

1-1-2009

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Recommended Citation

James Alcorn, *Recent Developments in Absentee Voting*, 12 RICH. J.L. & PUB. INT. 283 (2008).

Available at: <http://scholarship.richmond.edu/pilr/vol12/iss4/4>

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RECENT DEVELOPMENTS IN ABSENTEE VOTING

James Alcorn

I. INTRODUCTION

With the votes cast and counted, the political signs down, and the final dollars tallied, most people were glad to have election season behind them. For the election community, however, the groundwork for future decisions was beginning anew. The 2009 session of the Virginia General Assembly again saw a large number of bills related to election administration.¹ Included in those were a large number of absentee voting bills.² For the last fifteen years, legislators have introduced numerous bills related to absentee voting, and roughly half of these bills have succeeded.³ While the rest of the country considers large election reform such as vote centers and all vote-by-mail, Virginia cautiously makes incremental reform by adding permissible reasons for absentee voting.

II. THE DEVELOPMENT OF ABSENTEE VOTING IN VIRGINIA

Virginia's absentee voting schema dates back to the Civil War, when members of the Virginia or Confederate armed services, absent from their homes because of the "presence of the public enemy," were permitted to vote absentee.⁴ Absentee voting became more widespread a half century later, when many states permitted soldiers to vote absentee

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1. See Legislative Information System, Bill Tracking: Bills and Resolutions, 2009 Session: Elections, <http://leg1.state.va.us/cgi-bin/legp504.exe?091+sbj+024> (last visited Apr. 5, 2009).

2. See *id.*

3. See Legislative Information System, Bill Tracking: Bills and Resolutions, Elections (1995–Present), <http://leg1.state.va.us/cgi-bin/legp504.exe?000+sbj+024> (last visited Apr. 5, 2009) [hereinafter Legislative Information System, Elections].

4. Act of Mar. 26, 1863, ch. 36, 1863 Va. Acts 71.

during World War I.⁵ Like several other states, Virginia questioned the constitutionality of absentee voting, but it was upheld by the Supreme Court of Virginia.⁶ Once upheld, Virginia, in the early 1900s, implemented a more expansive absentee voting program than nearby states.⁷ The purpose of Virginia's absent voters law was to increase voter participation by permitting voters who were eligible, but unable to vote in their polling place on election day, to cast absentee ballots.⁸ This early program did not contain modern protections and securities, inviting concerns of absentee fraud, further scrutiny, and calls to repeal the entire absentee voters program.⁹

In the last fourteen years, legislators introduced more than one hundred bills in the General Assembly addressing absentee voting.¹⁰ The 2009 session included fifteen bills to expand absentee voting out of nearly one hundred election-related bills.¹¹ Of those fifteen bills, the General Assembly adopted only two.¹² Nine of the failed bills called for no-excuse absentee or early voting.¹³ None of those bills passed the

5. See *Commonwealth ex rel. Dummit v. O'Connell*, 181 S.W.2d 691, 695 (Ky. 1944); *Clark v. Nash*, 234 S.W. 1, 2 (Ky. 1921); *Jenkins v. State Bd. of Elections*, 104 S.E. 346, 347-48 (N.C. 1920); *Moore v. Pullem*, 150 Va. 174, 183-84, 142 S.E. 415, 418 (1928).

6. *Goodwin v. Snidow*, 150 Va. 54, 55, 142 S.E. 423, 424 (1928); *Moore*, 150 Va. at 190, 193-94, 196, 200, 142 S.E. at 420-23. The *Moore* court held that an offer to vote did not require the physical presence of the voter at the polls. *Moore*, 150 Va. at 190-93, 142 S.E. at 420-21. The court discussed the legislature's unrestricted power within specific constitutional limits to determine the methods of election within the state. *Id.* at 196, 142 S.E. at 421-22.

7. Compare VA. CODE ANN. § 24-319 (1950) (currently codified at VA. CODE ANN. § 24.2-700 (Cum. Supp. 2008)) (permitting absentee voting by voters who are absent from their precinct for personal affairs), with N.C. GEN. STAT. §§ 163-64, 163-70, 163-77 (1952), KY. REV. STAT. ANN. § 126.140 (West 1955), TENN. CODE ANN. § 1-1602 (Cum. Supp. 1969) (requiring residents to be out of their county to vote absentee), and W. VA. CODE § 135 (1955) (requiring residents to expect to be out of the state to vote absentee).

8. While the creation of absentee voting was for the noble purpose of permitting military soldiers to vote, the widespread adoption of absentee voting is due to the work of the Travelers Protective Association. In an era of depressed civic engagement, the Association's members did not wish to lose their ability to vote while traveling for business. See *Moore*, 150 Va. at 183-84, 142 S.E. at 418; *Absentee Voting*, N.Y. TIMES, July 3, 1916, available at http://query.nytimes.com/mem/archive-free/pdf?_r=2&res=9C02E4DF1E3FE233A25750C0A9619C946796D6CF.

9. H.B. 26, Va. Gen. Assembly (Reg. Sess. 1950) (as introduced by the H. Committee on Privileges and Elections on Jan. 16, 1950).

10. See Legislative Information System, Elections, *supra* note 3.

11. See Legislative Information System, Bill Tracking: Bills and Resolutions, *supra* note 1.

12. See H.B. 1877, Va. Gen. Assembly (Reg. Sess. 2009), ¶ 1, § 24.2-700(10) (enacted as Act of Mar. 27, 2009, ch. 405, 2009 Va. Acts ___; S.B. 1070, Va. Gen. Assembly (Reg. Sess. 2009), ¶ 1, § 24.2-700(10) (enacted as Act of May 6, 2009, ch. 873, 2009 Va. Acts ___).

13. See H.B. 1620, Va. Gen. Assembly (Reg. Sess. 2009), ¶ 1, § 24.2-700.1 (as introduced Jan. 14, 2009); H.B. 1621, Va. Gen. Assembly (Reg. Sess. 2009), ¶ 1, § 24.2-700 (as introduced Jan. 14, 2009); H.B. 1644, Va. Gen. Assembly (Reg. Sess. 2009), § 1, § 24.2-700.1 (as introduced Jan. 14, 2009); H.B. 1894, Va. Gen. Assembly (Reg. Sess. 2009), ¶ 1, § 24.2-700 (as introduced Jan. 14, 2009); H.B. 2110, Va. Gen. Assembly (Reg. Sess. 2009), ¶ 1, § 24.2-700.1 (as introduced Jan. 14, 2009); H.B. 2301, Va. Gen. Assembly (Reg. Sess. 2009), ¶ 1, § 24.2-700 (as introduced Jan. 14, 2009); S.B. 810, Va. Gen.

House Committee on Privileges and Elections.¹⁴ The lone success was a pair of bills to expand absentee voting to first responders.¹⁵

Electoral reform happens slowly and incrementally. The General Assembly has expanded absentee voting in several ways over the last fourteen years. These changes include granting emergency absentee ballots to any voter who becomes ill and is confined to his residence;¹⁶ any voter who suffers the loss of a spouse, parent, or child;¹⁷ any voter with a business emergency;¹⁸ and any voter otherwise incapacitated by an emergency found by the electoral board to justify providing an emergency absentee ballot application.¹⁹ Additionally, the period for a person to request an emergency absentee ballot before the election was extended from five to seven days.²⁰ The General Assembly granted absentee ballots for voters who were hospitalized or who had an immediate member of their family hospitalized.²¹ It also allowed absentee ballots in the event of a death in the voter's immediate family or in the event of late assignments for an officer of elections.²² Absentee ballots for members of the armed forces were expanded to include all unformed services,²³ and absentee ballots were granted to

Assembly (Reg. Sess. 2009), ¶ 1, § 24.2-700 (as introduced Jan. 14, 2009); S.B. 819, Va. Gen. Assembly (Reg. Sess. 2009), ¶ 1, § 24.2-700.1 (as engrossed Feb. 6, 2009).

14. Legislative Information System, Bill Tracking: HB1620, [http://leg1.state.va.us/cgi-bin/legp504.exe?](http://leg1.state.va.us/cgi-bin/legp504.exe?ses=091&typ=bil&val=hb1620)

[ses=091&typ=bil&val=hb1620](http://leg1.state.va.us/cgi-bin/legp504.exe?ses=091&typ=bil&val=hb1620) (last visited May 16, 2009); Legislative Information System, Bill Tracking: HB1621, <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=091&typ=bil&val=hb1621> (last visited May 16, 2009); Legislative Information System, Bill Tracking: HB1644, <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=091&typ=bil&val=hb1644> (last visited May 16, 2009); Legislative Information System, Bill Tracking: HB1894, <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=091&typ=bil&val=hb1894> (last visited May 16, 2009); Legislative Information System, Bill Tracking: HB2110, <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=091&typ=bil&val=hb2110> (last visited May 16, 2009); Legislative Information System, Bill Tracking: HB2301, <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=091&typ=bil&val=hb2301> (last visited May 16, 2009); Legislative Information System, Bill Tracking: HB2307, <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=091&typ=bil&val=hb2307> (last visited May 16, 2009); Legislative Information System, Bill Tracking: SB810, <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=091&typ=bil&val=sb810> (last visited May 16, 2009); Legislative Information System, Bill Tracking: SB819, <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=091&typ=bil&val=sb819> (last visited May 16, 2009).

15. See Act of Mar. 27, 2009, ch. 405, 2009 Va. Acts ___ (to be codified at VA. CODE ANN. § 24.2-700(10)).

16. Act of Mar. 16, 1996, ch. 224, 1996 Va. Acts 420 (codified at VA. CODE ANN. § 24.2-705).

17. *Id.*

18. Act of Mar. 16, 1997, ch. 464, 1997 Va. Acts 701 (codified at VA. CODE ANN. § 24.2-705.1).

19. Act of Mar. 16, 1996, ch. 224, 1996 Va. Acts 420 (codified at VA. CODE ANN. § 24.2-705).

20. Act of Mar. 27, 1999, ch. 590, 1999 Va. Acts 910 (codified at VA. CODE ANN. § 24.2-705).

21. Act of Mar. 25, 2001, ch. 622, 2001 Va. Acts 766 (codified at VA. CODE ANN. § 24.2-705).

22. *Id.*

23. Act of Mar. 10, 1995, ch. 157, 1995 Va. Acts 235 (codified at VA. CODE ANN. § 24.2-700). The practical effect of this bill was to include the United States Public Health Service Commissioned Corps and the National Oceanic and Atmospheric Administration Commission Corps. See 10 U.S.C. §

those who work eleven or more of the thirteen hours that polls are open.²⁴ The General Assembly also expanded provisions for those who had religious objections²⁵ and for those whose employment required that they temporarily reside outside the continental limits of the United States.²⁶ They further included commuting time in the provision permitting a voter with a long work day to vote absentee.²⁷ Additional absentee provisions were made for voters who are pregnant²⁸ and all voters whose disabilities fall under the Virginians with Disabilities Act.²⁹

In addition to the above changes, there have been many other attempts to expand absentee voting.³⁰ The most common approach seeks no-excuse or early voting. As Virginia debates incremental expansion of absentee voting, other states move toward no-excuse absentee voting.³¹ There are currently thirty-two states that permit some version of no-excuse absentee or early voting.³² Since 1995, there have been twenty-eight bills for no-excuse absentee or early voting in Virginia.³³ The majority of these bills never made it out of committee, and none have ever made it out of the House Privileges and Elections Committee.³⁴ Legislators introduce some issues multiple times before the General Assembly eventually adopts them. The following

101(a)(5) (2006).

24. Act of Apr. 4, 2000, ch. 378, 2000 Va. Acts 528 (codified at VA. CODE ANN. § 24.2-700). The introduced version of the bill provided that a registered voter was entitled to time off to vote if his work schedule did not afford him at least three hours to vote either before or after his work shift. S.B. 315, Va. Gen. Assembly (Reg. Sess. 2000), ¶ 1, § 24.2-603.1 (as introduced Jan. 19, 2000).

25. Act of Apr. 7, 1998, ch. 254, 1998 Va. Acts 377 (codified at VA. CODE ANN. § 24.2-700). This measure was the result of a registrant who was an Orthodox Jew directed by her rabbi not to enter a Christian house of worship, which was her polling place, to cast her ballot.

26. Act of Apr. 8, 2002, ch. 819, 2002 Va. Acts 1988 (codified at VA. CODE ANN. § 24.2-420.1).

27. Act of Mar. 25, 2001, ch. 631, 2001 Va. Acts 773 (codified at VA. CODE ANN. § 24.2-700).

28. Act of Mar. 6, 2008, ch. 425, 2008 Va. Acts 613 (codified at VA. CODE ANN. § 24.2-700).

29. Act of May 12, 2008, ch. 880, 2008 Va. Acts 3139 (codified at VA. CODE ANN. § 24.2-101).

30. See, e.g., Associated Press, *Lawmakers Draft Plans to Expand Early and Absentee Voting Options*, WASH. POST, Dec. 28, 2008, at C3; *Kaine Backs Early Voting*, WASH. POST, Jan. 11, 2009, at LZ06.

31. Domenico Montanero, *Can Early Voting Ease Election Day Drama?*, NBC NEWS, Sept. 24, 2008, available at <http://www.msnbc.com/id/26854757/> ("The number of states offering no-excuse, in-person early voting is also on the rise.")

32. Early Voting Info. Ctr. at Reed Coll., *Absentee and Early Voting Laws*, <http://earlyvoting.net/states/abslaws.php> (last visited May 16, 2009).

33. See Legislative Information System, Elections, *supra* note 3.

34. See Legislative Information System, Bill Tracking: HB309, <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=081&typ=bil&val=hb309> (last visited May 16, 2009); Legislative Information System, Bill Tracking: HB2153, <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=051&typ=bil&val=hb2153> (last visited May 16, 2009); Legislative Information System, Bill Tracking: HB2781, <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=011&typ=bil&val=hb2781> (last visited May 16, 2009); Legislative Information System, Bill Tracking: HB2792, <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=011&typ=bil&val=hb2792> (last visited May 16, 2009); Legislative Information System, Bill Tracking: SB1226, <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=051&typ=bil&val=sb1226> (last visited May 16, 2009).

expansions of absentee voting have been introduced in the last few years but not yet adopted: persons sixty-five or older;³⁵ persons who home-school or care for pre-school and school-aged children;³⁶ and persons who volunteer for eleven or more of the thirteen hours that polls are open.³⁷

While the Virginia General Assembly has yet to embrace a no-excuse absentee voting program, campaigns and voters have increased their reliance upon absentee voting. Absentee voting has grown in popularity, both in Virginia and across the country.³⁸ A record number and percentage of Virginia voters decided to vote absentee in the 2008 presidential election. Out of the 3,752,858 voters who participated in the 2008 Virginia presidential election, 506,672 submitted absentee ballots.³⁹ This is the largest number and percentage of absentee voters in a Virginia election and nearly double the previous high for absentee voter participation.⁴⁰ The percentage of voters casting absentee ballots has risen steadily from 4.72% in 1996, 5.39% in 2000, 6.89% in 2004, to 13.57% in 2008.⁴¹

Virginia now tracks twenty-four different reasons for absentee voting, each reason varying in popularity from over one hundred thousand users to single digit users.⁴² Five of the twenty-four absentee reasons account

35. H.B. 1582, Va. Gen. Assembly (Reg. Sess. 2005), ¶ 1, §§ 24.2-700(10), 24.2-701(C)(13) (as introduced Jan. 12, 2005); H.B. 587, Va. Gen. Assembly (Reg. Sess. 2006), ¶ 1, §§ 24.2-700(10), 24.2-701(C)(13) (as introduced Jan. 11, 2006); H.B. 2911, Va. Gen. Assembly (Reg. Sess. 2007), ¶ 1, §§ 24.2-700(10), 24.2-701(C)(13) (as introduced Jan. 10, 2007).

36. S.B. 838, Va. Gen. Assembly (Reg. Sess. 2005), ¶ 1, §§ 24.2-700(7), 24.2-701(C)(10) (as introduced Jan. 12, 2005).

37. H.B. 2069, Va. Gen. Assembly (Reg. Sess. 2007), ¶ 1, §§ 24.2-700(9), 24.2-701(C)(12) (as introduced Jan. 10, 2005); H.B. 1069, Va. Gen. Assembly (Reg. Sess. 2008), ¶ 1, §§ 24.2-700(9), 24.2-701(C)(12) (as introduced Jan. 9, 2008).

38. PEW CTR. ON THE STATES, ELECTION 2008 IN REVIEW, <http://www.pewcenteronthestates.org/uploadedFiles/ElectioninReviewPDF%20Final.pdf> (last visited Apr. 4, 2009) (“Experts predicted as many as a third of all ballots would be cast before Election Day, a rise from [twenty] percent in 2004, [fifteen] percent in 2000, and a huge increase from only [seven] percent in 1992. And while those predictions might have been a bit high, the preliminary data suggests that nearly [thirty] percent of votes—an estimated [thirty-eight] million—were cast before Election Day.”).

39. Va. State Bd. of Elections, November 2008 Official Results, https://www.voterinfo.sbe.virginia.gov/election/DATA/2008/07261AFC-9ED3-410F-B07D-84D014AB2C6B/Official/95_s.shtml (last visited May 16, 2009) [hereinafter Va. State Bd. of Elections, Official Results].

40. Va. State Bd. of Elections, Summary of Virginia Registration and Turnout Statistics, http://www.sbe.virginia.gov/cms/Statistics_Polling_Places/Registration_Statistics/voting_statistics.html (last visited May 16, 2009) [hereinafter Va. State Bd. of Elections, Summary]. The previous high for absentee voter participation was 6.89% of voter turnout in 2004. *See id.*

41. Va. State Bd. of Elections, Official Results, *supra* note 39; Va. State Bd. of Elections, Summary, *supra* note 40.

42. VA. STATE BD. OF ELECTIONS, 2008 GENERAL ELECTION MEDIA FACT SHEET 11, http://www.sbe.virginia.gov/cms/documents/Public_Notices/General_Election_Fact_Sheet-Final-

for more than eighty-five percent of all absentee ballots, but only fourteen percent of all ballots cast.⁴³ The remaining nineteen reasons are used by less than fifteen percent of all absentee voters and two percent of all voters.⁴⁴ Some absentee reasons were used by only one voter each in the last election; these voters were literally one in a million.⁴⁵ The most recent expansion of absentee voting for the 2008 presidential election permitted an additional 2372 pregnant voters to vote absentee and was used by less than one percent of all absentee voters.⁴⁶

III. ABSENTEE VOTING AS A SPECIAL LAW

Every legislative session, the General Assembly considers the merits of another expansion of the absentee voting privilege. Each new reason is meant to somehow expand the use of absentee ballots. But the decision on each expansion appears to be arbitrary to even the closest observer.

The Constitution of Virginia prohibits the General Assembly from enacting certain local, special, or private laws.⁴⁷ The prohibition on special laws was first introduced in the 1902 constitution to correct the perception that the General Assembly spent too much time furthering private interests at the expense of more important, general issues.⁴⁸ A general law is one that has the possibility to affect all similar citizens and places within the Commonwealth equally.⁴⁹ Giving effect to this prohibition is no easy task, and the courts have heard multitudes of cases concerning this topic. In doing so, the Virginia Supreme Court has developed lengthy jurisprudence to evaluate special laws.

While the Constitution prohibits special legislation, it does not

PDF.pdf (last visited May 16, 2009) (listing each of the twenty-four reasons why people applied for absentee ballots).

43. *Id.*; Va. State Bd. of Elections, Official Results, *supra* note 39. The absentee reasons were personal business or vacation, disability or illness, business, student, and working on election day. VA. STATE BD. OF ELECTIONS, *supra* note 42; Va. State Bd. of Elections, Official Records, *supra* note 39.

44. *See* VA. STATE BD. OF ELECTIONS, *supra* note 42; Va. State Bd. of Elections, Official Results, *supra* note 39.

45. VA. STATE BD. OF ELECTIONS, *supra* note 42. Reasons “6F-Early Ballot-Military-Spouse/Dependent-Overseas” and “6G-A US Citizen Temporarily Residing Outside the US” were each requested by one voter a piece. *Id.*

46. *Id.*

47. VA. CONST. art. IV, § 14.

48. A.E. HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 536–37 (1974) (citing RALPH C. MCDANIEL, VIRGINIA CONSTITUTIONAL CONVENTION OF 1901–1902, at 88–89 (1928)).

49. *See* *Martin Ex’rs v. Commonwealth*, 126 Va. 603, 612, 102 S.E.2d 77, 80 (1920); *see also* VA. CONST. art. IV, §§ 14–15.

prohibit against classifications or laws that only affect small percentages of individuals.⁵⁰ A classification “must not be purely arbitrary. It must be natural and reasonable, and appropriate to the occasion. There must be some such difference in the situation of the subjects of the different classes as to reasonably justify some variety of rule in respect thereto.”⁵¹ Additionally, special legislation would violate the Virginia Constitution if it created arbitrary separations.⁵² The court has also said, “A law is ‘special’ in a constitutional sense when by force of an inherent limitation it arbitrarily separates some persons, places[,] or things from those upon which, but for such separation, it would operate.”⁵³

The true 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.⁵⁴ When legislation that affects a particular class is called into question, the test is whether there is some difference in the situation of the subjects of the classes so as to reasonably justify the classification.⁵⁵ What may be an appropriate classification in one situation may be an arbitrary classification in another situation. For example, an act that used population density as a classification related to the regulation of trailer parks was arbitrary whereas population density as a classification as to whether a trial judge should be appointed was appropriate.⁵⁶ It must be clear that classification and not designation is the purpose of any separation.⁵⁷

50. *Ex parte Settle*, 114 Va. 715, 718–19, 77 S.E. 496, 497 (1913) (“Laws may be made to apply to a class only, and that class may be in point of fact a small one, provided the classification itself be a reasonable, and not an arbitrary, one, and the law be made to apply to all of the persons belonging to the class without distinction.”); see *Diantonio v. Northampton-Accomack Mem’l Hosp.*, 628 F.2d 287, 292 (4th Cir. 1980) (holding that the Virginia Medical Malpractice Act does not violate the Virginia Constitution and constitutes a valid legislative classification since a law may apply to a small class so long as the classification is reasonable and the law applies equally to all persons within the class).

51. *Martin Ex’rs*, 126 Va. at 612, 102 S.E. at 80.

52. *Id.* at 610, 102 S.E. at 79 (“[A]n arbitrary separation of persons, places, or things of the same general class, so that some of them will and others of them will not be affected by the law, is of the essence of special legislation.”).

53. *Quesinberry v. Hull*, 159 Va. 270, 277, 165 S.E. 382, 384 (1932) (quoting *Budd v. Hancock*, 48 A. 1023, 1024 (N.J. 1901) (“This definition undoubtedly strikes at the foundation of the subject, for an arbitrary separation of persons, places or things of the same general class, so that some of them will and others of them will not be affected by the law, is of the essence of special legislation.”)).

54. *Bray v. County Bd.*, 195 Va. 31, 37, 77 S.E.2d 479, 482 (1953); *Green v. County Bd.*, 193 Va. 284, 288, 68 S.E.2d 516, 518 (1952); *County Bd. of Supervisors v. Am. Trailer Co.*, 193 Va. 72, 79, 68 S.E.2d 115, 120 (1951); *Martin Ex’rs*, 126 Va. at 612, 102 S.E. at 80.

55. *Martin Ex’rs*, 126 Va. at 612, 102 S.E. at 80 (“There must be some such difference in the situation of the subjects of the different classes as to reasonably justify some variety of rule in respect thereto.”); see *Polglaise v. Commonwealth*, 114 Va. 850, 864–65, 76 S.E. 897, 901–02 (1913).

56. *Compare Am. Trailer Co.*, 193 Va. at 80–81, 68 S.E.2d at 121, with *Ex parte Settle*, 114 Va. 715, 716, 77 S.E. 496, 498 (1913).

57. *Martin Ex’rs*, 126 Va. at 612, 102 S.E. at 80.

Laws may be enacted as general laws but be rendered special by subsequent and repeated amendments. The Virginia Constitution provides safeguards against such changes by amendment, partial repeal, exemption, or suspension of a general law.⁵⁸ The courts have said, “though an act be general in form, if it be special in purpose and effect, it violates the constitutional prohibition.”⁵⁹ A recent example of a general law morphing into a special law is the Sunday closing laws.

The Sunday closing laws survived for over three hundred years and began with the religious purpose to require every person to “repair in the morning to the divine service.”⁶⁰ It prohibited all Sunday labor or business except “work of necessity or charity.”⁶¹ The General Assembly on numerous occasions added exemptions to the Sunday closing law. By 1988, the statute contained a general prohibition against Sunday labor, but granted exemptions “to all transactions conducted by over [sixty] ‘industries or businesses’... grouped in [twenty-two] categories of exemptions.”⁶² One category, covering “festival market places” permitted local governing bodies to determine whether to exempt privately-owned shopping centers if they were the site of a public “gathering” and more than fifty percent of its sales were for otherwise exempt activities.⁶³ The law survived several challenges until a court reviewed it as a special law in 1988.⁶⁴ In reviewing the Sunday closing laws, the court first asked whether it “affect[ed] all persons similarly situated or engaged in the same business throughout the state without discrimination.”⁶⁵ The answer was a resounding and obvious “no.” The court then asked whether the “statutory scheme, as applied, [bore] a reasonable and substantial relationship to the object sought to be accomplished by the legislation.”⁶⁶

The Constitution of Virginia grants the General Assembly the authority to regulate the manner and conduct of elections, so long as it does not contradict any constitutional provisions.⁶⁷ The constitution

58. VA. CONST. art. IV, § 15.

59. *Benderson v. Sciortino*, 236 Va. 136, 150, 372 S.E.2d 751, 758 (1988).

60. *Mandell v. Haddon*, 202 Va. 979, 988, 121 S.E.2d 516, 523 (1961).

61. *Id.* at 982, 121 S.E.2d at 519.

62. *Benderson*, 236 Va. at 142, 372 S.E.2d at 754.

63. *Id.* at 143, 372 S.E.2d at 754.

64. *Mandell*, 202 Va. at 993, 121 S.E.2d at 527 (upholding the Sunday closing laws).

65. *Benderson*, 236 Va. at 148, 372 S.E.2d at 757 (citing *Mandell*, 202 Va. at 991, 121 S.E.2d at 525).

66. *Id.* at 149, 372 S.E.2d at 757 (citing *Mandell*, 202 Va. at 991, 121 S.E.2d at 525).

67. VA. CONST. art. II, § 4 (“The General Assembly shall provide for the nomination of candidates, shall regulate the time, place, manner, conduct, and administration of primary, general, and special elections, and shall have power to make any other law regulating elections not inconsistent with this Constitution.”); *Moore v. Pullem*, 150 Va. 174, 199, 142 S.E. 415, 422 (1928).

contains a specific prohibition against special legislation concerning the conduct of elections.⁶⁸ The prohibition on special laws regulates the manner in which an election is conducted, such as the “time of opening and closing of the polls, the selection of the judges of election, and the many other matters relating to the conduct of elections.”⁶⁹ This prohibition does not extend to all laws impacting elections such as a city council’s power to reapportion or select the method of nominating candidates for council office.⁷⁰ The process by which one casts a ballot and the provision regulating who is eligible to participate in an election are fundamental to the conduct of elections and are thus covered by the scope of the Virginia Constitution’s prohibition against special legislation.⁷¹

When the absentee laws are general in purpose, the classifications appear to be arbitrary and unreasonable. Absentee voting is available in all jurisdictions in the Commonwealth but only for certain voters who would be in the same class were it not for an arbitrary separation of voters. Similar to the classification of certain businesses and industries for the purposes of the Sunday closing laws, the classifications in absentee voting appear to be arbitrary and unreasonable. Examples of arbitrary classifications within the absentee laws are plentiful. For example, people who work full-time jobs for eleven of the thirteen hours that the polls are open can vote absentee.⁷² However, a person

68. VA. CONST. art. IV, § 14 (“The General Assembly shall not enact any local, special, or private law . . . for registering voters, conducting elections, or designating the places of voting.”).

69. *Porter v. Joy*, 188 Va. 801, 805–06, 51 S.E.2d 156, 158 (1949) (quoting Appellee’s brief: “The section merely forbids local law for conducting elections and designating the places of voting. This refers to the manner in which an election is conducted. There are many general provisions concerning elections such as preparation of the ballots, the marking of the same, keeping of the ballot boxes, the keeping of poll lists, the opening and counting of the ballots and numerous other provisions for the secrecy and safety of elections. The framers of the Constitution wanted to make certain that these general provisions should not be interrupted or interfered with by local laws permitting a man to mark a ballot by one method in one county and another in another or permitting one type of ballot in one and another in another or having different regulations touching on any of the essential matters concerning an election in different parts of the state.”); *Quesinberry v. Hull*, 159 Va. 270, 277, 165 S.E. 382, 384 (1932) (upholding a law regarding the election of a trial judge in Carroll County but did not discuss the scope of the prohibition on special laws regarding the conduct of elections).

70. *Davis v. Dusch*, 205 Va. 676, 684, 139 S.E.2d 25, 30 (1964) (holding the provision of a charter restricting a city council’s power to reapportion has nothing to do with the manner of conducting any election and consequently does not fail because of the provisions of this section). This prohibition was clearly not intended as a restriction upon the power of the General Assembly to provide what offices in a county should be filled by election. *Porter*, 188 Va. at 805, 51 S.E.2d at 157; 1970 Op. Va. Atty. Gen. 115 (Feb. 4, 1970).

71. Even if special legislation on the same topic is not explicitly prohibited by the enumerated list in article four, section fourteen of the Virginia Constitution, the amendment of any general law cannot be used as a device to enact special, private, or local laws. VA. CONST. art. IV, § 15; HOWARD, *supra* note 48, at 548.

72. VA. CODE ANN. § 24.2-700 (Repl. Vol. 2006).

who volunteers full-time for eleven of the thirteen hours that the polls are open is not permitted to vote absentee.⁷³ Similarly, a person who is the primary caregiver of an ill or disabled family member can vote absentee.⁷⁴ However, a stay-at-home parent who is the primary caregiver for young children is not permitted to vote absentee.⁷⁵ Also, members of an electoral board, registrars, and officers of election are permitted to vote absentee, but members of the State Board of Elections are not permitted to vote absentee.⁷⁶ Additionally, if a voter's family member is hospitalized in Maryland between noon on Saturday and 2:00 p.m. on the Monday before an election, a voter can vote absentee in-person.⁷⁷ However, if the same family member is hospitalized in Pennsylvania, the voter is not eligible for such absentee voting.⁷⁸

Subjective exceptions to permit absentee voting exist beyond the arbitrary classifications. Similar to the local governing bodies' ability to subjectively classify and exempt a shopping center as a "festival market place," the local electoral board may subjectively determine whether a person is incapacitated and may receive an emergency absentee ballot.⁷⁹

The appropriate standard in undertaking a constitutional analysis under the due process clause and the equal protection clause is examining whether there were any conceivable facts existing at the time of the enactment that would render the challenged legislation reasonable.⁸⁰ If the purpose of the expanded absent voters law was to increase voter turnout among eligible voters, it is difficult to conceive of any reason to exclude some registered voters.⁸¹ A more narrow reading that absentee laws facilitate voting by allowing people who cannot go to the polls on election day to vote in advance does not explain the arbitrary exclusions of otherwise eligible voters. Each of the various reasons for absentee voters appears facially related to attainment of the legislative goal. The record is devoid of any reasons why the law permits some to vote

73. Compare *id.*, with H.B. 2069, Va. Gen. Assembly (Reg. Sess. 2007), ¶ 1, § 24.2-700 (as introduced Jan. 8, 2005), and H.B. 1069, Va. Gen. Assembly (Reg. Sess. 2008), ¶ 1, § 24.2-700 (as introduced Jan. 9, 2008).

74. VA. CODE ANN. § 24.2-700 (Repl. Vol. 2006).

75. Compare *id.*, with S.B. 838, Va. Gen. Assembly (Reg. Sess. 2005), ¶ 1, § 24.2-700 (as introduced Jan. 10, 2005).

76. VA. CODE ANN. § 24.2-700(6) (Repl. Vol. 2006).

77. *Id.* § 24.2-705.1.

78. *Id.*

79. *Id.*

80. *King v. Va. Birth-Related Neurological Injury Comp. Program*, 242 Va. 404, 411–12, 410 S.E.2d 656, 661 (1991) (holding that legislation that does not affect a constitutionally protected status, such as a fundamental right, will be upheld against a due process challenge if such legislation is rationally related to a legitimate legislative purpose).

81. See *supra* note 8.

absentee and not others. Similar to the various exceptions to the Sunday closing law, none of the reasons for absentee voting appear improper, but their combined effect reduces the application of a general law to the kind of special legislation prohibited by the Virginia Constitution.

IV. CONCLUSION

Electoral systems need to be stable and secure; therefore, electoral reform generally moves at glacial speeds. While other states consider and implement no-excuse absentee and early voting, Virginia continues to create additional reasons for absentee ballots. Virginia's absentee voting schema has slowly expanded from a few reasons for an absentee ballot to twenty-four different reasons. While each of the reasons for an absentee ballot seem facially related to the original purposes of the absent voters law, together the combined effect separates otherwise similar, eligible voters. When one looks at the growth in absentee voting and compares the current absentee schema in Virginia to the Sunday closing laws, one only has to wonder how long it will be before absentee voting laws go the way of the old blue laws in Virginia.

