close when the law limits the population determination to a definite year or a certain snapshot in time like a certain census point.<sup>70</sup> Although not in any of our three MRs, a Florida court has spoken on the combination of population with date of creation in special laws. In *McGrath*,<sup>71</sup> the appellee city passed an ordinance implementing a parking tax previously enacted by the legislature. Appellant taxpayers filed suit challenging the validity of the ordinance. The trial court granted appellee summary judgment, holding the ordinance was validly enacted and upholding the constitutionality of the parking tax statute. Appellants challenged the ruling.

Under the Florida Constitution, a municipality may not impose any non-ad valorem tax, such as a parking tax, except as authorized by general law, per Fla. Const. art. VII, §§ 1(a), 9(a). Thus, in order to be constitutional, the statute must be a general law and not a special law. A general law is one that operates uniformly among a class of entities while a special law relates to particular entities. In keeping with other state courts, the Florida court here observed that, in order to be constitutional, the statute was required to be a general law as opposed to a special law. The court held a general law was one that operated uniformly among a class of entities while a special law related to particular entities. The court concluded the ordinance at issue was a special law because it did not operate uniformly among all cities. This suit involved taxpayers disputing a special law with overly specific criteria. In finding this law special, the court noted that the statute was:

“anchoring the 300,000-population classification to the specific date of April 1, 1999,” and thus it could not “operate uniformly among all cities that reach the 300,000-population threshold as is required of a general law. Cities that reach the population threshold after April 1, 1999 are forever excluded from the class. As worded, the statute is no different than if it had identified *by name* the three particular cities to which it relates. See *Fort v. Dekle*, 138 Fla. 871, 190 So. 542 (Fla. 1939); *Walker v. Pendarvis*, 132 So. 2d 186 (Fla. 1961); *Ocala Breeders’ Sales Company, Inc. v. Florida Gaming Centers, Inc.*, 731 So. 2d 21 (Fla. 1st DCA 1999).”

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<sup>69</sup> See, e.g., *Teigen v. State*, 749 N.W.2d 505 (N.D. 2008); *Pebble L.P. v. Parnell*, 215 P.3d 1064 (Alaska 2009); *In re S.B. 95*, 261 P.2d 350 (Colo. 1961); *In re S.B. 9*, 56 P. 173 (Colo. 1899); *Banks v. Heineman*, 837 N.W.2d 70 (Neb. 2013).

<sup>70</sup> See, e.g., *City of Scottsbluff v. Tiemann*, 175 N.W.2d 74 (Neb. 1970); *City of Miami v. McGrath*, 824 So. 2d 143 (Fla. 2002) (population on a certain date operated to restrict a parking-tax enabling provision to three cities).

<sup>71</sup> *McGrath v. City of Miami*, 789 So. 2d 1168, 1169, 2001 Fla. App. LEXIS 9495, \*3, 26 Fla. L. Weekly D 1682 (Fla. Dist. Ct. App. 3d Dist. July 11, 2001)

If we compare this Florida description to the date-restrictive methods used within Texas<sup>72</sup> and other states<sup>73</sup> in creating law classifications, we see that the classifications using date with population often fall within the suspect, closed-class analysis. An examination of special law cases will show that a closed class is one to which no objects will be added in the future and therefore the law may be invalidated.<sup>74</sup>

Geography as a category for special transportation laws seems valid and is commonly used across all three MRs analyzed for this report. However, if we examine the geographic distribution of impacts across legislative districts, and one district has a disproportionate disadvantage, the legislature needs to be made aware. For MRs in particular, legislation that involves a set of transportation interests that are beyond the state's boundary could pose a legislative-scrutiny problem.<sup>75</sup>

These court cases involve an examination of equal protection for the targeted groups, but are decided differently from state to state. To add to the confusing jurisprudence on these special laws, some scholars observe that state courts differ and often base equal protection decisions on a standard that comes from each unique state constitution itself, instead of the federal constitution and its established standards of judicial review.<sup>76</sup>

Although most states are prevented from enacting local and specific legislation that applies selectively to specific jurisdictions, certain criteria must apply to any law to identify the subject. Federal transportation laws require certain population numbers to categorize legal criteria for funding and rules. Often federal law will reference the last census count to use the index for this legal category; the most current census is 2010 (pending release of the 2020 results). For example, in Virginia:

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<sup>72</sup> See *infra*, Texas discussion of restrictive classes in legislation, Chapter 3.3.2.

<sup>73</sup> See Maryland case law discussion, Chapter 3.2.7.

<sup>74</sup> See, e.g., *Teigen v. State*, 749 N.W.2d 505 (N.D. 2008); *Pebble L.P. v. Parnell*, 215 P.3d 1064 (Alaska 2009); *In re S.B. 95*, 261 P.2d 350 (Colo. 1961); *In re S.B. 9*, 56 P. 173 (Colo. 1899); *Banks v. Heineman*, 837 N.W.2d 70 (Neb. 2013).

<sup>75</sup> See Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 431 (3d ed. 2006) (mentioning the political process and virtual representation theories of the dormant commerce clause doctrine)

<sup>76</sup> *Schutz*, *supra* note 11, at 54.

“Metropolitan area” means a metropolitan statistical area as defined by the U.S. Census Bureau and the Office of Management and Budget or any contiguous counties or cities within the Commonwealth that together constitute an urban area.<sup>77</sup>

Since one classification often used by state legislatures in crafting classifications for special bills is population, the size of a city and its suburbs is one way to determine applicability of a transportation law in which state and federal funding could apply. Since population alone is a broad classification for a law, a transit-oriented draft bill with population alone will appear to be a general law, not a special law. However, if there is a floor and ceiling or other restrictive criteria on a population bracket, a classification could be suspect.

Population is important because being in an UZA makes a difference in terms of federal funding for transit authorities<sup>78</sup>—especially for growing cities with increases in regional population growth and sudden sociodemographic changes that affect how the UZA is defined and how service area expansion will need to occur in the future. The addition of non-member jurisdictions to an UZA that is outside of the authority’s current service area after the recent census allows an opportunity to possibly plan expansion of services into these jurisdictions. However, the urban designation means that the non-member jurisdictions may lose eligibility for rural funding while becoming eligible to receive Federal Transit Administration (FTA) Section 5307 UZA Funds for transit capital and operating assistance. This cycle may occur multiple times over time and local matching funds must be committed based upon these census numbers and federal law considerations.

The amount of federal funding and the ways in which funds are allocated can vary, depending on whether an authority is in an UZA of more than 200,000 population, in an UZA with a population between 50,000 and 200,000, in an area that’s not urbanized, or in a non-urbanized federally recognized tribal nation.<sup>79</sup> Since the last census in 2010, the current UZA delineations have resulted in many reclassifications: five UZAs topped the 1 million population threshold (Austin, Charlotte, Jacksonville, Memphis, and Salt Lake City); one UZA dipped below the 1 million

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<sup>77</sup> § 33.2-1901. Definitions, Va. Code Ann. § 33.2-1901 (current through the 2020 Regular Session of the General Assembly).

<sup>78</sup> Zeilinger Chris. Transit and the Census: It Matters A Lot. Not dated. Community Transportation Reader. URL: <https://ctaa.org/transit-and-the-census-it-matters-a-lot/>,

<sup>79</sup> Ibid.

population threshold (New Orleans); 27 UZAs reached the 200,000 population threshold; 36 new UZAs, all under 200,000 in population, were named; and four areas that were UZAs based on the 2000 Census in 2010 fell below the 50,000 threshold that qualifies an area as a UZA (Galveston, TX; Sandusky, OH; Danville, VA; and Saipan, MP).<sup>80</sup>

A citizen's access to transit is determined by many factors, but the first step is when the legislature creates law that creates the transit authority and its powers. State transit programs receive a large portion of funding from federal sources.<sup>81</sup> This funding is then awarded as grants that typically require matching funds depending on the type of program. If a local or regional transit authority wishes to secure federal funding to support a system, it must examine how FTA's formula-based funding for transit operating and capital assistance will apply to current populations (using 2010 Census data), as well as those in the future (2020 Census data).

The federal funds are apportioned to states using a variety of formulas<sup>82</sup>, many of which require local governments to match funding first. In most states, the federal language of grant programs is reflected in state codes governing transit authorities. The UZA grant program is the largest and is reserved for UZAs over 200,000 in population; this population requirement is reflected in the Tex. Transp. Code.<sup>83</sup> Although population is considered broad enough to not be a special law, it can still be a problematic classification when a metro area is growing fast, given that the census is taken only every ten years yet serves as the baseline for the grant. If the only population number of record no longer applies as intended, due to changes in population between the censuses, funding and equitable use problems arise. As the past thirty years have seen the rise of MRs, it can be hypothesized that legislative practices—like bracketing and special laws governing transportation—have impacted the ability to effectively manage congestion and mobility options inter and intra city by failing to keep up with population changes.

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<sup>80</sup> See population categories, FTA Website, <https://www.transit.dot.gov/sites/fta.dot.gov/files/Census%202010%20and%20FTA%20Formula%20Grants%2012-7-15.pdf>, and information on Implications of Census 2010 on Transportation Planning and FTA Formula Grants

<sup>81</sup> FTA Grant Programs, listed on <https://cms7.fta.dot.gov/grants#:~:text=Grant%20Programs%20%20%20Title%20%20,%20%20Competitive%20%204%20more%20rows%20>

<sup>82</sup> 49 USC Sec. 5307, passenger Ferry Grants; 5309 Capital Investment Grants; 5311 Indian Reserv. Transit; 5339 Bus and Bus Facilities (Regular); 5339 Bus and Bus Facilities (Low/No); See also FAST Act (TOD Planning Pilot), FAST Act (ICAM Pilot)

<sup>83</sup> See Texas Transportation Code § 456.001. Definitions, (11) "Transit authority" means a municipality or a metropolitan or regional authority in an urbanized area of over 200,000 population with a local transit tax.

If new areas and populations become subject to such special legislation due to changing demographics, the law may no longer reflect the intent of the legislature, thwarting one of the legal criteria used in many states to adjudicate the constitutionality of a special law. Growing cities need more certainty and assistance in funding and maintaining future transit projects, especially if they are attempting to get FTA Formula Funding with strict population criteria, such as Urbanized Areas Formula Grants (Sec. 5307),<sup>84</sup> Enhanced Mobility for Seniors & Individuals with Disabilities (Sec. 5310),<sup>85</sup> Rural Area Formula Grants (Sec. 5311),<sup>86</sup> Bus-Bus Facility Formula (Sec. 5339),<sup>87</sup> and State of Good Repair (Sec. 5337).<sup>88</sup>

### 2.5.3 Rational Basis with “Bite”

Various restrictive criteria have been used for special laws such as population numbers, geographic boundaries, and dates, all of which are also criteria used in transportation related laws. However, if the law’s criteria are “rationally” related to a legitimate state interest or purpose, the law will be upheld as valid, depending upon the criteria used to define the class to which the law applies. Most courts equate the state constitutional prohibition on special laws with federal rational-basis equal protection.<sup>89</sup> However, when courts give special laws more scrutiny, which we will call *rational basis with “bite,”*<sup>90</sup> they often find the law unconstitutional.<sup>91</sup> However, this has been a rare occurrence during the past decade.

For example, in Indiana, the court found that a special law was justified by the unique conditions in a county that included a Superfund site.<sup>92</sup> Although the criteria, population size, did identify only one county that was given the taxing authority to clean up a Superfund site in this case, the class was considered “open.” An “open class” means that objects or people may be added in the

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<sup>84</sup> 49 USC § 5307 (Urban Area Formula funding allocation involves factors such as population and population density)

<sup>85</sup> 49 USC §.5310

<sup>86</sup> 49 USC § 5311, (Rural Area Transit Grant Programs: populations less than 50,000)

<sup>87</sup> 49 USC § 5339

<sup>88</sup> 49 USC § 5337

<sup>89</sup> See *Robson v. Rodriguez*, 141 A.2d 1 (N.J. 1958).

<sup>90</sup> See *Schutz*, supra note 11, at 54.

<sup>91</sup> *Best v. Taylor Machine Works*, 689 N.E.2d 1057, 1105 (Ill. 1997). *Best*, 689 N.E.2d at 1057; see also *Ferdon v. Wisconsin Patients Compensation Fund*, 701 N.W.2d 440 (Wis. 2005) (striking down similar legislation on state equal protection grounds, using a rational-basis with “bite” standard); *Libertarian Party v. State*, 546 N.W.2d 424 (Wis. 1996) (using the same standard for special-legislation analysis).

<sup>92</sup> *State v. Hoover*, 668 N.E.2d 1229, 1234 (Ind. 1996)

future. Open classes are generally found to be valid while closed classes will often lead a court to find a law invalid.<sup>93</sup> This means the relationship between the criteria and the purpose of the law must be “rationally related” to pass the test. In the Hoover case, the class was open, but the court concluded the legislation was special because population criteria had nothing to do with the need for taxing authority.<sup>94</sup> That is, the classification served no purpose other than to identify Tippecanoe County. Nonetheless, the court found the law to valid. These cases cause confusion and create a lack of uniformity because often the court defers to the legislature and creates language to find a way to validate the law.

#### 2.5.4. Population: Necessary but Sometimes Problematic Metric

One category that states use to create local or special legislation is population, which alone is a broad category already used by federal transportation laws.<sup>95</sup> The 2020 Census data is used to determine population and population density for sections 5303, 5305, 5307 and 5339 as well as rural population and rural land area for the federal Rural Areas Formula Program. Population is a major factor in allocating both Section 5311 and 5307 funds to states and UZAs. Section 5307 allocations also factor in population density from census data, whereas Section 5311 uses non-urbanized land area as another factor when making allocations to states. The census results of 2020 will update the current rules (now based on the 2010 census) that govern so much of the FTA’s funding rules and federal formulas that assist states. Both FHWA and FTA use census data to define their own population thresholds for urbanized and nonurbanized areas.<sup>96</sup> Federal and state public transportation funds are allocated based on formulas according to population in areas classified as urbanized or non-urbanized. Since the U.S. Census Bureau defines and designates UZAs, changes to the current UZAs and additions of new UZAs will occur following the 2020 Census. These changes will especially impact state funding allocations in areas that have seen rapid growth since 2010, like Texas.

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<sup>93</sup> See, e.g., *Teigen v. State*, 749 N.W.2d 505 (N.D. 2008); *Pebble L.P. v. Parnell*, 215 P.3d 1064 (Alaska 2009); *In re S.B. 95*, 261 P.2d 350 (Colo. 1961); *In re S.B. 9*, 56 P. 173 (Colo. 1899); *Banks v. Heineman*, 837 N.W.2d 70 (Neb. 2013).

<sup>94</sup> Hoover at 1234.

<sup>95</sup> See *infra* on grants to states from the Federal Transit Administration (FTA) under the Urbanized Area Formula Program (49 USC § 5307) or Other than Urbanized Area (Rural) Formula Program (49 USC § 5311).

<sup>96</sup> Texas State Demographer. What’s at State for Texas? June 6, 2019/ URL: [https://demographics.texas.gov/Resources/Presentations/DDUC/2019/2019\\_06\\_06\\_Census2020WhatsatStakeforTexasTxDOT.pdf](https://demographics.texas.gov/Resources/Presentations/DDUC/2019/2019_06_06_Census2020WhatsatStakeforTexasTxDOT.pdf)

States like Texas—those that rely heavily on census data for policy and planning—need to reexamine how they balance their treatment of rural and urban transportation districts. For example, as the population in rural Texas grows, Texas will have more newly urbanized areas, which could rapidly merge into large urban areas or become their own new UZAs. When communities with a population over 50,000 become small UZAs, they will have many choices to make on long-range regional growth and taxation. Will the state law structure of transportation districts hinder regional growth and cooperation on long-range transit planning? In Texas, census data are used in many transportation planning applications, including population forecasting, travel demand modeling and microsimulation, Title VI analysis, and land use analysis.<sup>97</sup> Texas state and local planning experts’ contract for a special tabulation of American Community Survey data is called the Census Transportation Planning Package (CTTP). The U.S. Census definition of “urbanized areas” is used in the Federal determination of Metropolitan Planning Organizations (MPOs), which is used by many states.

In many states like Texas, census population data is used in state laws for many policy choices, instead of a state data method. Small UZAs (those with populations between 50,000 and 200,000) are authorized to receive slightly less than 8 percent of all FTA formula-based transit funding (including not only Section 5307, but also the small-urban portions of Sections 5310 and 5339). This narrow range is in federal law, so states must also implement it within their own state laws. However, in case law, special laws have been found constitutionally suspect when narrow population ranges exist as a legal classification. In examining the law on suspect special legislation, there is little uniformity in how population as a class affects transportation and other areas of law. Population and geography, although used frequently for state legislation, may be defined with floors and ceilings on the number of residents before certain state constitutional prohibitions apply and the numbers are held to be arbitrary. The unintended consequences of such special legislation can adversely affect transportation planning and funding issues if a city loses or gains population and part of the code no longer applies as intended.

Once 2020 census data is available, states will reevaluate how their transportation codes and transportation authorities are meeting mobility needs. In reexamining a state law’s criteria

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<sup>97</sup> Ibid.

governing transit districts, such as population numbers, taxing authority of political subdivisions, geographical boundaries, and the metropolitan statistical area definitions, lawmakers may want to focus on the structural restrictions linked to a district’s powers and growth over time. In addition, the effects of the COVID-19 pandemic on transit ridership, notwithstanding the CARES Act support many received, and predicted transit agency funding shortfalls may prompt legislatures to reevaluate how transportation codes are structured.<sup>98</sup> Large events like a pandemic often prompt state legislatures to create special laws to address certain current concerns. In 2021, state legislatures may reexamine or create new transportation laws with more flexible interagency cooperation or dedicated funding streams to prop up their larger transit systems after COVID-19. This may be an opportune time to restructure other areas of transportation code to rectify systemic flaws negatively affecting multimodal transit multimodal transit. As Alex Hudson, executive director of Seattle-based nonprofit Transportation Choices Coalition, noted:

If we use this as an opportunity to do a makeover of our transit systems, our transit funding, and our transit infrastructure itself, we could come out of this exceptionally strong.<sup>99</sup>

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<sup>98</sup> Fiscal Year 2020 CARES Act Supplemental Public Transportation Apportionments and Allocations, URL: <https://www.transit.dot.gov/cares-act-appportionments>. The Coronavirus Aid, Relief, and Economic Security (CARES) Act (Pub. L. 116-136, Mar. 27, 2020) provides \$25 billion to transit agencies to help to prevent, prepare for, and respond to the COVID-19 pandemic. The total available amount for each program is based on funding appropriated under the Act.

<sup>99</sup> Alejandro De La Garza. Covid 19 Has Been “Apocalyptic” for Public Transit: Will Congress Offer More Help? Time Magazine, July 21 2020. URL: <https://time.com/5869375/public-transit-coronavirus-covid/>

## Chapter 3. A Review of Specialized Legislation in Three Megaregions

Among the states hosting the three MRs examined for this report,<sup>100</sup> Texas has the longest constitution, but each state has a special law prohibition within its constitution. Transportation cases on special laws are rare, so our analysis covers mostly other types of special law cases. The Mid-Atlantic MR includes Virginia, Maryland, and the District of Columbia, and has had rail for decades, in addition to established public transit. The Texas Triangle covers a large area with a unique history, lower population density outside of large cities, and a legislature that meets infrequently. The Cascadia MR covers Washington and Oregon, an area with some complex topography, such as mountains and waterways, that adds to the traffic congestion issues by limiting corridors for commuters. The Washington state legislature has a history of supporting high-speed rail<sup>101</sup> and other transit projects, perhaps due to the needs of the public in this unique geographical area.

Among our three MRs here, one city stands out: Washington, D.C., which is not a state but a federal district, so only federal laws apply and there are no state laws.<sup>102</sup> The District of Columbia Department of Transportation has completed a State Rail Plan that involves its neighbors, including commuter rail service provided by the Maryland Area Regional Commuter and the Virginia Railway Express lines.<sup>103</sup> However, as a non-state, the discussion of special laws do not apply to D.C. The Mid-Atlantic MR includes states that have a well-established rail presence in the region and a historical working relationship with funding sources of transit and rail, and using federal funding to facilitate mobility in the region. Most other MRs do not have this advantage. The Cascadia MR states both have established and well-funded rail and transit in a region compounded by unique geographical obstacles for commuters. The Texas Triangle is unique in

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<sup>100</sup> Texas (Texas Triangle); Washington, Oregon (Cascadia Megaregion), Virginia, Maryland, D.C. (D.C. Virginia).

<sup>101</sup> Jan. 18, 2019, <https://www.archpaper.com/2019/01/high-speed-rail-plan-pacific-northwest/> (Bill introduced to create a new high speed rail authority in 2019 for Washington, Oregon and Canada)

<sup>102</sup> The law applying to D.C. is 28 USC Sec. 88. There is one judicial district here and the D.C. does not sit inside of any state. Therefore, part of its transit system is created by a compact between the federal government the neighboring states. See *infra*, WMATA.

<sup>103</sup> District of Columbia State Rail Plan, includes intercity passenger rail, freight rail, and commuter rail. [https://ddot.dc.gov/sites/default/files/dc/sites/ddot/page\\_content/attachments/DC%20SRP%20Final%20Report\\_Executive%20Summary.pdf](https://ddot.dc.gov/sites/default/files/dc/sites/ddot/page_content/attachments/DC%20SRP%20Final%20Report_Executive%20Summary.pdf)

geography and history in that its land mass is larger than France,<sup>104</sup> giving it a low average on population density of 96.3 persons per square mile.<sup>105</sup> Texas was an independent country before joining the union in 1845, which also may affect how its legislature views itself. The current Texas constitution is its seventh constitution, adopted on February 15, 1876.<sup>106</sup> Texas has relatively few rail networks and—notwithstanding its current population density within its identified MR, and in other fast-growing areas of the state such as the Rio Grande Valley—has little political will to fund rail and transit to the extent that the other two MRs have accomplished.

## 3.1. Cascadia Megaregion

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### 3.1.1. Oregon Constitution

Article IV, section 23, of the Oregon Constitution, enumerates several types of special or local laws that are prohibited.<sup>107</sup> Not all local and special laws are invalid in Oregon. The section describes fourteen subjects upon which the Legislative Assembly may not enact special or local laws. Of note, the Oregon Supreme Court has declared that subdivision 7 of the section, relating to “laying, opening and working on highways,” has been repealed, at least as a basis for defeating legislative appropriations for the construction of public roads.<sup>108</sup>

### 3.1.2. Oregon Case Law

The most relevant areas to transportation are prohibitions against special legislation “for laying, opening, and working on highways,” and “for the assessment and collection of Taxes, for State, County, Township, or road purposes.”<sup>109</sup> The Supreme Court of Oregon has rarely discussed §23, and has not substantially defined the categories except by holding that they are exclusive, leaving the legislature residual power to make special or local laws regarding subjects not mentioned in

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<sup>104</sup> Approximately 695,662 square km. See <https://www.britannica.com/place/Texas-state>

<sup>105</sup> Texas data, per 2010 Census, <https://www.census.gov/data/tables/2010/dec/density-data-text.html>

<sup>106</sup> Texas State Historical Association, <https://tshaonline.org/handbook/online/articles/mhc07>

<sup>107</sup> Oregon State Legislature Website. URL: [https://www.oregonlegislature.gov/bills\\_laws/Pages/OrConst.aspx](https://www.oregonlegislature.gov/bills_laws/Pages/OrConst.aspx)

<sup>108</sup> *Stoppenback v. Multnomah County*, 71 Ore. 493, 142 P. 832, 1914 Ore. LEXIS 201 (Supreme Court of Oregon July 14, 1914, Decided).

<sup>109</sup> Section 23. Certain local and special laws prohibited., Ore. Const. Art. IV, § 23. The Oregon Annotated Statutes text is current through the 2019 and 2020 Regular Session. Some sections may have multiple variants due to amendments by multiple acts. Revision and codification by the Legislative Counsel are updated as available; see ORS § 73.111 et seq. For sections pending codification by the Legislative Counsel, see Newly Added Sections in the Table of Contents.

the section.<sup>110</sup> This follows a general rule of Oregon constitutional law that the constitution is not an exclusive enumeration of powers, but rather a list of specific limitations.<sup>111</sup>

When it comes to population as a class, Oregon has invalidated some population categories based upon the census due to the future changes of such a class. An act providing for the appointment of commissioners in a city with more than 100,000 people as of the most recent census at the time of the enactment, was found to be invalid special legislation because it would, in perpetuity, apply only to Portland even if another similarly situated city reached that same population total in the future.<sup>112</sup> In this case, Oregon had a much smaller population in 1911. Certain commissioners sought to remove the board of commissioners of the port from office under Laws 1911, p. 319, and to establish themselves as the rightful officeholders. However, the board argued that the Act was unconstitutional because it was special. The court dismissed the named commissioners' suit. The statute, which was plainly intended to affect a particular person or thing, or to become operative in a particular place or locality, was aptly characterized as special and local and was deemed unconstitutional.<sup>113</sup> The court found that the Act included only ports whose city at the time had a certain population—which meant only one city. In attacking the classification, the court correctly found no justification for a distinction between the ports whose cities varied in population. Finding the classification was “purely illusory,” the court said that:

“all acts or parts of acts attempting to create a classification of cities by population which are confined in their operation to a state of facts existing at the date of their adoption or any particular time, or which by any device or subterfuge exclude other cities from ever coming within their purview, or based upon any classification which in relation to the subject concerned is purely illusory, or founded upon unreasonable distinctions,” are special and local.”<sup>114</sup>

In this case the Oregon Constitution (Section 2 of Article XI) prohibited the legislature from creating a corporation by special law:

“Corporations may be formed under general laws, but shall not be created by the legislative assembly by special laws. The legislative assembly shall not enact, amend, or repeal any charter or act of incorporation for any municipality, city, or town. The legal voters of every

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<sup>110</sup> See *La Grande v. Public Employees Retirement Board*, 284 Ore. 173, 184 (Ore. 1978).

<sup>111</sup> See *Croft v. Lambert*, 228 Ore. 76, 83 (citing *State ex rel Powers v. Welch*, 198 Or 670 (Ore. 1953)).

<sup>112</sup> *State ex rel. Gray v. Swigert*, 59 Ore. 132, 116 P. 440, 1911 Ore. LEXIS 115 (Supreme Court of Oregon June 13, 1911, Decided).

<sup>113</sup> *Id.*

<sup>114</sup> (Citing *Ladd v. Holmes*, 40 Ore. 167, 173 (66 P. 714, 716: 91 Am. St. Rep. 457)) in *State ex rel. Gray v. Swigert*, 59 Ore. 132, 116 P. 440, 1911 Ore. LEXIS 115 (Supreme Court of Oregon June 13, 1911, Decided).

city and town are hereby granted power to enact and amend their municipal charter, subject to the constitution and criminal laws of the State of Oregon.”<sup>115</sup>

In this case there was no justification for a distinction between ports on the basis of population.

The court clarified that the statute was:

“plainly intended to affect a particular person or thing, or to become operative in a particular place or locality and looks to no broader or enlarged application, may be aptly characterized as special and local and falls within the prohibition.”<sup>116</sup>

As time marched on, however, courts started to scrutinize special law cases less. In 1955, a law applicable to all cities of fewer than 100,000 population was upheld in *Southern Pacific v. Consolidated Freightways*.<sup>117</sup> This trend has continued into recent years.

School laws have a fair amount of special law litigation in each state. The Oregon Legislature carved out a significant exception regarding school funding. While Article 4, §23 prohibits special laws “providing for supporting Common schools, and for the preservation of school funds,” the Oregon intermediate appeals court permitted a law facilitating a school district boundary change between two specific districts.<sup>118</sup> The court narrowly construed the constitutional provision, holding that the state had plenary power to draw school district lines and that redrawing lines was not sufficiently linked to school funding to fit within its scope.<sup>119</sup>

In *Portland v. Welch*, the court found that a law was special in that the county tax assessor was attempting to take over a power that was reserved to the state constitution itself.<sup>120</sup> The court found that the Tax Supervising and Conservation Commission Act unconstitutionally delegated authority

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<sup>115</sup> Section 2. Formation of corporations; municipal charters; intoxicating liquor regulation. Ore. Const. Art. XI, § 2. (The Oregon Annotated Statutes is current through the 2019 and 2020 Regular Session. Some sections may have multiple variants due to amendments by multiple acts. Revision and codification by the Legislative Counsel are updated as available; see ORS §173.111 et seq. For sections pending codification by the Legislative Counsel, see Newly Added Sections in the Table of Contents.)

<sup>116</sup> State ex rel. Gray v. Swigert, 59 Ore. 132, 135, 116 P. 440, 441, 1911 Ore. LEXIS 115, \*5 (Or. June 13, 1911), (citing *Ladd v. Holmes*, 40 Ore. 167, 173 (66 P. 714, 716: 91 Am. St. Rep. 457))

<sup>117</sup> *Southern Pacific Co. v. Consolidated Freightways, Inc.*, 203 Ore. 657, 281 P.2d 693, 1955 Ore. LEXIS 246 (Supreme Court of Oregon, Department One March 30, 1955).

<sup>118</sup> *Sherwood Sch. Dist. 88J v. Wash. County Educ. Serv. Dist.*, 167 Ore. App. 372, 375, 6 P.3d 518, 2000 Ore. App. LEXIS 819 (Court of Appeals of Oregon, May 24, 2000, Filed).

<sup>119</sup> *Id.* at 383.

<sup>120</sup> *Portland v. Welch*, 154 Ore. 286, 289, 59 P.2d 228, 229, 1936 Ore. LEXIS 22, \*1, 106 A.L.R. 1188 (Or. July 7, 1936)

to a county tax commission to strike items from a city's budget and restricted the ability of the city to levy taxes that were authorized by law. This case displays the power struggles between state (Oregon legislature), city, and county for control over local issues, so it may be applicable later to transportation cases. The appellant, a county tax assessor, sought review of the decision by the Circuit Court, Multnomah County (Oregon), which decreed the Tax Supervising and Conservation Commission Act, Or. Rev. Stat. § 69-1201 et seq., was unconstitutional in so far as it gave a county tax commission authority to levy taxes and reduce budget items on a city in contravention of the state constitution, Art. XI Sec. 2 (Home Rule for Cities Amendment).<sup>121</sup> The appellee city challenged the Act after the tax commission cut the city's budget and refused to permit it to levy taxes. The Supreme Court of Oregon affirmed the trial court, finding the county's Act to be unconstitutional in that it interfered with the powers reserved to municipalities within the state constitution. The authority of a city to legislate relative to matters germane to purely municipal affairs has been derived not from the legislature but from the constitution itself. The legislature cannot interfere with that right [to "legislate" on "municipal affairs"] through the enactment of a special law.<sup>122</sup>

The court here notes that the legislature was the body with the authority to place limits on a city, not the tax commission; however, the court clarifies that general law is what the legislature is allowed to create. In rebuking the county, the court distinguished general law from special law while noting the power that local government should have in Oregon:

“While a general law supersedes a municipal charter or ordinance in conflict therewith, it should be borne in mind that the subject matter of the general legislative enactment must pertain to those things of general concern to the people of the state. A law general in form cannot, under the constitution, deprive cities of the right to legislate on purely local affairs germane to the purposes for which the city was incorporated.”<sup>123</sup>

The court noted that local taxation and indebtedness under certain circumstances may become a matter of concern to the state and the constitution imposes a tax limitation upon municipalities and

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<sup>121</sup> Id. At 294: Article XI, § 2, of the constitution of Oregon provides: “The legislative assembly shall not enact, amend, or repeal any charter or act of incorporation for any municipality, city or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the constitution and criminal laws of the state of Oregon.”

<sup>122</sup> Id. At 295.

<sup>123</sup> Id at 296.

taxing districts.<sup>124</sup> “The legislature may, by a general law, limit the levying of taxes or incurrence of indebtedness by municipalities.”<sup>125</sup> This is important for the balance between the state and local governments in transportation planning in the future.

The court also recognized the true purpose of local laws in observing that Oregon’s Article IV, § 1a, was adopted, reserving to the legal voters of every municipality and district “the initiative and referendum powers” as to all “local, special, and municipal legislation.”<sup>126</sup>

### 3.1.3. Washington Constitution

Article II § 28 of Washington’s constitution lists 18 subjects forbidden to special legislation:

§ 28 Special legislation.

The legislature is prohibited from enacting any private or special laws in the following cases:

1. For changing the names of persons, or constituting one person the heir at law of another.
2. For laying out, opening or altering highways, except in cases of state roads extending into more than one county, and military roads to aid in the construction of which lands shall have been or may be granted by congress.
3. For authorizing persons to keep ferries wholly within this state.
4. For authorizing the sale or mortgage of real or personal property of minors, or others under disability.
5. For assessment or collection of taxes, or for extending the time for collection thereof.
6. For granting corporate powers or privileges.
7. For authorizing the apportionment of any part of the school fund.
8. For incorporating any town or village or to amend the charter thereof.
9. From giving effect to invalid deeds, wills or other instruments.
10. Releasing or extinguishing in whole or in part, the indebtedness, liability or other obligation, of any person, or corporation to this state, or to any municipal corporation therein.
11. Declaring any person of age or authorizing any minor to sell, lease, or encumber his or her property.
12. Legalizing, except as against the state, the unauthorized or invalid act of any officer.
13. Regulating the rates of interest on money.
14. Remitting fines, penalties or forfeitures.
15. Providing for the management of common schools.
16. Authorizing the adoption of children.
17. For limitation of civil or criminal actions.
18. Changing county lines, locating or changing county seats, provided, this shall not be construed to apply to the creation of new counties.<sup>127</sup>

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<sup>124</sup> Or. Const. art. XI, § 11

<sup>125</sup> Portland v. Welch, at 298.

<sup>126</sup> Id. At 232.

<sup>127</sup> § 28 Special legislation. Wash. Const. Art. II, § 28 (Statutes current through 2016 1st Special Session).

The subsections most likely to affect transportation consistency are assessment or collection of taxes, for extending the time for collection thereof (§5), and granting corporate powers or privileges (§6).<sup>128</sup>

### 3.1.4. Washington Case Law

The provisions in Washington Constitution Art. II § 28 have been applied most broadly, interpreted by the court as giving judicial review over classifications of counties and municipalities.<sup>129</sup>

The Washington Supreme Court has applied the special legislation prohibition only once to legislation specifying a population range, rather than a ceiling or floor.<sup>130</sup> In that case, the distinction was fairly wide, applying to multiple municipalities within the state.

In totality, the jurisprudence in Washington state regarding special legislation has been enforced with moderate rigor. Transparent attempts at using bracketing to single out localities rarely succeed. Classifications, even those that include only a single subject at the time of enactment, can survive with reasonable justifications.

Rarely does a special law case arise with specific transportation issues; however, one can examine other areas of law to understand how a state court would react to such a case. The Washington Supreme Court is unique in its jurisprudence on special laws. When special laws prohibitions are initially separated for analysis by a court from the Fourteenth Amendment equal protection claim in a case, the court often finds the law to be special and unconstitutional. The extra focus on the state constitution prohibitions in these rarer cases may lead to rational basis with bite—i.e., a stricter scrutiny than other courts use in regular rational-basis review of special laws.

In a rare holding involving the public input of a community on zoning and the importance of unique geography, the Washington Supreme Court found a law unconstitutional under the state

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<sup>128</sup> § 28 Special legislation. Wash. Const. Art. II, § 28 (Statutes current through 2016 1st Special Session).

<sup>129</sup> See generally *Clean v. State*, 130 wn.2d; *Seattle v. State*, 103 Wn.2d 663 (Wash. 1985).

<sup>130</sup> See generally *State ex rel. Hunt*, 64 Wash. 69 (Wash 1911).

constitution, and deemed the law special.<sup>131</sup> In *Island County*, a bill allowing for the creation of community councils to manage comprehensive planning and zoning in island counties with an unincorporated population over 30,000 was declared unconstitutional.<sup>132</sup> At issue was whether the statute constituted a special law granting corporate powers or privileges for municipal purposes; whether it granted privileges to a class of citizens that did not apply equally to all similarly situated citizens; whether it violated Wash. Const. art. XI, § 4; and whether it violated the one-person, one-vote requirement of the Equal Protection Clause of the Fourteenth Amendment.

In applying the prohibition against special law to governmental entities, the court focused on disparate treatment built into the law. The combination of population with unincorporated geography here was too narrow and treated island counties unequally. Due to its specificity, the clause applied to only a single county.<sup>133</sup> The court held that while islands may present unique transportation issues meriting a legislative classification, the act irrationally excluded other counties that also contained islands and could benefit from its effects.<sup>134</sup> The court was unable to conclude that the exclusion of all other island communities was rational. The Washington Supreme Court then agreed with the previous court, which found that the act was special legislation prohibited by Wash. Const. art. II, § 28(6) and/or art. XI, §.10 (amend. 10). In determining whether a particular classification was valid, a test of reasonableness was imposed:

“This is dependent upon two basic considerations. First, do the different classes established by the legislature possess different characteristics? Secondly, do the different characteristics relate to the purpose and subject matter of the legislation?”<sup>135</sup>

The court in *Island County* also cited another case<sup>136</sup> for its reasoning, in which it voided a statute for lack of a reasonable relationship between the taxes to be paid and services to be received in an area to be annexed and where the law applied only to cities of over 400,000 in population. The court focused on exclusiveness as a key factor:

“A law is special in a constitutional sense when, by force of an inherent limitation, it arbitrarily separates some persons, places or things from others upon which, but for such

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<sup>131</sup> *Island County v. State*, 135 Wn.2d 141, 955 P.2d 377, 1998 Wash. LEXIS 293 (Sup. Court of Washington May 14, 1998, Filed).

<sup>132</sup> 135 Wn.2d at 144.

<sup>133</sup> *Id.* at 151.

<sup>134</sup> *Id.*

<sup>135</sup> *Island County v. State*, 135 Wn.2d 141, 143, 955 P.2d 377, 378, 1998 Wash. LEXIS 293, \*1 (Wash. May 14, 1998)

<sup>136</sup> *City of Seattle v. State*, 103 Wn.2d 663, 694 P.2d 641 (1985)

limitation, it would operate. The test of a special law is the appropriateness of its provisions to the objects that it excludes. It is not, therefore, what a law includes that makes it special, but what it excludes.”<sup>137</sup>

Some population thresholds are rational, however. In *Clean v. State*, a statute subsidizing construction of baseball stadiums in counties containing more than a million people was found to be permissible, although only one county was affected when the law was passed.<sup>138</sup> The court found that a high population was necessary to make a major stadium profitable in an area, and that other counties may, in time, become eligible for the same benefits once they accrue such populations.<sup>139</sup> A similar view was held in the establishment of municipal courts in cities with population 400,000 or more (ARCW § 35.20.010) and a statutory requirement that justices of the peace must be attorneys in cities of 5,000 or more (ARCW § 3.58.010).<sup>140</sup> In 1911, the court determined a statute creating a new incorporation process for cities with populations of 2,500 to 20,000 to be constitutional general legislation; however, the state was less populous then and thus the range seemed less narrow.<sup>141</sup>

In examining the purpose of the Island County statute, to provide an island community with a “method to give direct input on the planning and zoning” of their community to the county legislative authority and to serve as a forum for the discussion of local issues, the court was unable to conclude that the exclusion of all other island communities was rational.

The Washington Const. Art. II, §28 prohibits “private or special laws” in 18 specific cases and only one of these provisions directly references transportation: prohibiting private or special laws “For laying out, opening or altering highways,<sup>142</sup> except in cases of state roads extending into more than one county, and military roads to aid in the construction of which lands shall have been or

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<sup>137</sup> *Island County v. State*, 135 Wn.2d 141, 150, 955 P.2d 377, 381-382, 1998 Wash. LEXIS 293, \*12-13 (Wash. May 14, 1998)

<sup>138</sup> See *Clean v. State*, 130 Wn.2d 782, 802 (Wash. 1996).

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

<sup>140</sup> See *Seattle v. State*, 103 Wn.2d at 675 (Wash. 1985).

<sup>141</sup> See *State ex rel. Hunt v. Tausick*, 64 Wash. 69, 75 (Wash. 1911).

<sup>142</sup> Compare to the Texas Constitutions: Article III, Section 56: “the Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law,” regarding a list of subjects, as well as prohibiting the passage of any local or special law in any case where a general law can be made applicable. In the transportation context, the section specifically prohibits special or local legislation regulating the affairs of counties and municipalities, and such legislation authorizing the laying out, opening, and maintenance of roads.

may be granted by congress,” as set forth in Wash Const. Art. II, §28 (2). The Supreme Court of Washington has interpreted the provision to reflect that of other jurisdictions: “A special law is one that relates to particular, as distinguished from a general law, which applies to all persons or things of a class.”<sup>143</sup>

The purpose of the rule is to prevent the legislature from “interfering with the government of municipal corporations” and to eliminate diversity of legislation upon a particular subject.<sup>144</sup> Like other states, the rule does not entirely prohibit the legislature from making classifications in its laws.<sup>145</sup> By its nature, all legislation is based on “a classification of some kind.”<sup>146</sup> Classifications must be based on “substantially different characteristics” that are “reasonably related to the purpose of the legislative enactment.”<sup>147</sup> To make this determination, the court asks whether “any appropriate object is excluded to which the law, but for its limitations, would apply.”<sup>148</sup>

Washington takes a different view of special laws based on particular geography as a class, perhaps due to its unique topography. In the example of the highly specific Island County bill cited earlier, the court held that while islands may present unique geography-related transportation issues meriting a legislative classification, this particular act irrationally excluded other counties that also contained islands and would have benefited from the act’s effects.<sup>149</sup>

In applying a “rational” standard of review, the court focused on whether the purpose of the legislation was rationally related to those counties that were excluded from its application. Excluded from the act’s application were all the counties that did not consist of islands with at least 30,000 people in unincorporated areas. In fact, this very specific limitation excluded every county in the state with the exception of Island County. In focusing on the fact that citizen participation may be difficult in island counties because of a lack of transportation, and other issues that make planning unique for island communities, the court still concluded that there was nothing

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<sup>143</sup> Young Men’s Christian Ass’n of Seattle v. Parish, 89 Wash. 495, 498 (Wash. 1916).

<sup>144</sup> Island County v. State, 135 Wn.2d 141, 148 (Wash. 1998).

<sup>145</sup> Id. at 149.

<sup>146</sup> Id.

<sup>147</sup> Id.

<sup>148</sup> Seattle v. State, 103 Wn.2d 663, 675 (Wash. 1985) (citing YMCA, 89 Wash. at 498).

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

unique about island counties with populations over 30,000 people in unincorporated areas that does not apply to other counties that may have populated islands within their borders and that meet the population requirement. The court therefore concluded that there was no purpose of the legislation that was rationally related to excluding other counties with islands from its applicability.

In a rare case, the court did use something resembling federal rational-basis review with more scrutiny, calling it a “reasonableness” test. In this case, the Washington Supreme Court used a stricter, higher, state constitutional standard that tends to deem a special law unconstitutional. In explaining its higher evidentiary burden of proof (“beyond a reasonable doubt”), the court-maintained deference to the legislature, yet still found the law to be unconstitutional:

“We assume the Legislature considered the constitutionality of its enactments and afford some deference to that judgment. Additionally, the Legislature speaks for the people and we are hesitant to strike a duly enacted statute unless fully convinced, after a searching legal analysis, that the statute violates the constitution. *Smith*, 111 Wn.2d at 17-18 (Utter, J., dissenting). See also *Pacific Legal Found. v. Brown*, 29 Cal. 3d 168, 624 P.2d 1215, 1221, 172 Cal. Rptr. 487 (1981). Ultimately, however, the judiciary must make the decision, as a matter of law, whether a given statute is within the legislature’s power to enact or whether it violates a constitutional mandate. E.g., *Brown*, 624 P.2d at 1221 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-80, 2 L. Ed. 60 (1803)).”<sup>150</sup>

In addition to unique geography, different local areas may have different preferences about how local government should be structured and how state funds should be allocated.

Any exclusions must be rationally related to the purpose of the statute.<sup>151</sup> For example, naming YMCA facilities in a bill excluding religious institutions from taxation was held to be unconstitutional special law because the classification had no rational reason for excluding other similarly situated religious institutions.<sup>152</sup> Had the statute not individually named the YMCA, and instead applied generally to institutions of the sort dedicated to religious purposes, it would likely have been permissible general legislation.<sup>153</sup>

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<sup>150</sup> *Island County v. State*, 135 Wn.2d 141, 147, 955 P.2d 377, 380, 1998 Wash. LEXIS 293, \*7-8 (Wash. May 14, 1998)

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 499-500.

<sup>153</sup> *Id.* at 500.

#### 3.1.4.1 Washington Special Law: Tesla Law

Washington is one of the many states (including Maryland,<sup>154</sup> as covered in Section 3.2.4 of this report) that has passed its own “Tesla Law:”<sup>155</sup> a special law favoring Tesla over other dealers, in that it allows Tesla, and no other carmaker, to circumvent the traditional manufacturer-dealer relationship and sell cars directly to consumers. Although Tesla is not named, this is, in effect, a special law. Many special laws are never brought to a court, either because there is no injured party or the injured party is unaware that injury (even economic) has occurred. Tesla is definitely singled out for special treatment here, but if there is an injured party, it has not sued yet.

### 3.1.5. Oregon Statute

Oregon is prone to restrict use of transportation revenues by using population as a criterion in statutes, yet this differs from Texas in that it lacks a date limitation.

Rev. Code Wash. (ARCW) § 46.68.110 Distribution of amount allocated to cities and towns.<sup>156</sup>

Funds credited to the incorporated cities and towns of the state as set forth in RCW 46.68.090 shall be subject to deduction and distribution as follows:

(3) One percent of such funds distributed under RCW 46.68.090 shall be deducted monthly, as such funds accrue, to be deposited in the small city pavement and sidewalk account, to implement the city hardship assistance program, as provided in RCW 47.26.164. However, any moneys so retained and not required to carry out the program under this subsection as of July 1<sup>st</sup> of each odd-numbered year thereafter, shall be retained in the account and used for maintenance, repair, and resurfacing of city and town streets for cities and towns with *a population of less than five thousand*;

(4) After making the deductions under subsections (1) through (3) of this section and RCW 35.76.050, the balance remaining to the credit of incorporated cities and towns shall be apportioned monthly as such funds accrue among the several cities and towns within the state ratably on the basis of the population last *determined by the office of financial management*.

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<sup>154</sup> See *infra*. Maryland Statute.

<sup>155</sup> 46.96.185. Unfair practices — Exemptions — Definitions. Rev. Code Wash. (ARCW) § 46.96.185 (Statutes current with legislation from the 2020 Regular Session): Rev. Code Wash. (ARCW) § 46.96.185(1)(g)(vii) *A manufacturer that held a vehicle dealer license in this state on January 1, 2014*, to own, operate, or control a new motor vehicle dealership that sells new vehicles that are only of that manufacturer’s makes or lines and that are not sold new by a licensed independent franchise dealer, or to own, operate, or control or contract with companies that provide finance, leasing, or service for vehicles that are of that manufacturer’s makes or lines; See also <https://www.geekwire.com/2014/tesla-wins-battle-auto-dealers-washington-state-future-rivals-screwed/>

<sup>156</sup> 46.68.110. Distribution of amount allocated to cities and towns. Rev. Code Wash. (ARCW) § 46.68.110 (Statutes current with legislation from the 2020 Regular Session).

What is the justification for this specific population criteria? In fairness, this population number used by Oregon is determined by the “office of financial management” and not the federal census, so perhaps it will reflect current numbers more accurately than a census conducted every 10 years.

### 3.1.5. Washington Statute

#### 3.1.5.1. Utilizing Cooperation Language

Certain states recognize the value of cooperation among localities in transportation planning like Oregon. By putting into the law that local jurisdictions should coordinate, there is no doubt as to the legislature’s intent, in any future case, on how regional transit should progress going forward. Washington provides an example of cooperation language.

RCW 81.104.010 Purpose.

Increasing congestion on Washington’s roadways calls for identification and implementation of high capacity transportation system alternatives. The legislature believes that local jurisdictions should coordinate and be responsible for high capacity transportation policy development, program planning, and implementation. The state should assist by working with local agencies on issues involving rights-of-way, partially financing projects meeting established state criteria including development and completion of the high occupancy vehicle lane system, authorizing local jurisdictions to finance high capacity transportation systems through voter-approved tax options, and providing technical assistance and information.<sup>157</sup>

#### 3.1.5.2 Use of Population Brackets

Washington also uses population brackets to create transportation laws: a population of 1 million<sup>158</sup> is used to limit passenger ferries in the Puget Sound area:

(4) Until July 1, 2007, the commission shall not accept or consider an application for passenger-only ferry service serving any county in the Puget Sound area with a population of over one million people. Applications for passenger-only ferry service serving any county in the Puget Sound area with a population of over one million pending before the commission as of May 9, 2005, must be held in abeyance and not be considered before July 1, 2007.

Washington also creates a floor population for a regional transportation planning organization which is not suspect as it has no date attached, refers to federal law, and has no ceiling:

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<sup>157</sup>RCW 81.104.010. URL: <https://apps.leg.wa.gov/rcw/default.aspx?cite=81.104&full=true#81.104.010>

<sup>158</sup> 81.84.020. Application — Hearing — Issuance of certificate — Determining factors. Rev. Code Wash. (ARCW) § 81.84.020 (Statutes current with legislation from the 2020 Regular Session).

47.80.020. Regional transportation planning organizations authorized.<sup>159</sup>

The legislature hereby authorizes creation of regional transportation planning organizations within the state. Each regional transportation planning organization shall be formed through the voluntary association of local governments within a county, or within geographically contiguous counties. Each organization shall:

- (1) Encompass at least one complete county;
- (2) (a) Have a population of at least one hundred thousand, (b) have a population of at least seventy-five thousand and contain a Washington state ferries terminal, (c) have a population of at least forty thousand and cover a geographic area of at least five thousand square miles, or (d) contain a minimum of three counties; and
- (3) Have as members all counties within the region, and at least sixty percent of the cities and towns within the region representing a minimum of seventy-five percent of the cities' and towns' population.

The state department of transportation must verify that each regional transportation planning organization conforms with the requirements of this section. In UZAs, the regional transportation planning organization is the same as the MPO designated for federal transportation planning purposes.

Transportation projects have flexibility written into the laws in Washington. A project does not necessarily have to be included in the transportation plan element of a city, town, or county's comprehensive plan in order to be funded by a transportation benefit district (TBD). TBDs may only be established "for the purpose of acquiring, constructing, improving, providing, and funding a transportation improvement within the district that is consistent with *any* existing state, regional, or local transportation plans."

RCW 36.73.020

Establishment of district by county or city—Participation by other jurisdictions.

- (1) The legislative authority of a county or city may establish a transportation benefit district within the county or city area or within the area specified in subsection (2) of this section, for the purpose of acquiring, constructing, improving, providing, and funding a transportation improvement within the district that is consistent with any existing state, regional, or local transportation plans and necessitated by existing or reasonably foreseeable congestion levels.

Washington also defines "transportation improvement" to include regional and high-capacity projects within the definitions part of its code:

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<sup>159</sup> 47.80.020. Regional transportation planning organizations authorized. Rev. Code Wash. (ARCW) § 47.80.020 (Statutes current with legislation from the 2020 Regular Session).

RCW 36.73.015

Definitions.

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

- (1) “City“ means a city or town.
- (2) “District“ means a transportation benefit district created under this chapter [...]
- (5) “Supplemental transportation improvement” or “supplemental improvement” means any project, work, or undertaking to provide public transportation service, in addition to a district’s existing or planned voter-approved transportation improvements, proposed by a participating city member of the district under RCW 36.73.180.
- (6) “Transportation improvement” means a project contained in the transportation plan of the state, a regional transportation planning organization, city, county, or eligible jurisdiction as identified in RCW 36.73.020(2). A project may include investment in new or existing highways of *statewide* significance, principal arterials of *regional* significance, *high capacity transportation*, public transportation, and other transportation projects and programs of *regional* or statewide significance including transportation demand management. Projects may also include the operation, preservation, and maintenance of these facilities or programs.

Washington includes population numbers in its laws (1.5 million) but without narrowing it by date, which would make it suspect.

RCW 36.73.180

Supplemental transportation improvements.

- (1) In districts comprised of more than one-member city, the legislative authorities of any member city that is located in a county having a population of more than one million five hundred thousand may petition the district to provide supplemental transportation improvements.
- (2) Upon receipt of a petition as provided in subsection (1) of this section for supplemental transportation improvements that are to be fully funded by the petitioner city, including ongoing operating and maintenance costs, the district must:
  - (a) Conduct a public hearing, and provide notice and opportunity for public comment consistent with the requirements of RCW 36.73.050(1); and
  - (b) Following the hearing, if a majority of the district’s governing board determines that the proposed supplemental transportation improvements are in the public interest, the district shall adopt an ordinance providing for the incorporation of the supplemental improvements into any existing services. The supplemental transportation improvements must be in addition to existing services provided by the district. The district shall enter into agreements with the petitioner city or identified service providers to coordinate existing services with the supplemental improvements.
- (3) Upon receipt of a petition as provided in subsection (1) of this section for supplemental transportation improvements proposed to be partially or fully funded by the district, the district must:
  - (a) Conduct a public hearing, and provide notice and opportunity for public comment consistent with the requirements of RCW 36.73.050(1); and

(b) Following the hearing, submit a proposition to the voters at the next special or general election for approval by a majority of the voters in the district. The proposition must specify the supplemental transportation improvements to be provided and must estimate the capital, maintenance, and operating costs to be funded by the district.

(4) If a proposition to incorporate supplemental transportation improvements is approved by the voters as provided under subsection (3) of this section, the district shall adopt an ordinance providing for the incorporation of the supplemental improvements into any existing services provided by the district. The supplemental improvements must be in addition to existing services. The district shall enter into agreements with the petitioner city or identified service providers to coordinate existing services with the supplemental improvements.

(5) A supplemental transportation improvement must be consistent with the petitioner city's comprehensive plan under chapter 36.70A RCW.

(6) Unless otherwise agreed to by the petitioner city or by a majority of the district's governing board, upon adoption of an ordinance under subsection (2) or (4) of this section, the district shall maintain its existing public transportation service levels in locations where supplemental transportation improvements are provided.

## 3.2. Mid-Atlantic Megaregion

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The Mid-Atlantic MR includes the states of Maryland and Virginia and the federally administered District of Columbia, which introduces factors not present in the previously analyzed regions. First, D.C. is administered by the federal government rather than any state government; second, regulation of D.C. is not limited by special legislation restrictions due to a lack of such restrictions in the federal constitution.

In the Mid-Atlantic MR one large regional transit system dwarfs that of other MRs: the Washington Metropolitan Area Transit Authority, or WMATA. The compact forming WMATA demonstrates how well a regional transit authority can function if it is structured correctly. WMATA provides transit service to the D.C. metro area. Founded by a compact between Maryland, Virginia, and the District of Columbia, the rules governing this compact resemble more a corporate contract than a state transportation law. For years, the three signatories have cooperated to provide services to the D.C. metro area, in accordance with Article IX of the Compact.<sup>160</sup> In contrast to other states' transit authorities, WMATA gets an additional \$148.5 million bonus from a separate capital program that no other metro area receives and in which all three political subdivisions must participate and cooperate.

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<sup>160</sup> D.C. Code § 9-1107.01; Md. Transp. Code Ann. Sec. 10-204; Va. Code Ann. Sec. 33.2-3000.

As in other states' transportation codes, Maryland, Virginia, and D.C. all use the census population as a basis for funding allocations within the WMATA Compact as ratified by each signatory into their state laws. An additional feature of the compact is that the signatories have given an alternative to the census as the basis for allocation. This intelligent move means that if any area goes through a period of rapid population growth between censuses, the signatory will not be forced to use an outdated population number, such as using the 2010 census numbers during the year 2019. Not all states do this, which means that any regional cooperation may not reflect equitably the usage or contributions of one area over another within any regional transit agreement.

#### Article IV

1. (a) The signatories shall bear the expenses of the Commission in the manner set forth here.

(b) The Commission shall submit to the Governor of Virginia, the Governor of Maryland, and the Mayor of the District of Columbia, when requested, a budget of its requirements for the period required by the laws of the signatories for presentation to the legislature.

(c) The Commission shall allocate its expenses among the signatories in the proportion that the population of each signatory within the Metropolitan District bears to the total population of the Metropolitan District.

(d)

*(i) The Commission shall base its allocation on the latest available population statistics of the Bureau of the Census; or*

*(ii) If current population data are not available, the Commission may, upon the request of a signatory, employ estimates of population prepared in a manner approved by the Commission and by the signatory making the request.*

### 3.2.1. Virginia Constitution

The Virginia Constitution Article IV §14 restricts local, special, and private legislation in twenty circumstances.<sup>161</sup> None directly address transportation, however.

### 3.2.2. Maryland Constitution

The Maryland Constitution Art. III, § 33, provides that the General Assembly shall pass no special law for any case for which provision has been made by an existing general law.<sup>162</sup>

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<sup>161</sup> § 14. Powers of General Assembly; limitations, Va. Const. Art. IV, § 14 (Current through the 2020 Regular Session of the General Assembly.)

<sup>162</sup> Section 33. Local and special laws, Md. Const. art. III, § 33 (Statutes current through legislation effective July 10, 2020).

Within Article III, §33 of the Maryland Constitution, language prohibits special legislation in six enumerated cases.<sup>163</sup> The provision is broader than most other state provisions, having a catch-all clause prohibiting the legislature from passing any special law “for which provision has been made, by an existing general law.” The catch-all clause has been the subject of most of the jurisprudence on this issue. Unlike other states’ special legislation prohibitions, it contains a caveat that special legislation will be invalid only in situations already covered by general laws. To violate this provision, a law must (1) be special and (2) affect a field already covered by a general law.

To satisfy Art. II Sec. 33 of the Maryland Constitution, a statute must do more than simply designate a class. That class must have some distinguishing trait justifying unique legislation that would render the legislation useless or detrimental to other classes.<sup>164</sup>

The Court of Appeals of Maryland, the state’s highest court, has interpreted this clause to prohibit laws that relate to “particular persons or things of a class, as distinguished from a general law which applies to all persons or things of a class.”<sup>165</sup> Maryland courts consider several factors in determining whether a statute does this: a statute is likely to be special if the statute was intended to benefit or burden specific persons, if a particular person or business sought and received special advantages from the legislature, or if the distinctions it makes lack reasonable basis.<sup>166</sup> A statute is less likely to be special if it addresses significant public need, especially where the existing general law is inadequate.<sup>167</sup> Whether or not the act names specific entities is not dispositive.<sup>168</sup>

Because the Maryland constitution only bars special legislation in areas already controlled by general law, one important issue is whether the issue at hand has already been adequately addressed by a general statute. A statutory permitting requirement was sufficient general legislation to

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<sup>163</sup> The General Assembly shall not pass local or special laws “for extending the time for the collection of taxes; granting divorces; changing the name of any person; providing for the sale of real estate, belonging to minors, or other persons laboring under legal disabilities, by executors, administrators, guardians or trustees; giving effect to informal, or invalid deeds or wills; refunding money paid into the State Treasury, or releasing persons from their debts, or obligations to the State, unless recommended by the Governor, or officers of the Treasury Department.” Article II §33, Maryland Constitution.

<sup>164</sup> See *Littleton v. Hagerstown*, 150 Md. 163, 176 (1926).

<sup>165</sup> (citing *Hagerstown*, 150 Md. at 176 (1926)). *Cities Service Co. v. Governor, Maryland*, 290 Md. 553, 568; 431 A.2d 663, 1981 Md. LEXIS 240 (Court of Appeals of Maryland June 30, 1981, Decided).

<sup>166</sup> *Id.* at 569-70.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 569.

prohibit special legislation exempting the City of Hagerstown from needing such a permit.<sup>169</sup> This requirement follows wherever the state delegates power; a county cannot amend its council's residency requirements to remove one councilmember involuntarily and temporarily incarcerated out of state.<sup>170</sup> When no general statute applies to an issue, a statute addressing a specific issue may be permissible. See *Mayor, etc., of Baltimore v. United R&E Co*, 126 Md. 39, 56 (1915), which held constitutional an act granting Baltimore the power to condemn private roads in the absence of any general law allowing such an action. The Court has rarely found that no general statute applies, however, and often skips this part of the analysis entirely in its decisions.

Overall, while the Maryland law regarding special legislation is framed differently, it reaches similar results to other states which enforce special legislation restrictions. The most severe legislative favoritism and egregious local horse-trading are prohibited, but the legislature receives fairly deferential treatment in how its laws apply to specific classes, and the issue is infrequently raised in litigation.

### 3.2.3. Virginia Statutes

A state legislature has the power to knowingly or unknowingly limit a transit authority when it crafts the legislation creating it and places it into the code. Unlike Texas, Virginia houses its transportation districts (local, regional, etc.) under one Subtitle IV. Local and Regional Transportation. Districts are named and classified neatly under the Subtitle IV, with each District having its own definitions, funding, creation, bond issuing, powers and responsibilities sections spelled out in detail – including continued responsibilities for local transit funding in its own section. No reader of the statute must guess which district was created when or, which is defined by its population size.

- Subtitle IV. Local and Regional Transportation
- Chapter 19. Transportation District Act Of 1964
- Chapter 20. Local Transportation Districts
- Chapter 21. Transportation Districts within Certain Counties
- Chapter 22. Chesapeake Bay Bridge and Tunnel District and Commission
- Chapter 23. U.S. Route 58 Corridor Development Fund and Program
- Chapter 24. Northern Virginia Transportation District Fund and Program

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<sup>169</sup> See generally *Hagerstown*, 150 Md (1926).

<sup>170</sup> See *Jones v. Anne Arundel County*, 432 Md. 386, 403 (2013).

- Chapter 25. Northern Virginia Transportation Authority
- Chapter 26. Hampton Roads Transportation Accountability Commission
- Chapter 27. Transportation District within the City of Charlottesville and the County of Albemarle
- Chapter 28. Charlottesville-Albemarle Regional Transit Authority
- Chapter 29. Richmond Metropolitan Transportation Authority
- Chapter 30. Washington Metropolitan Area Transit Regulation Compact Of 1958
- Chapter 31. Washington Metropolitan Area Transit Authority Compact Of 1966
- Chapter 31.01. Metro Reform Commission
- Chapter 31.1. Washington Metrorail Safety Commission Interstate Compact.
- Chapter 32. Metropolitan Planning Organizations
- Chapter 33. Williamsburg Area Transit Authority
- Chapter 34. Washington Metropolitan Area Transit Authority Capital Fund
- Chapter 35. Commuter Rail Operating and Capital Fund
- Chapter 36. Interstate 81 Corridor Improvement Program and Fund
- Chapter 37. Central Virginia Transportation Authority

For example, the most recent regional authority created,<sup>171</sup> the Central Virginia Transportation Authority, has a section detailing, by planning district, which counties and cities are in its area:<sup>172</sup>

§ 33.2-3702. Central Virginia Transportation Authority created The Central Virginia Transportation Authority is hereby created as a body politic and as a political subdivision of the Commonwealth. The Authority shall embrace each county, city, and town **located in Planning District 15**, which is established pursuant to Chapter 42 (§ 15.2-4200 et seq.) of Title 15.2.

The transparency and flexibility of this statute aids the public and lawmakers going forward and makes any regional future plans easier to implement. For years, the Richmond area wanted to have a regional transportation system but the General Assembly must authorize all debt. Virginia’s state legal system of controlling capital projects revenue bonds has forced some regions (like Richmond) into competing against “regional transit authorities in Northern Virginia and Hampton Roads for limited state dollars”.<sup>173</sup>

Planning district 16, for example, attempted to pass a study on the feasibility of creating a transportation authority, but its HJR failed.<sup>174</sup>

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<sup>171</sup> General Assembly of Virginia, House Bill 1541, 2020 Session, created the Central Virginia Transportation Authority.

<sup>172</sup> § 33.2-3702. Central Virginia Transportation Authority created, Va. Code Ann. § 33.2-3702 (Current through the 2020 Regular Session, and 2020 Special Session I, c. 1 of the General Assembly.).

<sup>173</sup> C. Suarez Rojas, “Transit authority gets off the ground in central Va.; “*Let us not do politics as usual*”: Regional transit authority launches, bolstered by new tax money”, Richmond Times Dispatch (Virginia) August 28, 2020.

<sup>174</sup> General Assembly of Virginia, House Joint Resolution No. 37, 2020 Session, created the Central Virginia Transportation Authority.

As various regions grow and wish to create their own transit systems, they must go through the legislature to do so in Virginia. In Richmond, public transit projects, such as the expansion of the RTC Pulse rapid-transit bus line may be acted upon by the newly formed Central Virginia Transit Authority with its new tax revenue and better coordination by local officials.<sup>175</sup> With the fifteen percent of new revenues, the Richmond area has hope of growing its transit system to meet the needs of residents: *“It puts us in a position to have a regional transportation system that we have not had in the past,”* said Ben Campbell, chairman of the GRTC board of directors.<sup>176</sup>

Transit interest groups are also able to get involved and examine the funding of regionally significant projects that will be possible with the remaining 35% of funding that will be held by the authority for these purposes. *“The CVTA offers tremendous promise for our region, and it can be a key to advancing a cleaner, more equitable, truly multi-modal regional transportation system,”* said Trip Pollard, director of the Southern Environmental Law Center's land-use program and a member of the Richmond Area Partnership for Smarter Growth.<sup>177</sup>

### 3.2.4. Maryland Statutes

Within Maryland are two state-level transportation entities that operate independently of each other: WMATA (interstate corporation/instrumentality)<sup>178</sup> and the Maryland Transportation Authority.<sup>179</sup> They differ in structure and funding, but both areas' codes have few suspect classifications.

Although there are no cases on it, Maryland passed a special law favoring Tesla over other dealers, in effect, since it allowed Tesla, and no other carmaker, to circumvent the traditional manufacturer-dealer relationship and sell cars directly to consumers.<sup>180</sup> The statute itself is limited to Tesla alone in that it states that it applies only to manufacturers that have “no dealers” in the state and that deal exclusively “in electric or non-fossil-fuel burning vehicles.”<sup>181</sup>

Md Transp. Code Sec. 15-305. Special requirements for license to deal in new vehicles  
(e) Manufacturers or distributors licensed as dealers. --

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<sup>175</sup> Rojas, *supra*, note 174.

<sup>176</sup> Rojas, *supra* note 174: *“Half of the funding would be allocated proportionally to the nine localities represented on the transit authority: Richmond, the town of Ashland and the counties of Henrico, Hanover, Chesterfield, Goochland, New Kent, Powhatan and Charles City. Each locality would decide how to spend its funds on transit-related projects, such as walking trails, bike lanes and road paving.”*

<sup>177</sup> Rojas, *Supra* note 174.

<sup>178</sup> Md. Transp. Code Sec. 10-204.

<sup>179</sup> MTA operates the toll facilities. Md. Transp. Code Ann. Sec. 4-201 et seq.

<sup>180</sup> Evan C. Zoldan (2019) *supra* note 46, at 416.

<sup>181</sup> Md. Code Ann., Transp. § 15-305(e)(2)(i) (2018), § 15-305. Special requirements for license to deal in new vehicles, Md. TRANSPORTATION Code Ann. § 15-305 (Statutes current through legislation effective July 10, 2020).

- (1) Notwithstanding subsections (a) and (f) of this section, a manufacturer or distributor may be licensed as a dealer if the manufacturer or distributor:
- (i) Operates temporarily a dealership that:
    1. Was previously owned by a franchised dealer; and
    2. Is for sale to any qualified person at a reasonable price;
  - (ii) Operates a dealership in a bona fide relationship in which an independent person:
    1. Has made a significant investment, subject to loss, in the dealership; and
    2. Can reasonably expect to acquire full ownership of the dealership under reasonable terms and conditions; or
  - (iii)
    1. Is a second-stage manufacturer as defined in § 13-113.2(a)(7) of this article; and
    2. Deals only in Class E (truck) vehicles with a gross weight limit of 10,000 pounds or more, as defined in § 13-916 of this article.
- (2) (i) Notwithstanding subsections (b) and (f) of this section and subject to subparagraph (ii) of this paragraph, a manufacturer or distributor may be licensed as a dealer if:
1. *The manufacturer or distributor deals only in electric or nonfossil-fuel burning vehicles;*
  2. *No dealer in the State holds a franchise from the manufacturer or distributor;*
  3. The manufacturer or distributor, or a subsidiary, an affiliate, or a controlled entity of the manufacturer or distributor, does not hold a controlling interest in another manufacturer or distributor, or a subsidiary, an affiliate, or a controlled entity of the other manufacturer or distributor, that is licensed as a dealer under this paragraph; and
  4. No other manufacturer or distributor, or subsidiary, affiliate, or controlled entity of the other manufacturer or distributor, that is licensed as a dealer under this paragraph, holds a controlling interest in the manufacturer or distributor, or a subsidiary, an affiliate, or a controlled entity of the manufacturer or distributor.
- (ii) No more than four licenses may be issued under this paragraph.
- (iii) The Administration shall adopt regulations to implement this paragraph.<sup>182</sup>

### 3.2.5. D.C. Statutes

Washington, D.C. is not a state but a federal district and thus has no state legislature; however, the Council of the District of Columbia has the authority to enact any act adopting “amendments to the Washington Metropolitan Transit Regulation Compact” and these amendments become effective once Congress approves of them.<sup>183</sup> The Constitution gives Congress exclusive legislative authority over D.C. in Article I, Section 8, Clause 17.<sup>184</sup> Congress may pass laws to modify the local governance structure; in the District of Columbia Home Rule Act of 1973,

<sup>182</sup> § 15-305. Special requirements for license to deal in new vehicles, Md. TRANSPORTATION Code Ann. § 15-305 (Statutes current through legislation effective July 10, 2020).

<sup>183</sup> § 9-1107.02. Authority of Council to enact acts adopting Compact amendments. D.C. Code § 9-1107.02 (The Official Code is current through July 22, 2020, except for Title 26, Ch. 5, which is current through May 5, 2020).

<sup>184</sup> Constitution annotated U.S. Congress Gov. URL: <https://constitution.congress.gov/browse/article-1/section-8/clause-17/>

Congress granted D.C. limited Home Rule authority,<sup>185</sup> establishing the D.C. Council as the legislative branch of local government. The Council is composed of a chairman elected at large and twelve members—four of whom are elected at large, and one from each of the District’s eight wards. Without statehood, however, D.C. lacks a state constitution and therefore any discussion of special laws would be moot here. Congress oversees D.C. through four Congressional subcommittees, four committees, the House of Representatives, the Senate, and the President. Congress may review and modify D.C.’s local budget, but it can also annul any law it does not agree with.<sup>186</sup> Therefore, the WMATA Compact was essentially negotiated between Congress, Virginia, and Maryland, and the dedicated funding for WMATA is found in D.C Laws, Sec. 1-325.401.

### 3.2.6. Virginia Cases

In Virginia, the court has examined Equal Protection and the arbitrary nature of a classification of a law and given the legislature deference in its role. The court examined the nature and scope of equal protection by testing the classification to see if it bore a “reasonable and substantial relation” to the purpose of the legislation, but the trend continues when it also gives the legislature the ultimate role of lending reasonableness of classification to the Virginia Legislature.<sup>187</sup>

In one Virginia case, the co-committees of an injured patient’s estate brought a medical malpractice action against a hospital and the estate of a physician, after the patient suffered brain damage and paralysis following surgery. A jury returned a \$2,750,000 verdict for the co-committees. The trial court reduced the jury award to \$750,000 as required by Va. Code Ann. § 8.01-581.15 (1977 Repl. Vol.), which limited damage awards in medical malpractice actions to that amount. The co-committees appealed and attacked the validity of § 8.01-581.15 on various constitutional and statutory grounds.

The court affirmed and held that § 8.01-581.15 did not violate the due process, jury trial, or equal protection guarantees of the Virginia or United States constitutions. The court also held that the

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<sup>185</sup> Council for the District of Columbia Home Rule Act. URL: <https://dccouncil.us/dc-home-rule/>

<sup>186</sup> Id.; See Also the D.C. Home Rule Act. On site.

<sup>187</sup> Etheridge v. Medical Center Hospitals, Supreme Court of Virginia, January 13, 1989, 237 Va. 87 \*; 376 S.E.2d 525 \*\*, 1989 Va. LEXIS 27 \*\*\*, 5 Va. Law Rep. 1438

co-committees could not recover the full amount of the jury award against the hospital under Va. Code Ann. § 8.01-38 (1984), and that Va. Code Ann. § 8.01-581.15 prevailed over Va. Code Ann. § 8.01-38. In affirming the judgment that reduced a jury award for the co-committees, pursuant to a Virginia statute, the court held that the Virginia statute limiting the award did not violate the Virginia and United States constitutions.<sup>188</sup>

In Virginia,<sup>189</sup> the court often defers to the legislature, noting that a “presumption of validity” is the starting point. Special law and class test analysis here focused on the “arbitrariness” of the law.

“According to the legislation the presumption of validity to which it is entitled, we conclude that the classification is not arbitrary and bears a reasonable and substantial relation to the object sought to be accomplished by the legislation. We further conclude that the legislation applies to all persons belonging to the class without distinction and, therefore, is not special in effect. Accordingly, we hold that Code § 8.01-581.15 does not violate the prohibition against special legislation.”<sup>190</sup>

The court here predictably fails to find the law special by employing the lax rational-basis review test to class legislation. In holding that § 8.01-581.15 (law limiting a jury award) did not violate the due process, jury trial, or equal protection guarantees of the Virginia or United States constitutions, the court clearly places its deference to the legislature first.

The court held that § 8.01-581.15 did not violate the separation of powers doctrine and prohibitions against special law under the Virginia Constitution. In examining special laws and equal protection, the court focused on if the classification bore a “reasonable and substantial relation to the object sought to be accomplished by the legislation,” it places the power back with the Virginia legislature and its intent, which is what most courts do. First the court examines the law’s purpose, then the “facts at the time the law was enacted” are just “assumed” to be “reasonably conceived” by the court.<sup>191</sup>

“Indeed, the necessity for and the reasonableness of classification are primarily questions

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<sup>188</sup> Etheridge v. Medical Center Hospitals, 237 Va. 87, 91, 376 S.E.2d 525, 526, 1989 Va. LEXIS 27, \*1, 5 Va. Law Rep. 1438 (Va. January 13, 1989)

<sup>189</sup> Etheridge v. Medical Center Hospitals, Supreme Court of Virginia, January 13, 1989, 237 Va. 87 \*; 376 S.E.2d 525 \*\*; 1989 Va. LEXIS 27 \*\*\*; 5 Va. Law Rep. 1438

<sup>190</sup> Etheridge v. Medical Center Hospitals, 237 Va. 87, 103, 376 S.E.2d 525, 533, 1989 Va. LEXIS 27, \*36, 5 Va. Law Rep. 1438 (Va. January 13, 1989)

<sup>191</sup> Id. 102.

for the Virginia Legislature. [citations omitted] If any state of facts can be reasonably conceived, that would sustain it, that state of facts at the time the law was enacted must be assumed. Whether a classification is arbitrary depends upon the purpose and subject of the particular act and the circumstances and conditions surrounding its passage.”

In another case, *Laurels of Bon Air, LLC v. Med. Facilities of Am. LIV Ltd.*, the Virginia court applied a rational-basis test when determining the constitutionality of special legislation.<sup>192</sup> When analyzing a law, a court that applies this test will often find it valid due to the lowered level of scrutiny it requires.

In this case, appellant nursing homes appealed a decision of the Circuit Court that dismissed consolidated appeals of a decision regarding appellee Virginia Department of Health, which granted a request by appellee competitor to relocate beds from one of its facilities to two others pursuant to 2005 Va. Acts 99 (Relocation Act). The Relocation Act provided a simplified process for dealing with bed relocations between nursing homes under common ownership or control. Appellant nursing homes were denied the ability to challenge the bed relocation request by the Virginia Department of Health because they lacked standing to challenge the competitor’s relocation request, and without that standing, appellants could not be aggrieved for purposes of judicial review. Although most of the case centered on a question of standing for the appellants, the court did examine the 2005 Relocation Act (2005 Va. Acts 99), and found it to be “not an unconstitutional special law” under the state constitution since the class was reasonable.<sup>193</sup>

“The appellants argue that this interpretation of the Act converts it into an unconstitutional “special” law in violation of Article IV, §§ 14-15, of the Virginia Constitution. Though we question whether the appellants have standing in this case to challenge the constitutionality of the 2005 Relocation Act, we assume *arguendo* they do and nonetheless find the Act cannot be judicially vacated as an unconstitutional special law.”<sup>194</sup>

The court appears to be using the most commonly used version of rational-basis review while it defers to the legislature in weighing the equal protection arguments:

The prohibitions against “special, private, or local law” found in Article IV, §§14-15, of the Virginia Constitution track the minimum rationality requirements employed by longstanding due

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<sup>192</sup> *Laurels of Bon Air, LLC v. Med. Facilities of Am. LIV Ltd. P’ship*, 51 Va. App. 583, 659 S.E.2d 561, 2008 Va. App. LEXIS 189 (Court of Appeals of Virginia April 22, 2008, Decided).

<sup>193</sup> *Id.* At 570.

<sup>194</sup> *Id.* At 589.

process and equal protection doctrines. Virginia courts “apply the so-called ‘rational-basis test’ when testing the constitutionality of legislation “under due process, equal protection, and special legislation provisions.”<sup>195</sup> The special laws prohibitions recognize “the necessity for and the reasonableness of classification are primarily questions for the legislature. If any state of facts can be reasonably conceived, that would sustain it, that state of facts at the time the law was enacted must be assumed.”<sup>196</sup>

The Virginia court, in keeping with other courts using the rational-basis test, focused on the vast deference that courts must give the legislature when analyzing a special law for constitutionality:

“Litigants challenging a statute as an illegitimate special law shoulder a “heavy burden,” (Holly Hill Farm Corp. v. Rowe, 241 Va. 425, 432, 404 S.E.2d 48, 51, 77 Va. Law Rep. 2257 (1991)), one calculated to safeguard the maxim that all “legislative acts are ‘presumed to be constitutional,’” Boyd v. County of Henrico, 42 Va. App. 495, 506, 592 S.E.2d 768, 774 (2004) (en banc) [\*598] (quoting In re Phillips, 265 Va. 81, 85, 574 S.E.2d 270, 272 (2003)). “This presumption is ‘one of the strongest known to the law.’” Id. at 507, 592 S.E.2d at 774 (citation omitted). “Under it, courts must ‘resolve any reasonable doubt’ regarding the [\*\*569] constitutionality of a law in favor of its validity.” Id. (citations omitted). “To doubt is to affirm.” Id. (citation omitted).”<sup>197</sup>

The Virginia court also colorfully looks at whether this is closed-class legislation and decides it is not:

“We can strike down legislation as an unconstitutional special law only when ‘the class established by its provisions 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.’ Peery v. Va. Bd. of Funeral Dirs. & Embalmers, 203 Va. 161, 167, 123 S.E.2d 94, 98 (1961) (citation omitted). Such an assertion cannot be made here.”<sup>198</sup>

In another case, the court decided the necessity for and the reasonableness of classification are primarily questions for the legislature.<sup>199</sup> This deference to the court shows that Virginia uses the lesser version of the rational-basis test and defers much to the legislature on special law. Virginia courts have examined special law prohibitions and have determined that if any statement of facts

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<sup>195</sup> Willis v. Mullett, 263 Va. 653, 659, 561 S.E.2d 705, 709 (2002)

<sup>196</sup> Id. At 568. Jefferson Green Unit Owners Ass’n v. Gwinn, 262 Va. 449, 459, 551 S.E.2d 339, 345 (2001) (citation omitted)

<sup>197</sup> Id. At 568-9.

<sup>198</sup> Id. At 599-600.

<sup>199</sup> Bray v. County Board of Arlington County, 195 Va. 31, 32, 77 S.E.2d 479, 480, 1953 Va. LEXIS 173, \*1 (Va. September 10, 1953); see also

can be reasonably conceived that would sustain it, that statement of facts at the time the law was enacted must be assumed.<sup>200</sup>

In *Bray*, an action against defendant county board, plaintiff individual sought review of the orders of the Circuit Court of Arlington county (Virginia), which upheld the constitutionality of two local ordinances. The individual had been charged and convicted for violation of the ordinance. The individual contended Arlington, Va., Code § 8-578 (1949), which imposed an annual license fee on individuals engaged in certain professions, was unconstitutional. The lower court declined to pass upon the constitutional validity because the ordinance in question was legal and valid at the time of the assessment of which the individual complained. The court affirmed the lower court's order and dismissed the individual's motion for declaratory judgment, finding the law valid and general—not special.

The individual also contended that the county board erred when it adopted an ordinance that imposed a license tax and required license plate on motor vehicles. The individual contended that he should not have been convicted of a violation of the ordinance. The court disagreed, and held that the county board had the legal right to adopt the ordinance. The Va. Const. § 65 provides that

“the general assembly may, by general laws, confer upon the boards of supervisors of counties, and the councils of cities and towns, such powers of local and special legislation as it may, from time to time, deem expedient, not inconsistent with the *limitations* contained in this constitution.”<sup>201</sup>

In finding the classification of population for an Act reasonable, the court cited other cases involving small population numbers in which the Oregon legislature wrote targeted laws:

“A law is general though it may immediately affect a small number of persons, places or things, provided, under named conditions and circumstances, it operates alike on all who measure up to its requirements.”<sup>202</sup>

It also cited a case in which a law:

“under review provided that in all counties having a population greater than 300 per square mile the judge of the circuit court should appoint a trial justice. It was attacked on the ground that it was special legislation, applying only to the county of Alexandria. It was

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<sup>200</sup> *Martin's Ex'rs v. Commonwealth*, 126 Va. 603, 102 S.E. 77 (1920); *Joy v. Green*, 194 Va. 1003, 76 S.E.2d 178 (1953); *Bray v. County Bd.*, 195 Va. 31, 77 S.E.2d 479 (1953); *Avery v. Beale*, 195 Va. 690, 80 S.E.2d 584 (1954).

<sup>201</sup> *Bray v. County Board of Arlington County*, 195 Va. 31, 32, 77 S.E.2d 479, 480, at 481, 1953 Va. LEXIS 173, \*1 (Va. September 10, 1953)

<sup>202</sup> *Bray v. County Board of Arlington County*, 195 Va. 31, 36, 77 S.E.2d 479, 482, 1953 Va. LEXIS 173, \*10 (Va. September 10, 1953), citing *Gandy v. Elizabeth City County*, *supra*, 179 Va. at p. 344, 19 S.E.2d at p. 99.

held that that fact did not render the act unconstitutional, because it represented a reasonable and not an arbitrary classification, in that the county of Alexandria was faced with conditions not unlike those within a city, and its needs were quite different from those of a sparsely settled community.”<sup>203</sup>

In *Bray*, the court found that an ordinance of Arlington County imposing a license tax on attorneys at law and those engaged in many other occupations was not invalid as a special and local tax prohibited by section 63(5) of the Constitution of Virginia, but was authorized by Code 1950, section 15-10(3), a general statute that gives to counties with a population of 475 or more per square mile the same powers in this regard as are given by cognate statutes to cities and towns.<sup>204</sup> The ordinance of Arlington here was not a local or special law, but was part of a valid legislative action under Code 1950, section 15-10(3), the court declared.<sup>205</sup>

In defining a general law, the court clarified the definition of a special law in Virginia: “A law is general which operates alike on all who measure up to its requirements, though it may immediately affect a small number only; it is special when by force of inherent limitation it arbitrarily separates some persons, places or things from those upon which, but for such separation, it would operate.”<sup>206</sup>

### 3.2.7. Maryland Cases

In examining special law prohibitions, courts may try to save a flawed law by severing the parts that are unconstitutional from the parts that are valid. This is infrequently done, however. Date criteria may also be enough to find a law invalid under certain tests. Note that in doing this, a court may try to focus on the state constitutional role and avoid ruling on the equal protection arguments at all.<sup>207</sup> Although the Maryland Constitution contains no express equal protection clause, the concept of equal protection is embodied in the Due Process Clause, according to the Maryland Court.<sup>208</sup>

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<sup>203</sup> *Bray v. County Board of Arlington County*, 195 Va. 31, 36, 77 S.E.2d 479, 482, 1953 Va. LEXIS 173, \*10 (Va. September 10, 1953), citing *Ex parte Settle*, 114 Va. 715, 77 S.E. 496.

<sup>204</sup> *Id.* At 40.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* At 37.

<sup>207</sup> *Cities Serv. Co. v. Governor*, 290 Md. 553, 569, 431 A.2d 663, 673 (1981): Note that in *Cities Service*, the court modified the declaratory judgment so as not to include the equal protection issues.

<sup>208</sup> *Cities Service Co. v. Governor*, Maryland, 290 Md. 553, 555, 431 A.2d 663, 665, 1981 Md. LEXIS 240, \*1 (Md. June 30, 1981)

In *Cities Service*, a petroleum producer sought review of a judgment of the Circuit Court of Baltimore City (Maryland), which declared invalid the 1979 amendments to the Divestiture Law in their entirety. At the time, Maryland petroleum producers were generally prohibited from operating retail gasoline service stations with their own personnel or with a subsidiary company. In 1979, two exemptions to the prohibition were enacted that, in essence, allowed only one producer (Montgomery Ward) to continue operating stations through a subsidiary.

“Another witness for the defendants, an official in the office of the Comptroller of Maryland, agreed that, to the best of his knowledge, Montgomery Ward was the only entity which could qualify under the mass merchandiser exemption.”<sup>209</sup>

The petroleum producer claimed that the exemption in Md. Ann. Code art. 56, § 157E(c)(2) constituted a prohibited special law under Md. Const. art. III, § 33. The trial court found that the 1979 amendments were prohibited special laws, thereby declaring the amendments invalid. The mass merchandiser exemption to the Divestiture Law, with its limited qualifying dates, was held a prohibited special law under Art. III, § 33. On appeal, the court vacated and remanded.

In determining that the law’s mass merchandiser exemption, with its limited qualifying dates, was a prohibited special law, the court clarified its standard of review, revealing a stricter scrutiny than other states, although Maryland has not remained consistent.

The record showed that the exemption was sought by one company, that the legislature was advised that the one company was the sole beneficiary, and that no other general retail mass merchandiser could qualify in the future. The court, finding that such exemption was invalid, severed the valid portions from the invalid qualifying dates so as to put all petroleum producers and the exempted company in the same competitive category.

In analyzing the class of one here, the court examines the “substance and practical effect” of the law and seems to recognize that only one company was benefitted by this law, obviating the fact that some suspect action by the legislature may have been at play.

“If a particular individual or business sought and received special advantages from the legislature, or if other similar individuals or businesses were discriminated against by the legislation, this would support a conclusion that the act constitutes a prohibited special law.

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<sup>209</sup> Id. At 562.

The public need and public interest underlying the enactment, and the inadequacy of the general law to serve the public need or public interest, are pertinent considerations. Finally, in deciding whether an enactment applies to an entire class, or applies only to certain members of the class and therefore is prohibited by Md. Const. art. III, § 33, the court reviews the legislatively drawn distinctions to determine whether they are arbitrary and without any reasonable basis.”<sup>210</sup>

In *Cities Service*, limited date criteria were found to be too narrow by the court, so it severed the flawed portions of the special law so that the invalid “qualifying dates” would not operate. The court also pointed out the closed-class argument that invalidates laws that use a date as a criterion: “no other existing general retail mass merchandiser could qualify in the future if it became a subsidiary of a producer or refiner.”<sup>211</sup> By severing the dates criteria, the court ensured all petroleum producers would be in the same competitive category.<sup>212</sup>

### 3.3. Texas Triangle Megaregion

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To determine whether the research team’s literature findings matched actual practice, the team also reviewed the formative constitutional, statutory, and regulatory provisions for funding transit in Texas. What emerged was a complex myriad of sub-sections of the Texas Transportation Code (Tex. Trans. Code), specific to singular transit agencies, that make financing transit challenging at best and prohibitive at worst.

#### 3.3.1 Texas Constitution

Article III, Section 56 of the Texas Constitution provides that “the Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law,” regarding a list of subjects, as well as prohibiting the passage of any local or special law in any case where a general law can be made applicable. In the transportation context, the section specifically prohibits special or local legislation regulating the affairs of counties and municipalities, and such legislation authorizing the laying out, opening, and maintenance of roads.

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<sup>210</sup> *Cities Service Co. v. Governor, Maryland*, 290 Md. 553, 555, 431 A.2d 663, 665, 1981 Md. LEXIS 240, \*1 (Md. June 30, 1981)

<sup>211</sup> *Id.* At 570-71.

<sup>212</sup> *Cities Serv. Co. v. Governor*, 290 Md. 553, 569, 431 A.2d 663, 673 (1981).

The section treats equally local laws, which are those limited to a specific geographic region of the state, and special laws, which are limited to a particular class of persons.<sup>213</sup> The restriction is intended to focus the efforts of the legislature on the public interest by preventing the advancement of personal projects.<sup>214</sup>

Sec. 56. PROHIBITED LOCAL AND SPECIAL LAWS.

(a) The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law, authorizing:

(2) regulating the affairs of counties, cities, towns, wards or school districts;

(5) authorizing the laying out, opening, altering or maintaining of roads, highways, streets or alleys;

(6) relating to ferries or bridges, or incorporating ferry or bridge companies, except for the erection of bridges crossing streams which form boundaries between this and any other State;

(11) incorporating cities, towns or villages, or changing their charters;

(22) exempting property from taxation;

(29) for incorporating railroads or other works of internal improvements; or

(b) In addition to those laws described by Subsection (a) of this section in all other cases where a *general* law can be made applicable, *no local or special law* shall be enacted”

Laws that are defined purely by geographic area or laws that use only population as a bracketed category may violate the Texas Constitution, Equal Protection, and Due Process, but this is not definite. One may argue that employing population size as a class for special legislation is permissible in state transportation law because federal law uses some population numbers for its criteria; however, this would be disingenuous if classifications are too narrow.

### 3.3.2. Texas Statutes

Within the Tex. Transp. Code are ten different types of special districts and mass transportation districts, and a high-speed rail compact that can be utilized to fund, construct, maintain, and operate transit (light rail, heavy rail, bus, and other) within freight right-of-way, on dedicated right-of-way, and within the traditional highway right-of-way activities. This is a high number of categories of districts compared to the other states in this report.

Texas Transportation Districts include:

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<sup>213</sup> See *Maple Run v. Monaghan*, 931 S.W.2d 941, 945 (Tex. 1996) (citing George Braden, *The Constitution of the State of Texas: An Annotated Comparative Analysis*, 273-277 (1977)).

<sup>214</sup> See *Id.* at 945.

- Freight Rail Districts (Chapter 171)
- Rural Rail Transportation Districts (Chapter 172)
- Intermunicipal Commuter Rail Districts (Chapter 173)
- Commuter Rail Districts (Chapter 174)
- Regional Mobility Authorities (Chapter 370)
- Metropolitan Rapid Transit Authorities (Chapter 451)<sup>215</sup>
- Regional Transportation Authorities (Chapter 452)
- Municipal Transit Departments (Chapter 453)
- Municipal Mass Transportation Systems (Chapter 454)
- Southern High-Speed Rail Compact (Chapter 462)

While some state transportation codes do name specific districts (such as WMATA<sup>216</sup> and the Central Puget Sound Regional Transit Authority<sup>217</sup>, both of which are named in their state’s code), it is not unusual for a transportation code to leave the mass transportation districts unnamed. However, in the Tex. Trans. Code, the refusal to name districts opens the door to bracketing. To give a concrete example within the Texas Triangle the practice of bracketing has specifically and substantially affected Texas transit policy by setting different rules for different municipal transit authorities. For example, Chapter 451 of the Tex. Transp. Code sets specific policies for the Capital Metropolitan Transportation Authority (CapMetro), the transit agency serving Austin and the surrounding areas. However, the text does not mention “CapMetro” or “Austin” specifically. Instead, it uses the classification of a “transit agency confirmed *before* July 1, 1985 and with a *population* less than 850,000.”<sup>218</sup>

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<sup>215</sup> Ch. 451 contains the following population brackets that are not readily found in federal transportation law: 1.2 million; 1.9 million, 850,000; 320,000; 1.1 million; 1.3 million; 60,000.

<sup>216</sup> Va. Code Ann. Sec. 56-529, Sec. 56-530, Sec. 33.2-3100; DC Code Sec. 9-1107.1; Maryland Code Ann. Transp. Sec. 10-204. which operates the bus and Metrorail system in Washington, D.C. and suburban Maryland and Virginia

<sup>217</sup> 43.79.520. Puget Sound taxpayer accountability account. Rev. Code Wash. (ARCW) § 43.79.520 (Statutes current with legislation from the 2020 Regular Session).

<sup>218</sup> Tex. Transp. Code, Sec. 451.061 (d-1). The language of the statute seems to suggest that once Austin’s population exceeds 850,000, it will no longer be in effect. This threshold was not reached in the 2010 census but almost certainly will be in 2020.

### 3.3.2.1 Tex. Transp. Code 's Four Transit Chapters

In contrast to Oregon's simpler code, in which mass transit districts fall under one chapter (Ch. 267 Mass Transit Districts; Transportation Districts), the Tex. Transp. Code contains four chapters that govern mass transit and mass transportation. The chapters apply to various types of agencies depending, primarily, on the size of the municipality, along with other specific criteria, such as the date of creation. Agencies are separated into the different chapters so as to allow transit in rural areas to be subject to a different set of laws than the urban mass transit authorities.

Chapter 451, the first in the sequential chapters on transit, applies only to metropolitan mass transit, or as it's defined in the chapter, a "metropolitan area" with a population density of 250 people per square mile and where more than 51% of the incorporated territory has a population of 230,000 or more.<sup>219</sup> This definition, as assigned in the chapter, applies to only four transit agencies in the state: the Metropolitan Transit Authority of Harris County, serving Houston and fifteen outlying cities; VIA Metropolitan Transit, which services fourteen cities in the greater San Antonio area; the Corpus Christi Regional Transportation Authority; and CapMetro, which serves seven cities in the Austin area. Transit agencies in Chapter 451 are bracketed by population and the date the agency was confirmed by the state. For example, as mentioned earlier, neither "Austin" or "CapMetro" is listed in the chapter, but many references explicitly include or exclude the Austin area authority, by specifying a "transit agency confirmed before July 1, 1985"<sup>220</sup> and "with a population less than 850,000."<sup>221</sup>

There are no titles within Tex. Transp. Code for generalized public transportation, mass transportation, or transit. This differs from Oregon, which has a "Mass Transit Districts" chapter<sup>222</sup> and a Transportation Districts chapter.<sup>223</sup> Chapter 456 of Tex. Transp. Code provides the following definition of public transportation:

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<sup>219</sup> Tex. Transp. Code, Sec.451.001(5).

<sup>220</sup> Tex. Transp. Code, 451.254, Sec. 451.3625.

<sup>221</sup> Tex. Transp. Code, Sec. 451.106, 451.109, 644.202(b); Note: Population brackets are determined by the current census of 2010, until the 2020 census data are available. Despite the incorrect population numbers as the cities have grown beyond the legal description, an agency's obligation to comply with state law remains.

<sup>222</sup> ORS (Sec. 267.010, et seq.)

<sup>223</sup> ORS (Sec. 267.510, et seq.)

“transportation of passengers and their hand-carried packages or baggage on a regular or continuing basis by means of surface or water, including fixed guideway or underground transportation or transit, other than aircraft, taxicab, ambulance, or emergency vehicle.”

Texas has defined transit districts by various population numbers in various areas of transportation code. Texas adds to this the “created before” language, such as: “An authority created before 1980 in which the principal municipality has a population of less than 1.9 million.”<sup>224</sup>

Yet it also has another bracket: “an authority confirmed before July 1, 1985, in which the principal municipality has a population of less than 850,000.”<sup>225</sup> Of course, we should not confuse this authority’s bracket with one that has only “created before July 1, 1985” and lacks the population category, of which there are four examples in Chapter 451 alone.<sup>226</sup> There is another bracket for all of Subchapter C-1, Additional Management Provisions for Certain Authorities, containing “an authority created before July 1, 1985” and adding, “in which the principal municipality has a population of less than one million.”<sup>227</sup>

### 3.3.2.2. Tex. Transp. Code ’s Numerous Population Brackets

In a very unusual method of describing the categories of districts, Texas has created nine different categories of “population brackets” that do not mirror population criteria in federal transportation law. Chapter 451 (“Metropolitan Rapid Transit Authorities”) contains the following population brackets for legal categories that are not found in federal transportation law: 1.9 million;<sup>228</sup> 850,000;<sup>229</sup> and 60,000.<sup>230</sup> In addition to these seemingly arbitrary numbers, other areas of code have definite population numbers restricting population by category: 1.1 million;<sup>231</sup> 1.3 million;<sup>232</sup> 320,000;<sup>233</sup> and 500,000.

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<sup>224</sup> Sec. 451.362(d), among others.

<sup>225</sup> Tex. Transp. Code Sections 451.3625, 451.458, 451.460, 451.5021, 451.506, 451.602, 451.061, 451.068, 451.071, 451.108.

<sup>226</sup> Tex. Transp. Code, Sec. 451.252, 451.254, 451.065, 451.254.

<sup>227</sup> Tex. Transp. Code, Sec. 451.131.

<sup>228</sup> Tex. Transp. Code, Ch. 451: “more than 1.9 million”: 451.054(b); 451.001(8)(B)9ii); 451.066(a); 451.072(a); 451.056(3)(c); 451.108(d); 451.001(1)(B); “less than 1.9 million: 451.001(8)(B)(i); 451.061(3)(d); 451.0611(g); 451.064; 451.065(f); 451.104; 451.108; 451.112; 451.154; 451.202; 451.252, etc. (this list is not exhaustive).

<sup>229</sup> Tex. Transp. Code, Sec. 451.061 (d-1); Sec. 451.106, 451.109, 644.202(b).

<sup>230</sup> Tex. Transp. Code, Sec. 451.001(1)(A) “alternate municipality”

<sup>231</sup> Tex. Transp. Code, Ch 375, Municipal Management Districts

<sup>232</sup> Tex. Transp. Code, Sec. 502.403 Registration of Vehicles (fees)

<sup>233</sup> Tex. Transp. Code, Sec. 451.506 Term Limitations (on boards)

### 3.3.2.3 State Financing Restrictions

In addition, Tex. Transp. Code also provides a certain amount of authority to the Texas Department of Transportation (TxDOT), as seen in sections on:

- Powers and Duties of Department of Transportation Regarding Mass Transportation
- State Financing of Public Transportation

The complexity of financing public transportation can even be seen in the area in which public transportation is housed within the Tex. Trans. Code: The State Financing of Public Transportation at *Transportation Title 6: Roadways*, Subtitle K Mass Transportation Chapter 456 State Financing of Public Transportation. In addition to Chapter 456, Ch. 321 Municipal Sales and Use Tax Act restricts how an authority may impose tax for the authorities created under Ch. 451 (Metropolitan Rapid Transit Authorities)<sup>234</sup> and Ch. 452 (Regional Transportation Authorities).<sup>235</sup> Chapters 460 (Coordinated County Transportation Authorities)<sup>236</sup> and Ch. 454 (Municipal Mass Transportation Systems)<sup>237</sup> are notably absent from this chapter entirely. Ch. 460 pertains to DART, the Dallas Area Rapid Transit. There are many restrictions within the sales and use tax section, including restrictions by *population* and date of creation.

#### CHAPTER 321. MUNICIPAL SALES AND USE TAX ACT

##### SUBCHAPTER B. IMPOSITION OF SALES AND USE TAXES BY MUNICIPALITIES

Sec. 321.101. TAX AUTHORIZED. (a) A municipality may adopt or repeal a sales and use tax authorized by this chapter, other than the additional municipal sales and use tax, and may reduce or increase the rate of the tax, at an election in which a majority of the qualified voters of the municipality approve the adoption, reduction, increase, or repeal of the tax.

(b) A municipality that is not disqualified may, by a majority vote of the qualified voters of the municipality voting at an election held for that purpose, adopt an additional sales and use tax for the benefit of the municipality in accordance with this chapter. A municipality is disqualified from adopting the additional sales and use tax if the municipality:

(1) is included within the boundaries of a rapid transit authority created under Chapter 451, Transportation Code;

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<sup>234</sup> Tex. Transp. Code, Ch 451, Metropolitan Rapid Transit Authorities URL:  
<https://statutes.capitol.texas.gov/Docs/TN/htm/TN.451.htm>

<sup>235</sup> Tex. Transp. Code, Ch 452, Reginal Transportation Authorities  
URL:<https://statutes.capitol.texas.gov/Docs/TN/htm/TN.452.htm>

<sup>236</sup> Tex. Transp. Code, Ch 460 Coordinated County Transportation Authorities URL:  
<https://statutes.capitol.texas.gov/Docs/TN/htm/TN.460.htm>

<sup>237</sup> Tex. Transp. Code, Ch 454 Municipal Mass Transportation Systems URL:  
<https://statutes.capitol.texas.gov/Docs/TN/htm/TN.454.htm>

(2) is included within the boundaries of a regional transportation authority created under Chapter 452, Transportation Code, by a principal municipality having a *population* of less than 1.1 million according to the most recent federal decennial census, unless the municipality has a *population* of 400,000 or more and is located in more than one county;

(3) is wholly or partly located in a county that contains territory within the boundaries of a regional transportation authority created under Chapter 452, Transportation Code, by a principal municipality having a *population* in excess of 1.1 million according to the most recent federal decennial census, unless:

(A) the municipality is a contiguous municipality; or

(B) the municipality is not included within the boundaries of the authority and is located wholly or partly in a county in which fewer than 250 persons are residents of both the county and the authority according to the most recent federal census; or

(C) the municipality is not and on January 1, 1993, was not included within the boundaries of the authority; or

(4) imposes a tax authorized by Chapter 453, Transportation Code.

(c) For the purposes of Subsection (b), “principal municipality” and “contiguous municipality” have the meanings assigned by Section 452.001, Transportation Code.

(d) In any municipality in which an additional sales and use tax has been imposed, in the same manner and by the same procedure the municipality by majority vote of the qualified voters of the municipality voting at an election held for that purpose may reduce, increase, or abolish the additional sales and use tax.

(e) An authority created under Chapter 451 or 452, Transportation Code, is prohibited from imposing the tax provided for by those chapters if within the boundaries of the authority there is a municipality that has adopted the additional sales and use tax provided for by this section.

(f) A municipality may not adopt or increase a sales and use tax or an additional sales and use tax under this section if as a result of the adoption or increase of the tax the combined rate of all sales and use taxes imposed by the municipality and other political subdivisions of this state having territory in the municipality would exceed two percent at any location in the municipality.

(g) For the purposes of Subsection (f), “territory” in a municipality having a *population* of 5,000 or less and bordering on the Gulf of Mexico does not include any area covered by water and in which no person has a place of business to which a sales tax permit issued under Subchapter F of Chapter 151 applies.

(h) Expired.

(i) A municipality for which the adoption or increase of a sales and use tax approved by the voters in an election held after May 1, 1995, and *before December 31, 1995*, is invalid because the election combined into a single proposition proposal for adopting an economic development sales and use tax under Chapter 505, Local Government Code, and an additional sales and use tax under Subsection (b) may adopt or increase the sales and use tax previously approved by the voters by ordinance or resolution of the governing body of the municipality. If the governing body of the municipality adopts or increases the sales and use tax under this subsection, the municipal secretary shall send to the comptroller by certified or registered mail a certified copy of the ordinance or resolution. The tax takes

effect on the first day of the month following the expiration of the calendar quarter occurring after the date on which the comptroller receives the ordinance or resolution.<sup>238</sup>

Use of bracketing and local laws in Texas over long periods has created an overly complex legal structure for transit authorities that affects their abilities to operate and plan in conjunction with other political subdivisions and entities. In transportation, this complexity has been used to restrict transit agencies from efficiently planning multimodal transportation options. While other states use these criteria in regulating transit districts, their laws rarely combine both date of creation and population into one district classification.

One might assume that certain criteria in state law exist solely as a mirror of certain federal transportation law requirements; however, this is not the case. Federal law population criteria are few despite the various categories of funding and programs. In federal law we find the following population requirements based upon the census: 50,000<sup>239</sup>; 200,000<sup>240</sup>; and 145,000<sup>241</sup>.

Some Texas laws reflect the 50,000-population limit within the federal funding bracket:

Sec. 453.051. CREATION OF TRANSIT DEPARTMENT.

(a) The governing body of a municipality, by ordinance or resolution, may create a transit department if:

- (1) the municipality operates a mass transportation system;
- (2) the municipality has a population of 50,000 or more; and

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<sup>238</sup> See Tx. Tax. Code, Ch 321. URL: <https://statutes.capitol.texas.gov/Docs/TX/htm/TX.321.htm#321>; Note the many changes to this Act: Added by Acts 1987, 70th Leg., ch. 191, Sec. 1, eff. Sept. 1, 1987. Amended by Acts 1987, 70th Leg., 2nd C.S., ch. 54, Sec. 1, eff. Oct. 20, 1987; Acts 1989, 71st Leg., ch. 2, Sec. 14.14(a), eff. Aug. 28, 1989; Acts 1989, 71st Leg., ch. 489, Sec. 1, eff. Aug. 28, 1989; Acts 1991, 72nd Leg., ch. 184, Sec. 2, eff. May 24, 1991; Acts 1991, 72nd Leg., ch. 223, Sec. 1, eff. May 29, 1991; Acts 1993, 73rd Leg., ch. 320, Sec. 1, eff. May 28, 1993; Acts 1993, 73rd Leg., ch. 1031, Sec. 25, eff. Sept. 1, 1993; Acts 1997, 75th Leg., ch. 65, Sec. 1, eff. May 9, 1997; Acts 1997, 75th Leg., ch. 165, Sec. 30.264, eff. Sept. 1, 1997; Acts 1997, 75th Leg., ch. 705, Sec. 1, eff. Sept. 1, 1997; Amended by: Acts 2007, 80th Leg., R.S., Ch. 885 (H.B. 2278), Sec. 3.73, eff. April 1, 2009; Acts 2015, 84th Leg., R.S., Ch. 1122 (H.B. 3777), Sec. 1, eff. September 1, 2015; Acts 2015, 84th Leg., R.S., Ch. 1246 (H.B. 157), Sec. 12, eff. September 1, 2015.

<sup>239</sup> 23 USC sec. 134 [Metropolitan Transportation Planning], (b)(7) Urbanized Area—The term “urbanized area” means a geographic area with a population of 50,000 or more, as determined by the Bureau of the Census; (d)(1) Designation of Metropolitan Planning Organizations: In general.—To carry out the transportation planning process required by this section, a Metropolitan Planning Organization shall be designated for each urbanized area with a population of more than 50,000 individuals;

<sup>240</sup> Tex. Transp. Code Ch. 451.001, ...population of 200,000 or more; 49 USC Sec. 5307(a)(1)(D) [Urbanized area formula grants] operating costs of equipment and facilities for use in public transportation in an urbanized area with a population of fewer than 200,000 individuals, as determined by the Bureau of the Census (r) Bi-state MPO—uses 145,000 population number. (California and Nevada)

<sup>241</sup> 23 USC Sec. 134(r)(2)(C) [Bi-state MPO Region] an urbanized area, which is comprised of a population of 145,000 in the State of California and a population of 65,000 in the State of Nevada—uses 145,000 population number. (California and Nevada).

- (3) the governing body determines that the creation of a transit department and operation of a transit department system would be in the public interest and of benefit to persons residing in the municipality.
- (b) The jurisdiction of a transit department is coextensive with the territory of the municipality that creates the transit department.
- (c) The jurisdiction of a transit department created by a municipality with a population of more than 500,000 that borders the United Mexican States does not include any territory within the boundaries of a federal military installation that is located in that municipality's extraterritorial jurisdiction.

Yet, Texas also has some arbitrary classifications for metro rapid transit authorities, such as that for CapMetro in Austin, for whom the population bracket of 850,000 is unusual by federal standards:

Tex. Transp. Code § 451.602. Authorities Covered by Subchapter.  
Except as provided by Section 451.617, this subchapter applies only to an authority in which the principal municipality has a population of less than 850,000 and that was confirmed before July 1, 1985.<sup>242</sup>

By creating a rapid transit authority with both a date limitation and a narrow population range, Texas has created an unusually narrow description for this metro rapid transit authority while also not naming the city involved. If this were done in Florida, it might be an unconstitutional special law, according to the rules of *McGrath v. Miami*.<sup>243</sup> Even under Texas law, this bracket appears suspect and differs from the other MRs in this study. Yet other transit districts are also described this way. One could ask why Virginia can explicitly name a rapid mass transit authority (specifically, § 33.2-3401. Washington Metropolitan Area Transit Authority Capital Fund)<sup>244</sup> within its code, yet Texas cannot do so with CapMetro in Tex. Transp. Code Sec. 451.602. No other state has this confusing complexity built into its code. As a consequence, Texas' use of bracketing leads to a multiplicity of questions:

- Is there a legal justification for this?

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<sup>242</sup> See Also Tex. Transp. Code, Ch. 451, Subchapter C-1 (1985 & less than 1 million).

<sup>243</sup> *McGrath v. City of Miami*, 789 So. 2d 1168, 1169, 2001 Fla. App. LEXIS 9495, \*3, 26 Fla. L. Weekly D 1682 (Fla. Dist. Ct. App. 3d Dist. July 11, 2001).

<sup>244</sup> § 33.2-3401. Washington Metropolitan Area Transit Authority Capital Fund, Va. Code Ann. § 33.2-3401 (Current through the 2020 Regular Session of the General Assembly).

- Could a citizen guess which transit authorities these code sections describe? For example, can a non-Texas transit expert read this and understand that San Antonio may be one of the three authorities created before 1980 to which 451.252 does not apply?<sup>245</sup>
- Given that the population changes every year, is it clear within code whether the description refers only to the population number of the authority at the time of formation, or does it apply to any year?
- In trying to avoid special legislation by not naming the city, has the legislature gone too far in creating these categories?

According to the Texas Government Code, “population” is the “population shown by the most recent federal decennial census,”<sup>246</sup> which reflects the same standard used by federal transportation law:

49 U.S. Code § 5340. Apportionments based on growing States and high-density States formula factors

(c) (2) “Apportionments between urbanized areas and other than urbanized areas in each state.— (A) In general.— The Secretary shall apportion amounts to each State under paragraph (1) so that urbanized areas in that State receive an amount equal to the amount apportioned to that State multiplied by a ratio equal to the sum of the forecast population of all urbanized areas in that State divided by the total forecast population of that State. In making the apportionment under this subparagraph, the Secretary shall utilize any available forecasts made by the State. If no forecasts are available, the Secretary shall utilize data on urbanized areas and total population *from the most recent decennial census.*”

Population matters because being in an UZA affects eligibility for federal funding, depending upon the population category in which a transit authority fits.<sup>247</sup> The census population number accounts for about 34 percent of FTA’s formula allocations.<sup>248</sup> Population is the leading factor in allocating both Section 5311 and 5307 funds to states and UZAs. If there are no alternative standards for population numbers written into a law, the state will use the census. For example, Texas has grown

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<sup>245</sup> Sec. Tex. Transp. Code §, 451.252. Minority and Disadvantaged Individuals Program: Certain Authorities. (a) The board of an authority confirmed before July 1, 1985, shall establish a program to encourage participation in contracts of the authority by businesses owned by minorities or disadvantaged individuals; (b) This section does not apply to an authority created before 1980 in which the principal municipality has a population of less than 1.9 million.

<sup>246</sup> Sec. 311.005. General Definitions. Tex. Gov’t Code § 311.005. (This document is current through the 2019 Regular Session, 86th Legislature, and 2019 election results.)

<sup>247</sup> Zeilinger, *Supra* Note 78.

<sup>248</sup> *Ibid*

considerably since the 2010 census, but its laws refer to the census throughout the code. Because of its draw as a destination for migrating talent, metro Austin’s population surpassed 2 million in 2015.<sup>249</sup> The decade ending 2018 saw a 32.7 percent increase in population and growth was 2.5 percent for the year ending 2018.<sup>250</sup> One could say that the 2010 census numbers for legal purposes would certainly be incorrect for Austin to use for federal transit grant formulas.

If we compare this description to the way Texas creates its mass transit districts, we see that they fall within the suspect, closed-class analysis. A closed class is one to which no objects will be added in the future and therefore the law may be invalidated.<sup>251</sup>

Unlike Texas, states in the Mid-Atlantic MR (Maryland and Virginia), which has a strong regional transit system, have not written precise population numbers in their state codes. By stipulating a set population number in the code, Texas has created various categories of transit district with differing requirements and must constantly amend the law to keep up with the changing populations and specific transit districts it has created.

Special legislation prohibitions have the potential to foster the sort of conformity necessary to facilitate multijurisdictional transportation planning. This project will determine the extent to which these prohibitions have been applied by courts in Texas and several other states, investigate their applicability to transportation planning, and explore legal arguments that could be made in the future to use these provisions to facilitate multijurisdictional transportation projects.

In several areas of the Tex. Trans. Code, an “authority confirmed before July 1, 1985” is used (referring presumably to Fort Worth, created in 1983, and Austin’s CapMetro, approved by voters in January of 1985). However, in other areas of code, the authority referred within the section of law must have both the date criteria and the population of less than 850,000.<sup>252</sup>

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<sup>249</sup> Austin Chamber of Commerce. Population profile. URL: <https://www.austinchamber.com/economic-development/austin-profile/population/overview>

<sup>250</sup> Id.

<sup>251</sup> See, e.g., *Teigen v. State*, 749 N.W.2d 505 (N.D. 2008); *Pebble L.P. v. Parnell*, 215 P.3d 1064 (Alaska 2009); *In re S.B. 95*, 261 P.2d 350 (Colo. 1961); *In re S.B. 9*, 56 P. 173 (Colo. 1899); *Banks v. Heineman*, 837 N.W.2d 70 (Neb. 2013).

<sup>252</sup> Tex. Transp. Code Sec. 451.068\*, 451.071\*, 451.108\*, all of Subchapter C-1 in Ch. 451, 451.252, 451.254, 451.458\*, 451.460\*, 451.3625, 451.5021, 451.506\*, 451.602\*, 451.061\*, 451.3625\*, 451.5021\*,

Other areas of Tex. Transp. Code Chapter 451 apply to “an authority in which the principal municipality has a population of less than 850,000 or more than 1.9 million”<sup>253</sup> without the date “confirmed” language, but we do not know why and no notations to the code explain these numbers or categories.

In this case, perhaps more background is needed. As a result of mismanagement and a 1997 investigation by the FBI and a state Sunset Commission Review, the law governing CapMetro governance was specially crafted to create more oversight by the 75<sup>th</sup> Legislature with a law requiring CapMetro to conduct a referendum in order to attempt to operate a fixed rail system. (HB 2445).<sup>254</sup> CapMetro is burdened with unique requirements on board appointments compared to other transit districts. These unique requirements on CapMetro governance also have no expiration date, despite being implemented in response to certain events, which also indicates a lack of attention to the code by legislators over time.

Also, in 2005, the 79th Texas Legislature passed an amendment to CapMetro’s rail referendum requirement that allows the agency to hold a referendum on a proposal to expand a fixed rail system approved under the agency’s rail referendum requirements on any date specified in the Election Code or chosen by the CapMetro board if:

- (1) the referendum is held no earlier than the 62nd day after the date of the order; and
- (2) the proposed expansion involves the addition of not more than 12 miles of track to the system.<sup>255</sup>

If CapMetro could convince the legislature to alter its specific legislation, i.e., get its unique rail referendum requirement removed,<sup>256</sup> CapMetro could more effectively provide a multimodal transit system. Today, CapMetro is required to conduct a referendum in order for the agency to

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<sup>253</sup> Tex. Transp. Code. Sec. 451.106, for example.

<sup>254</sup> Capital Metropolitan Transportation Authority, Self-Evaluation Report, Submitted to Sunset Advisory Commission, September, 2009, URL:

<https://www.sunset.texas.gov/public/uploads/files/reports/Capital%20Metro%20SER%202009%2082%20leg.pdf>

<sup>255</sup> (Acts 2011, 82<sup>nd</sup> Leg. R.S., Ch. 1163 (H.B. 2702), codified at Sec. 451.071.

<sup>256</sup> See Sec. 451.071. Referendum for Rail Plan; Certain Authorities, Tex. Transp. Code § 451.071 (This document is current through the 2019 Regular Session, 86th Legislature, and 2019 election results.) Under existing law, CapMetro must seek voter approval if the proposed expansion involves the addition of 12 miles of track or more to the system.

operate passenger rail, even if no funds are sought as part of the referendum.<sup>257</sup> Additionally, if state law were amended to provide for other means by which communities could join a transit agency's service area, CapMetro would be better able to develop a more extensive regional transit system.

Notably, Chapter 460, a different chapter, was drafted in a uniquely tailored way to create DART for the Dallas area,<sup>258</sup> with unique, arbitrary population categories of "12,000 or more" and "1 million." These unique restrictions built into the Tex. Transp. Code are not mirrored in other states' codes. When laws appear too narrow, courts should take notice.

In a provision that looks special, DART also has a special benefit it confers but only to its city/county members over 12,000 in population. (This tax is not mentioned in Tex. Tax. Code. Ch. 321 because it is in Tex. Transp. Code Ch. 460, despite both chapters covering sales tax powers of municipalities.):

Sec. 460.551. SALES AND USE TAX.

(e) A municipality with a population of 12,000 or more that has confirmed the authority may impose a sales and use tax at a rate higher than the minimum uniform rate established under Subsection (d) on approval at an election if the authority will provide the municipality a higher level of service.

We know that population and timing requirements commonly form the basis for challenges against special legislation in Texas; however, population floors tend to be upheld when not accompanied by population ceilings.<sup>259</sup> So perhaps this open-ended population bracket would survive a challenge in Tex. Transp. Code Ch. 460.

### 3.3.3. Texas Case Law

Texas has a long history of bracketing in legislation, and the Texas Supreme Court has weighed in on the issue, saying that a law is not prohibited "merely because it only applies in a limited geographic area."<sup>260</sup> However, the legislation "must be broad enough to include a substantial class

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<sup>257</sup> Capital Metropolitan Transportation Authority Supra, note 254.

<sup>258</sup> Tex. Transp. Code Sec. 460.051.

<sup>259</sup> See *Robinson v. Hill*, 507 S.W.2d 521, 525 (Tex 1974) (permissible to regulate bail bonds in counties with population 150,000 or more); *Smith v. Davis*, 426 S.W.2d 827, 830-32 (Tex. 1968) (special tax rules permissible for hospital districts in counties with populations 650,000 or more).

<sup>260</sup> See *Maple Run at Austin Mun. Util. Dist. V. Monaghan*, 932 S.W.2d 941, 945 (Tex. 1996).

and must be based on characteristics legitimately distinguishing such class from others with respect to the public purpose sought to be accomplished by the proposed legislation.”<sup>261</sup>

While the Texas Supreme Court has sometimes given force to the special legislation clause of the Texas constitution, many statutes remain in full force despite a lack of compliance with these standards. The aforementioned example of CapMetro is just one of many bracketed provisions that may not pass constitutional muster.

### 3.3.3.1. Local Law versus Special Law in Texas

While the terms *local law* and *special law* may be both used by courts or legislatures in reference to the same thing, generally, a local law is one limited to a specific geographic area of a State, while a special law is limited to a particular class of persons distinguished by some criteria other than geography. A local law, which is considered allowable at times, has been defined by the court as one applying to a particular geographical point or area.<sup>262</sup> A special law, which is considered unconstitutional, is a law relating to a particular person or group.<sup>263</sup> However, over time, Texas Supreme Court cases have stated the terms are synonymous.<sup>264</sup> In order to understand the confusion, one must look at the front end of the law: the legislative process.

The legislature has latitude in how it defines a local versus a special law during the lawmaking process—as is evidenced in the Texas House Rules/Guidelines created each session for lawmakers to follow in crafting their bills for the session.<sup>265</sup> Although the terms “local” and “special” are often used interchangeably when referring to bills and laws, Texas separates the two during the bill drafting phase in the certain legislative terms and rules:

“A “local bill” proposes a “local law” that applies to a limited area, and a “special bill” proposes a “special law” that applies to a single person or class. In practice, local bills are far more common than special bills and the notice requirements are virtually the same. For that reason, this memorandum generally treats both types of bills as local bills.”<sup>266</sup>

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<sup>261</sup> *Id.*

<sup>262</sup> *Clark v. Finley*, 93 Tex. 171, 54 S.W. 343, 346 (1899).

<sup>263</sup> *Clark v. Finley*, 93 Tex. 171, 54 S.W. at 345 (1899).

<sup>264</sup> *Austin National Bank v. Sheppard*, 123 Tex. 272, 71 S.W.2d 242, 245 (1934).

<sup>265</sup> TLC, *supra* Note 36

<sup>266</sup> *Ibid.*

Like many state constitutions, the Texas Constitution expressly prohibits local and special bills for most purposes.<sup>267</sup> However, state legislatures are often given much discretion in determining whether a bill is tailored to a certain group or geographic area as special legislation during the bill drafting process. In Texas local laws are sometimes allowed for limited structural purposes such as creating a special-law municipality that operates under a municipal charter granted by a local law within the Texas Local Government Code.<sup>268</sup> On the front end of the law, state constitutional provisions restrain the legislature from identifying particularized or named persons, places, locations, and subjects within the newly drafted legislation in order to be objective or fair. For example, the Texas legislature each session puts out a document with the rules regarding how this type of bill may be drafted and remain constitutional under the state law.<sup>269</sup>

### 3.3.3.2. Standing in Texas Case Law

Lack of standing may explain why many special laws or bracketed Texas laws remain in force and un-litigated, despite failing the *Rodriguez* test. In Texas, the “ultimate test of whether a law is general or special is whether there is a reasonable basis for the classification made by the law, and whether the law operates equally on all within the class.”<sup>270</sup> A special law classification must have a “proper relation to the purpose of the statute.”<sup>271</sup> Especially in the case of transportation, it can be difficult to connect bracketed provisions to the harms they cause. Jurisdictional complexity and legal inconsistency between jurisdictions burden transportation planners and networks as well as the commuters who rely on them.

- In Texas, the judiciary has no power to decide issues in the abstract.<sup>272</sup> To receive a judgment binding on other branches of government, the law must come before the court in the form of litigation between parties.<sup>273</sup>

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<sup>267</sup> Sec. 56. Prohibited Local and Special Laws. Tex. Const. Art. III, § 56 (This document is current through the 2019 Regular Session, 86th Legislature, 2019 election results, and Constitution heading updates in 2018).

<sup>268</sup> Texas Local Government Code, Sec. 5.005, Special-law Municipality, (a) “A municipality is a special-law municipality if it operates under a municipal charter granted by a local law enacted by the Congress of the Republic of Texas or by the legislature.”

<sup>269</sup> TLC, *Supra* note 36, explaining the Texas Constitutional requirements in drafting bracket bills, Local bills, and special bills. A local bill applies to a limited area and is commonly used and a special bill applies to a single person or class and is rarely used. (page 1)

<sup>270</sup> *Rodriguez v. Gonzales*, 148 Texas 537, 540 (Tex. 1950).

<sup>271</sup> *Id.* at 541

<sup>272</sup> See *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304 (Tex. 2008).

<sup>273</sup> *Id.*

- To have an unconstitutional bracketed law considered by a court, a plaintiff injured by the law would need to come forward. Injury sufficient to bring a claim in court must reach a significant standard in Texas: the plaintiff must be personally aggrieved, the injury must be concrete and particularized, and it must be an actual or imminent injury rather than a hypothetical one.<sup>274</sup>
- The rules of standing, stringent as they are, cannot be construed to prevent courts from interpreting constitutional law and ensuring that constitutional provisions are adequately enforced. “Standing operates to prevent the Judiciary from exercising authority that belongs to other departments of government, not to deprive the Judiciary of its role in interpreting law, especially constitutional law.”<sup>275</sup> Because the determination as to whether a law violates constitutional protections against special legislation belongs solely with the courts, it follows that *someone* must have standing to challenge any such provision.
- In the aforementioned case, the plaintiffs were a set of homeowners who claimed their ability to secure home equity loans was adversely affected by the Financial Commission’s interpretation of Texas Constitution Article XVI, §50.<sup>276</sup> At the time of the suit, the homeowners had suffered no injury. The only interest injured was “to a person’s interest in obtaining a home equity loan in the future.”<sup>277</sup>

### 3.3.3.3. Economic Status: Taxpayer Standing in Texas Case Law

Taxpayer status cases, if they meet standing requirements, rarely favor the injured party and can only apply to the person being harmed, not the other taxpayers. This defeats the purpose of helping other current and future transit riders as a whole. The complainant in a taxpayer case could attempt to contest assessments that contribute to poor local transportation planning, but this approach is unlikely to succeed. Transportation cases on this are rare for a reason. For example, when a taxpayer asserted standing as a “taxpayer” to bring claims for declaratory and injunctive relief against a municipal management district, the taxpayer, Hawthorne, claimed that the District’s

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<sup>274</sup> *Id.*

<sup>275</sup> *See Fin. Comm’n of Tex. v. Norwood*, 418 S.W.3d 566, 581 (Tex. 2013).

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

unspent tax assessments were illegal or unconstitutional. However, the court found a way to stop his case from going further.

The court found that he failed to exhaust his statutory and judicial remedies pursuant to Texas Local Government Code section 375.123 for contesting assessments, which deprived the trial court of subject matter jurisdiction.<sup>278</sup> The court refused his request to reimburse property owners for assessments that had already been paid. Likewise, Hawthorne lacked standing to obtain relief for any other property owners because they failed to exhaust statutory remedies. Many taxpayers' standing cases cannot proceed in the court system due to these trial court requirements other than standing.

#### 3.3.3.4. Class Tests in Texas and Population

In 2020, the federal census will have a disproportionate impact on local Texas governments because of the practice of the bracketing bills that become law. A legislative concept, a “bracket bill” in Texas is “a legislative measure intended to apply only to a particular class of political subdivisions or geographic areas described by characteristics that relate to the purpose of the law.”<sup>279</sup> What other states may call special legislation because of its restrictive class parameters, Texas uses to create transportation classes or categories for its various political subdivisions. In restricting the application of a law to a certain class of political subdivisions by geographic area and population, it has impaired its ability to be flexible in transportation planning and cross-jurisdictional cooperation in mobility goals.

Note that most legislatures have rules that prohibit the drafting of laws that are limited to one or more political subdivisions according to a population bracket or other artificial device instead of by identifying the political subdivisions by name. Under Texas law, two questions should be asked about the classification scheme in a law:

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<sup>278</sup> *Montrose Mgmt. Dist. v. 1620 Hawthorne, Ltd.*, 435 S.W.3d 393, 2014 Tex. App. LEXIS 6217, 2014 WL 2583774 (Court of Appeals of Texas, Fourteenth District, Houston June 10, 2014, Opinion Filed). The court found that the trial court lacked subject matter jurisdiction over the municipal management district and dismissed part of this claim for want of jurisdiction. Hawthorne sought more than mere construction of Tex. Loc. Gov't Code Ann. § 375.262 but rather sought declaratory relief for the district's actions under § 375.262.

<sup>279</sup> Texas Legislative Council. Texas Legislative Glossary prepared by the Research Division of the Texas Legislative Council. URL: <https://www.tlc.texas.gov/docs/legref/Glossary.pdf>.

1. Are the classification criteria such that membership in the class may expand or contract over time?
2. Are the classification criteria reasonably related to the purpose of the bill?
3. If the answer to either question is “no,” the classification is suspect and will not be held constitutional if and when a true plaintiff is able to sue.

State constitutional law is vastly different from federal constitutional law. In the law creation phase, the Texas constitution does not prohibit a bill proposing a law that addresses a particular place or otherwise appears to be a local bill if adopting the bill would affect people throughout the state or if the bill treats substantially a subject that is a matter of interest across the state. A classification scheme used in a bracket bill does not violate the constitutional prohibition on local bills if the classification scheme applies uniformly, is broad enough to include a substantial class or geographic area, and is based on characteristics that legitimately distinguish the class or area from other classes or areas in a way related to the purpose of the proposed law.<sup>280</sup> Public notice rules during the legislative session are considered a guarantee of fairness and notice to the public in the crafting of local bills—but is this enough for a locality to know it is being treated disparately from others?

In Texas, the “ultimate test of whether a law is general or special is whether there is a reasonable basis for the classification made by the law, and whether the law operates equally on all within the class.”<sup>281</sup> A special law is one that makes a classification “not based upon a reasonable and substantial difference in kind, situation or circumstance bearing a proper relation to the purpose of the statute.”<sup>282</sup> To make this determination, the court relies on a two-part test.<sup>283</sup> The first part compares the purpose of the legislation to the delineated class; if the delineated class encompasses only a fraction of those the legislation could affect consistently with its objectives, the classification likely has no rational relation to the purpose of the statute.<sup>284</sup> The second part examines whether similarly situated parties are treated similarly, or arbitrarily excluded by the statute.<sup>285</sup>

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<sup>280</sup> *Id.*

<sup>281</sup> *Rodriguez v. Gonzalez*, 148 Texas 537, 540 (Tex. 1950)

<sup>282</sup> *Id.* at 541.

<sup>283</sup> See *Robinson v. Crown Cork & Seal Co.*, 335 S.W.3d 126, 189.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at 189-90.

In Texas,<sup>286</sup> as in many other states,<sup>287</sup> the milder rational-basis of review standard for equal protection is routinely used in restrictive classes in special legislation cases.

In *Robinson*, the court found a law to be general despite limiting criteria. Where lawyers, insurance agents, and others who had previously written bail bonds complained of former Tex. Rev. Civ. Stat. Ann. art. 2372p-3, relating to the licensing and regulation of bail bondsmen, the statute was not a special and local law violative of Tex. Const. art. III, § 56, by effect of its application only to counties exceeding a certain population, even though the affected counties could change with each census.<sup>288</sup>

### 3.3.3.5. Narrow Classes Found Suspect in Texas

Population and timing (date) requirements commonly form the basis for challenges against special legislation. Population floors tend to be upheld when not combined with population ceilings.<sup>289</sup> Also, by calling a law a “local law,” which is permissible in Texas, a court can avoid calling it a special law and drawing the political ire of the legislature. In the *Maple Run* case, by adding a date (“after 1983”),<sup>290</sup> the legislature created a “class of one” to which no other groups or objects could be added in the future.<sup>291</sup> However, the Texas court avoided this closed-class analysis altogether by focusing on the distinction between local laws and special laws, ultimately calling this law an impermissible “local law.” The Supreme Court of Texas drew a distinction between local and special law in its decision in *Maple Run*,<sup>292</sup> determining that the following provision regarding “Annexation of Certain Districts on Dissolution” was impermissible local legislation:

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<sup>286</sup> See Supreme Court cases sustaining statutes against challenges that they are local or special laws, see *Robinson v. Hill*, 507 S.W.2d 521 (Tex.1974) (law required bail bondsmen in counties greater than or equal to 150,000 population to be licensed); *Board of Managers v. Pension Board*, 449 S.W.2d 33 (Tex.1969) (statute authorized municipal pension systems in cities of greater than 900,000 population); *Smith v. Davis*, 426 S.W.2d 827, 830-2 (Tex.1968) (hospital districts in counties greater than or equal to 650,000 persons and having teaching hospital facilities affiliated with state medical schools may assess property at a higher rate than other governmental units for tax purposes); *Lower Colorado River Authority v. McCraw*, 125 Tex. 268, 83 S.W.2d 629, 636 (1935) (river authority may issue tax exempt bonds); *City of Houston v. Allred*, 123 Tex. 334, 71 S.W.2d 251, 257 (Tex.Comm’n App.1934, opinion adopted) (cities of population greater than 160,000 may issue water bonds).

<sup>287</sup> *New Jersey (Robson v. Rodriguez)*, 141 A2d1 (NJ 1958) (equating special laws prohibition with equal protection)

<sup>288</sup> *Robinson v. Hill*, 507 S.W.2d 521, 1974 Tex. LEXIS 264 (Tex. 1974).

<sup>289</sup> See *Robinson v. Hill*, 507 S.W.2d 521, 525 (Tex 1974) (permissible to regulate bail bonds in counties with population 150,000 or more); *Smith v. Davis*, 426 S.W.2d 827, 830-32 (Tex. 1968) (special tax rules permissible for hospital districts in counties with populations 650,000 or more).

<sup>290</sup> *Maple Run* at 944. Citing Sec. 43.083 Tex. Local Govt. Code within the case.

<sup>291</sup> Similar to the *McGrath* case in Florida, *infra*.

<sup>292</sup> 931 S.W.2d at 945-49.

(a) This section applies to any district *created in or after 1983* within the extraterritorial jurisdiction of a municipality with written consent by ordinance or resolution as required by Section 42.042 if the district has:

- (1) issued not less than \$17 million nor more than \$21 million in bonds, excluding refunding bonds, repayable in a manner authorized under Section 54.503(2), Water Code;
- (2) issued at least \$3.5 million of bonds repayable in a manner authorized under Section 54.503(3), Water Code, before June 1, 1993; and
- (3) constructed all of the facilities for which the bonds were issued prior to December 31, 1991. Act of May 19, 1995, 74th Leg., R.S., Ch 587, §2, sec. 43.082, 1995 Tex. Gen Laws. 3401, 3401-02 (expired Dec. 31, 1996).

In *Maple Run*, the court determined the classification in question to be unreasonable by comparing Maple Run with other similarly situated districts and found that other Texas utility districts suffered under similar levels of indebtedness and financial distress.<sup>293</sup> Finding no other possible reason to single out Maple Run, the Court held that Sec. 43.082 was not authorized under Article XVI, Sec. 59 of the Texas Constitution and therefore was a prohibited local law under Art. III, Sec. 56 of the Texas Constitution.<sup>294</sup> Only Maple Run, the district involved in the litigation, fit the conditions of the statute.<sup>295</sup> The statute itself was designed at the request of the district itself, and allowed it to dissolve, leaving its service obligations and its debts to the adjacent municipality.<sup>296</sup>

In Texas, as in other states, geography is a permissible criterion. However, the court clarifies its test:

“A law is not a prohibited local law merely because it applies only in a limited geographical area. We recognize the Legislature’s broad authority to make classifications for legislative purposes. (See *Miller*, 150 S.W.2d at 1001.) However, where a law is limited to a particular class or affects only the inhabitants of a particular locality, “the classification must be broad enough to include a substantial class and must be based on characteristics legitimately distinguishing such class from others with respect to the public purpose sought to be accomplished by the proposed legislation.” (*Miller*, 150 S.W.2d at 1001-02.) “The primary and ultimate test of whether a law is general or special is whether there is a reasonable basis for the classification made by the law, and whether the law operates equally on all within the class.” *Rodriguez v. Gonzales*, 148 Tex. 537, 227 S.W.2d 791, 793 (Tex. 1950).<sup>297</sup>

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<sup>293</sup> *Id.* at 946.

<sup>294</sup> *Id.* At 949.

<sup>295</sup> *Id.* at 944

<sup>296</sup> *Id.*

<sup>297</sup> *Maple Run at Austin Mun. Util. Dist. v. Monaghan*, 931 S.W.2d 941, 945, 1996 Tex. LEXIS 153, \*9-10, 40 Tex. Sup. J. 54 (Tex. October 18, 1996)

Under Texas law, for a special or “bracket law” to survive a challenge under Section 56, Article III, of the Texas Constitution, the law must have “uniform application.” The courts impose a three-part test to determine whether a classification scheme used in a law creates an invalid local law or creates a valid general law. The classification scheme used for a valid general law must: (1) “apply uniformly to all who may come within the classification designated” by the law; (2) “be broad enough to include a substantial class”; and (3) “be based on characteristics legitimately distinguishing such class from others with respect to the public purpose sought to be accomplished” by the law.<sup>298</sup>

Although the courts have dedicated little discussion to the first part of the test, the “uniform application” requirement is key to transportation in that population growth must be considered in the creation of the laws and the transportation districts. Legislators, boards, and planners need to ensure that political subdivisions and other geographic areas that come within the bracket later will be given the same treatment as the subdivisions and areas that are within the bracket at the time of the law’s enactment.<sup>299</sup>

How narrow a class is used to determine the validity of a law? When the population specified has too narrow a range, the court says that a statute is designed to single out a specific area.<sup>300</sup> In *Miller*, the court reversed the appellate court’s judgment and found a Texas law unconstitutional. Tex. Const. art. III, § 56 prohibits a legislature from passing local laws.

Tex. Const. art. III, § 56 provides:

The legislature shall not, except as otherwise provided in this constitution, pass any local or special law, regulating the affairs of counties, cities, towns, wards or school districts; creating officers, or prescribing the powers and duties of officers, in counties, cities, towns, election or school districts; and in all other cases where a general law can be made applicable, no local or special law shall be enacted.

The *Miller* court declared that Tex. Rev. Civ. Stat. art. 2325b was void because the population classification only applied to one county in Texas; therefore, it was considered a local law. The

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<sup>298</sup> *Miller v. El Paso County*, 150 S.W.2d 1000, 1001-1002 (Tex. 1941)

<sup>299</sup> *Morris v. City of San Antonio*, 572 S.W.2d 831, 833-834 (Tex. Civ. App.--Austin 1978, no writ); *Miller*, 150 S.W.2d at 1001.

<sup>300</sup> See *Miller v. El Paso County*, 136 Tex. 370, 375-76 (Tex. 1941) (authorizing a special tax in counties with population greater than 125,000 and less than 175,000); *City of Fort Worth v. Bobbitt*, 36 S.W.2d 470, 471-72 (permitting special assessments in cities with population between 106,000 and 110,000, which applied exclusively to Fort Worth).

local law was deemed unconstitutional unless the “segregated class” had characteristics that legitimately distinguished it from the remainder of the State which required the special legislation. Article 2325b was unconstitutional because whatever differences in population existed were not material to the object of the legislation.

## Chapter 4. Conclusions

### 4.1 Uniformity Is Needed for Long-Range Planning

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As demographics develop and change, American transportation policy must adapt, lest it become increasingly obsolete. Cooperation on mobility improvement needs to have the legal structure that will grow along with state populations. If a region is hamstrung by outdated, restrictive state laws governing the creation and legal duties of transit districts, long-range regional mobility and regional economies may suffer. The existing structures of certain state laws lack uniformity and inhibit long-range transit planning. If transportation laws creating transit districts use arbitrary criteria to define a district, such as population combined with a date of creation, they may hinder the abilities of that district going forward. If a state creates a closed class within a transit authority structure, the restrictions may have unintended consequences. Long-term regional transit planning requires cooperation and coordination among political subdivisions and transportation authorities.

Although few cases of special legislation specific to transportation exist, we know that narrow population ranges may indicate that a law is singling out a specific geographical area for disparate treatment. Do commuters understand the transportation process and the legal hurdles involved in creating efficient transit solutions locally? Do commuters understand what transit benefits they could be denied in the future?

### 4.2. Courts Want to Defer to the Legislature

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If the laws are complex and narrowly tailored, commuters and taxpayers may never be able to understand or navigate the planning process or act on community needs. If transportation stakeholders are able to obtain standing, show harm, and understand the complexities of how transit authorities are structured in the law, they could potentially sue in court as taxpayers. However, from studying these special law cases, we see that courts are reluctant to invalidate laws and therefore will try to avoid adjudicating these special law cases. In the majority of special law cases, courts show their unwillingness to scrutinize the legislature. Even when courts do review these cases, they often defer to the legislature, using a lower rational basis of review with which to validate special laws.

### **4.3. Laws Need to Anticipate Regional Change and Growth**

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As rural areas grow and become urban areas, population, land area, and population density are factors that legislatures could use in more effective ways to determine how transit authorities are formed and funded. Simplifying population criteria, cleaning up outdated code, and adding language to promote cooperation could decrease jurisdictional complexity and legal inconsistency between jurisdictions. Legal clarification on this subject could help the commuters who need regional transit as these newly urbanizing areas begin to merge. Complicated laws restricting a district's taxing authority and future boundary changes need to be reexamined in light of federal law and policy on regional transit. Legislatures concerned about budgets may find simplified language could reduce political strife and aid contiguous political subdivisions in cooperating on powers, duties, and taxation issues that flow from regional transit planning.

### **4.4. Public Awareness: The Good and the Bad**

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For decades, funding transit with taxes was unpopular in the face of building and maintaining roads. Legislatures thus fostered the funding of roads over the funding of transit, but public attitudes towards investing in transit are increasingly favorable now as congestion increases in metro areas. The American Public Transportation Association and its Center for Transportation Excellence, in tracking the 2019 results of public-transportation-related ballot measures, found that six of nine such measures passed, including those in Ohio, New Mexico, and Texas.<sup>301</sup>

Washington's transportation code goes so far as to help each county place propositions on the ballot: the code provides sample ballot language to foster the creation of a regional transit authority and a regional transportation investment district.<sup>302</sup> Ironically, the Washington taxpayers revolted against the many fees they pay to support public transportation. Washington voters in 2019 voted against a car tab fee that funds transportation.<sup>303</sup> In the past, Washington voters supported transit

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<sup>301</sup> Nov. 6, 2019, How transit ballot measures fared in 2019 election, Good news for Ohio, Texas, and New Mexico transit; but results in Washington state are not as rosy, Mischa Wanek-Libman:

<https://www.masstransitmag.com/management/article/21113384/how-transit-ballot-measures-fared-in-2019-election>

<sup>302</sup> See ARCW 29A.36.230 Regional transportation investment district and regional transit authority single ballot.

<sup>303</sup> Id.; See also, <https://patch.com/washington/across-wa/sound-transit-looks-ahead-initiative-976-leads-polls> (I-976 bars cities from charging additional car tab fees without voter approval and caps tabs for many vehicles at \$30, which will lead to the state losing billions of dollars in transportation funding and slows light rail expansion.)

ballot measures, such as the ones that created Sound Transit in 1996,<sup>304</sup> Sound Transit 2 in 2008, and Sound Transit 3 in 2016. Washington law is structured with TBDs<sup>305</sup> in which counties may easily establish a TBD funded by such fees via ballot measure. The recent I-976 vote repealed the existing TBD license fees and removed the authority to implement new ones, causing a funding gap for any new TBDs. In the case of Washington, its clearer code and aware public lead to more public involvement in the ballot process, but to the detriment of transit funding. The funding problem this has created for the Washington transit authorities to solve is an ongoing problem. The political side of funding transit with enhanced public awareness and process participation must include responsiveness by the legislature to taxpayer affordability and needs, or simplifying the code structure will not be worthy exercise.

Part of the problem may be a lack of substantial interest in litigating these issues. Special treatment of individual classes and locales can frequently benefit them. The harms of this sort of legislation are difficult to foresee or understand with regard to transit services during the district creation process. Residents who would benefit from a planning perspective from conformity between jurisdictions may not know why their local jurisdiction has an inefficient transportation district or transit that does not connect to neighboring counties. They may not make the intellectual connections between lengthy commutes, congestion, and taxes.

Taxpayers are learning how to get more involved but often miss a window. The structure of a state's code affects how taxpayers can make themselves heard and effect change. Those that depend on transit do not often have any other alternatives for transportation and need more than just commuter services.<sup>306</sup> If the transit-dependent group is not aware of how government has structured transit or how local government initiatives work, they may not know how to respond when services are being reduced in their area or funding is being cut for transit, as happened in Baltimore.<sup>307</sup> The law on district formation and governance can affect long-range transit plans and commuter route choices, and shape the evolution of those routes over time. For example, in

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<sup>304</sup> RCW 81.112; <https://apps.leg.wa.gov/rcw/default.aspx?cite=81.112>

<sup>305</sup> RCW 36.73

<sup>306</sup> <https://www.governing.com/topics/transportation-infrastructure/gov-public-transportation-riders-demographic-divide-for-cities.html>

<sup>307</sup> <https://usa.streetsblog.org/2020/07/01/op-ed-why-baltimore-needs-its-own-rta-to-achieve-real-transit-justice/>

Maryland, the law does not authorize local revenue sources specifically for transportation and the state law is structured so that hurdles exist if a city wants to control its own regional transit choices<sup>308</sup> or if voters want to use a charter initiative rather than the legislative process to effect changes.<sup>309</sup> Public awareness and accountability for legislators is key in stopping special legislation that may harm transit planning.

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<sup>308</sup> Section 2. General Assembly to provide grant of express powers; extension, modification, etc., of such powers, Md. Const. art. XI-A, § 2 (Statutes current through legislation effective July 10, 2020).

<sup>309</sup> See Md. Const. art. III Sec. 33 and *Cedlair Corp.*, 287 Md. 595, 415 A.2d 255 (1980) on restrictions on charter initiatives—allowing the voters to exercise the full range of the city’s express powers through the charter initiative rather than the legislative process would plainly involve an excessive exercise of those precisely limited powers granted to the city, and specifically to the city council in its representative capacity.