Preserving the Virginia Constitution's Prohibition on Special Legislation

*Conor D. Woodfin**

Introduction

"State courts have authority to construe their own constitutional provisions however they wish."[1] Sixth Circuit Judge Jeffrey Sutton argues that when a state supreme court analyzes a state constitutional provision with an analogous federal constitutional provision, the justices should interpret the provisions independently.[2] This Comment builds on Judge Sutton's recent book and a growing body of scholarship by applying the general principle to a particular case: the Supreme Court of Virginia should independently interpret Article IV, section 14 of the Constitution of Virginia. Section 14 contains Virginia's prohibition on special legislation—a provision common in many state constitutions but entirely foreign to the US Constitution.[3] Rather than surrendering interpretation of this provision to the US Supreme Court, Virginia should "jealously reserve the right under [its] state constitutional provisions to reach results different from current United States Supreme Court precedent . . . ."[4] Some states look to their own courts' precedent rather than that of the federal courts when analyzing a provision in their state constitution that has an analogous provision in the federal constitution.[5] Where there is no

* J.D. 2020, Antonin Scalia Law School, George Mason University; B.S. 2017, Hillsdale College. Thank you to Professor David Bernstein for insightful comments; Travis Royer for helpful guidance; and Harrisson Kummer, Miranda Isaacs, Lea Schild, and the George Mason Law Review editors for outstanding work in bringing this Comment to publication.

1 JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS 16 (2018).

2 *Id.*

3 Justin R. Long, *State Constitutional Prohibitions on Special Laws*, 60 CLEV. ST. L. REV. 719, 741–42 (2012).

4 *See* State v. Ingram, 914 N.W.2d 794, 799 (Iowa 2018).

5 For example, the Iowa Constitution contains search and seizure protections materially identical to those of the Fourth Amendment. *Compare* U.S. CONST. amend. IV, *with* IOWA CONST. art. I, § 8. Despite the nearly identical provisions, the Iowa Supreme Court recently asserted its "right under [its]

analogous federal provision, as in the case of Article IV, section 14 of the Virginia Constitution, the Virginia Supreme Court has no excuse not to interpret the Virginia Constitution on its own terms.

Virginia currently follows a "more extreme lockstep approach," applying federal precedent to state claims even if the text of the federal provision is substantially different from the text of the Virginia provision.[6] For example, the Virginia Supreme Court applies the federal equal protection doctrine to claims under Virginia's own equal protection clause.[7] This practice effectively nullifies independent Virginian rights.[8] The Virginia Supreme Court has, for example, abolished independent analysis of search and seizure protections,[9] double jeopardy protections,[10] due process rights,[11] and free speech rights.[12] As Virginia Supreme Court Justice Stephen McCullough aptly observed, the Constitution of Virginia is vanishing.[13]

One area that remains independent from federal jurisprudence (for the time being) is Virginia's prohibition on special legislation.[14] Article IV, section 14 of the Virginia Constitution restricts the power of the

---

state constitutional provisions to reach results different from current United States Supreme Court precedent under parallel provisions." *Ingram*, 914 N.W.2d at 799.

[6] Eric M. Hartmann, *Preservation, Primacy, and Process: A More Consistent Approach to State Constitutional Interpretation in Iowa*, 102 IOWA L. REV. 2265, 2290 n.10 (2017).

[7] *See* Willis v. Mullett, 561 S.E.2d 705, 708–09 (Va. 2002).

[8] Stephen R. McCullough, *A Vanishing Virginia Constitution?*, 46 U. RICH. L. REV. 347, 348 (2011). Virginia's approach has also been called "prospective lockstepping" because the state supreme court announces that it will follow future US Supreme Court pronouncements on the analogous federal provision rather than merely applying the current precedent to the case at hand. *See* Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499, 1509 (2005).

[9] Sidney v. Commonwealth, 702 S.E.2d 124, 126 (Va. 2010) (holding that Fourth Amendment rights "are co-extensive with those rights afforded under Article 1, section 10 of the Constitution of Virginia").

[10] Stephens v. Commonwealth, 557 S.E.2d 227, 230 (Va. 2002) ("Virginia's constitutional guarantee against double jeopardy affords a defendant the same guarantees as the federal Double Jeopardy Clause.").

[11] *Willis*, 561 S.E.2d at 708 ("The due process guarantees of Article 1, Section 11 of the Constitution of Virginia are virtually the same as those of the United States Constitution.").

[12] Elliott v. Commonwealth, 593 S.E.2d 263, 269 (Va. 2004) ("We take this opportunity to declare that Article I, § 12 of the Constitution of Virginia is coextensive with the free speech provisions of the federal First Amendment.").

[13] McCullough, *supra* note 8, at 348.

[14] *Id.* at 356.

legislature to pass special laws.[15] The purpose of this provision is to ensure that the legislature passes laws of general applicability.[16] The distinction between general and special legislation is largely one of degree[17]: On one end of the spectrum, a purely general law would be one that applies uniformly throughout the entire state; few statutes would ever pass muster under this definition.[18] On the other end of the spectrum, a purely special law would be one that explicitly targets a particular individual or group in its text.[19] The definition of a purely special law is closer to what the drafters of these provisions had in mind,[20] but a workable standard likely lies between the broad and narrow definitions.

Many state constitutions contain prohibitions on special laws, but they are steadily vanishing.[21] Because special law challenges are often accompanied by concurrent due process and equal protection claims, many state courts simply collapse the analysis.[22] These courts apply the extraordinarily deferential rational basis test to special legislation challenges,[23] effectively stripping the provisions of any force.[24] Meanwhile, attempts to keep the special legislation analysis distinct from equal

---

15 *See infra* text accompanying notes 51–55 for the full text of the provision. For purposes of this Comment, "special law" will be shorthand for "local, special, or private law." Most of the literature on the subject treats "local, special, and private laws" as a single unit. *See* Long, *supra* note 3, at 724. This Comment does not examine the differences between the three types primarily because the courts have not given weight to these differences. *Cf. id.* ("Intuitively, local laws are those confined in their application to a geographic subunit of the state, while special laws are those that favor a particular corporation or person without reference to location. Sometimes, legislatures might wish to bestow public benefits on a class narrowly defined by both geography and corporate identity, such as funding a particular company to build a bridge in a specified place; this legislation would presumably implicate both the 'special' and 'local' constitutional notions.").

16 *See* Long, *supra* note 3, at 723.

17 *See* Ferguson v. Ross, 27 N.E. 954, 955 (N.Y. 1891).

18 *See* R. S. H., *Special Legislation in Virginia*, 42 VA. L. REV. 860, 861 (1956).

19 *Cf. id.*

20 Anthony Schutz, *State Constitutional Restrictions on Special Legislation as Structural Restraints*, 40 J. LEGIS. 39, 43–48 (2013) (concluding that the history of special legislation provisions reveals an attempt to curtail individualized treatment by the legislature).

21 John Martinez, *Constitutional Provisions—Conceptual Categories and Textual Variations*, 1 LOCAL GOV'T L. § 3:23 (2020) (providing a current list of state constitutions that contain prohibitions on special legislation).

22 *See* Long, *supra* note 3, at 761 (By reading both the Fourteenth Amendment and the special legislation provisions as essentially the same "species of equality law," the courts justify unification of the doctrines.).

23 *Id.* at 719.

24 *Id.* at 761.

protection have been criticized as illogical and unpredictable.[25] Unfortunately, there is no indication that states are willing to take up more "activist" interpretations of their special legislation provisions.[26]

Virginia might very well follow suit and once again surrender independent constitutional analysis on an important constitutional provision. Currently, Virginia examines challenges under Article IV, section 14 by looking at the classifications made by the statute.[27] A classification that bears a "reasonable and substantial relation" to the regulated object is general, while one that does not is special and therefore unconstitutional.[28] Equal protection analysis has been creeping into the Virginia courts. The Virginia Court of Appeals stated that Virginia's prohibition against special legislation "track[s] the minimum rationality requirements employed by longstanding due process and equal protection doctrines."[29] The Virginia Supreme Court has yet to approve this dictum,[30] and it should avoid doing so.

This Comment aims to convince Virginia courts to interpret a unique state constitutional provision independently rather than deferring to a court with no concern for—and no authority to interpret—the Virginia Constitution. Although only the Virginia Supreme Court can restore an independent analysis of the special legislation provision, the lower courts might still avoid the final, fatal step of declaring the equal protection and special legislation doctrines one and the same.

Parts I and II provide a background of special legislation in Virginia. Part I provides an overview the history of the special legislation prohibition in the Virginia Constitution. It traces the development of the text through multiple revisions of the constitution and the debates that surrounded the enactment of the modern provision. Part II analyzes key Virginia cases concerning the special legislation provision. It discusses the fundamental principles applied by the court and the ultimate confusion with the equal protection doctrine.

Parts III and IV contend that the Virginia Supreme Court should reassert independence regarding its interpretation of the prohibition on special legislation. Part III argues that the history and text of Article IV,

---

25 *Id.*

26 *Id.* at 722.

27 *See* Willis v. Mullett, 561 S.E.2d 705, 709 (Va. 2002).

28 *Id.*

29 Laurels of Bon Air, LLC v. Med. Facilities of Am. LIV Ltd. P'ship, 659 S.E.2d 561, 568 (Va. Ct. App. 2008).

30 *But see Willis*, 561 S.E.2d at 709 ("[W]e apply the so-called 'rational basis' test in reviewing its constitutionality under due process, equal protection, and special legislation provisions.").

section 14 support an independent analysis of the provision. Part IV argues that the provision is reconcilable with modern equal protection and offers several interpretive frameworks that maintain the independence of the Virginia Constitution .

I. The History of Special Legislation in Virginia

The text and history of Virginia's prohibition on special legislation reveal a purpose entirely distinct from that of the federal Equal Protection Clause. Section A provides a textual analysis of prohibitions on special laws in Virginia's early constitutions. The early provisions reveal concerns about separation of powers and individualized treatment. Section B looks at Virginia's 1902 Constitutional Convention, the most well-documented discussion of the provision. Most of Virginia's modern special legislation provision comes from the 1902 Constitution, so the convention debates serve as a helpful guide to understanding special laws today.

A. *The Textual Development of the Prohibition on Special Legislation*

The prohibition on special laws first appeared in Virginia's Constitution in 1851.[31] Early restrictions acted as structural limitations on the legislature, preventing it from passing individualized legislation that infringed on the jurisdiction of the courts. The original section 35 provided:

> The general assembly shall confer on the courts the power to grant divorces, change the names of persons, and direct the sale of estates belonging to infants and other persons under legal disabilities, *but shall not, by special legislation, grant relief in such cases*, or in any other case of which the courts or other tribunals may have jurisdiction.[32]

The text of section 35 reads as a separation-of-powers restriction that prevents the legislature from intruding on the jurisdiction of the courts.[33] It likely began as an attempt to prohibit the legislature from granting divorces.[34] John Letcher proposed the following resolution on January 7, 1851: "*Resolved*, That the said committee inquire into the expediency of

---

31 VA. CONST. of 1851, art. IV, § 35.

32 *Id.* (emphasis added).

33 *See* Dan Friedman, *Applying Federal Constitutional Theory to the Interpretation of State Constitutions: The Ban on Special Laws in Maryland*, 71 MD. L. REV. 411, 443 (2012) (concluding from the Maryland constitutional convention debates that the delegates intended the Maryland special legislation provision as "a support to the separation of powers").

34 Long, *supra* note 3, at 726.

prohibiting the Legislature from granting divorces."[35] The convention considered the resolution about a month later.[36] Rather than strike this power from the Constitution outright, the final provision shifted it from the legislature to the courts.[37] Section 35 therefore more closely resembles a separation-of-powers provision than a restriction on the substance of legislation.[38] Even understood as a substantive legislative prohibition, its scope is considerably limited.

Meaningful restrictions on special legislation did not appear until 1870.[39] Article VI, section 20 of the Virginia Constitution of 1870 states: "General laws shall be passed for the organization and government of cities, and no special act shall be passed, except in cases where, in the judgment of the general assembly, the object of such act cannot be attained by general laws."[40] This provision is both restrictive and deferential[41]: On one hand, it mandates that "no special act shall be passed, except in cases where . . . the object of such act cannot be attained by general laws."[42] This seems to require an analysis of whether some alternative, more general law could apply.[43] In other words, it requires the highest level of generality possible rather than the lowest level tolerable—quite a restrictive mandate. On the other hand, the provision removes this judgment from the courts. The exception applies according to "the judgment of the general assembly."[44] From a court's perspective, this is very deferential indeed.[45] Regardless of whether a court concludes that the

---

35 REG. OF THE DEBATES AND PROCS. OF THE VA. REFORM CONVENTION 57 (1851).

36 *Id.* at 223.

37 *See* VA. CONST. of 1851, art. IV, § 35.

38 *See* Long, *supra* note 3, at 729.

39 *See* VA. CONST. of 1870, art. VI, § 20. Virginia adopted another intermediate constitution in 1864, but this version contained no changes to the special legislation provisions of the 1851 Constitution. *See* VA. CONST. of 1864, art. VI, § 20.

40 VA. CONST. of 1870, art. VI, § 20.

41 Curiously, though this provision explicitly restricts the General Assembly, it appears in section VI of the Constitution concerning the Judiciary. *See* VA. CONST. of 1870, art. VI, § 20. The convention later moved the provision to its own section. *See* VA. CONST. of 1902, art. VIII, § 117.

42 VA. CONST. of 1870, art. VI, § 20.

43 Constance Van Kley, *Article V, Section 12 of the Montana Constitution: Restoring Meaning to a Forgotten Provision*, 79 MONT. L. REV. 115, 143 (2018) (arguing that Montana's special legislation provision demands this exact interpretation); *see also* MONT. CONST. art. V, § 12 ("The legislature shall not pass a special or local act when a general act is, or can be made, applicable.").

44 VA. CONST. of 1870, art. VI, § 20; *cf.* MONT. CONST. art. V, § 12 (lacking any deference to the legislature's judgment).

45 *Cf.* ALASKA CONST. art. II, § 19 ("Whether a general act can be made applicable shall be subject to judicial determination."); ILL. CONST. art. IV, § 13; MICH. CONST. art. IV, § 29; MINN. CONST. art. XII, § 1.

object could have been "attained by general laws," it must defer to the legislature's judgment.[46] Finally, this provision extended only to the "organization and government of cities,"[47] a common limitation in nascent special legislation provisions.[48]

The modern version of the prohibition on special legislation did not emerge until 1902. The 1902 Virginia Constitution added a longer list onto the 1851 prohibitions, vastly expanding the number of areas in which the legislature could not pass special laws.[49] The 1902 constitutional provisions are virtually identical to those in Virginia's current constitution,[50] so only the modern version, as it appears in Article IV, section 14 of today's Virginia Constitution, is included here:

> The General Assembly shall not enact any local, special, or private law in the following cases:
>
> (1) For the punishment of crime.
>
> (2) Providing a change of venue in civil or criminal cases.
>
> (3) Regulating the practice in, or the jurisdiction of, or changing the rules of evidence in any judicial proceedings or inquiry before the courts or other tribunals, or providing or changing the methods of collecting debts or enforcing judgments or prescribing the effect of judicial sales of real estate.
>
> (4) Changing or locating county seats.
>
> (5) For the assessment and collection of taxes, except as to animals which the General Assembly may deem dangerous to the farming interests.
>
> (6) Extending the time for the assessment or collection of taxes.
>
> (7) Exempting property from taxation.
>
> (8) Remitting, releasing, postponing, or diminishing any obligation or liability of any person, corporation, or association to the Commonwealth or to any political subdivision thereof.
>
> (9) Refunding money lawfully paid into the treasury of the Commonwealth or the treasury of any political subdivision thereof.
>
> (10) Granting from the treasury of the Commonwealth, or granting or authorizing to be granted from the treasury of any political subdivision thereof, any extra compensation to any public officer, servant, agent, or contractor.
>
> (11) For registering voters, conducting elections, or designating the places of voting.

---

46 It is worth noting that New Jersey is the only other state that also designates the legislature as the arbiter for when a special law might be appropriate. *See* N.J. CONST. art. IV, § 7, ¶ 9; *see also* ME. CONST. art. IV, Pt. 3, § 13 ("The Legislature shall, from time to time, provide, *as far as practicable*, by general laws, for all matters usually appertaining to special or private legislation." (emphasis added)).

47 VA. CONST. of 1870, art. VI, § 20.

48 Schutz, *supra* note 20, at 45–46.

49 VA. CONST. of 1902, art. VIII, § 117.

50 *Compare* VA. CONST. of 1902, art. IV, § 64, *with* VA. CONST., art. IV, § 14.

> (12) Regulating labor, trade, mining, or manufacturing, or the rate of interest on money.
>
> (13) Granting any pension.
>
> (14) Creating, increasing, or decreasing, or authorizing to be created, increased, or decreased, the salaries, fees, percentages, or allowances of public officers during the term for which they are elected or appointed.
>
> (15) Declaring streams navigable, or authorizing the construction of booms or dams therein, or the removal of obstructions therefrom.
>
> (16) Affecting or regulating fencing or the boundaries of land, or the running at large of stock.
>
> (17) Creating private corporations, or amending, renewing, or extending the charters thereof.
>
> (18) Granting to any private corporation, association, or individual any special or exclusive right, privilege, or immunity.
>
> (19) Naming or changing the name of any private corporation or association.
>
> (20) Remitting the forfeiture of the charter of any private corporation, except upon the condition that such corporation shall thereafter hold its charter subject to the provisions of this Constitution and the laws passed in pursuance thereof.[51]

Section 14 substantially strengthened the 1870 constitutional provision. First, section 14 replaced the deferential language referencing the judgment of the General Assembly with a flat admonition that "[t]he General Assembly shall not enact any local, special, or private law . . . ."[52] Second, the convention vastly expanded the cases to which the prohibition applies; while the 1870 Constitution applied only to "the organization and government of cities,"[53] the new section 14 applies to nineteen other areas of law.[54]

The convention also included section 15, which contains additional restrictions regarding special legislation:

> In all cases enumerated in the preceding section, and in every other case which, in its judgment, may be provided for by general laws, the General Assembly shall enact general laws. Any general law shall be subject to amendment or repeal, but the amendment or partial repeal thereof shall not operate directly or indirectly to enact, and shall not have the effect of enactment of, a special, private, or local law.
>
> No general or special law shall surrender or suspend the right and power of the Commonwealth, or any political subdivision thereof, to tax corporations and corporate property, except as authorized by Article X. No private corporation, association, or individual shall be specially exempted from the operation of any general law, nor shall a

---

51 VA. CONST. art. IV, § 14.

52 *Id.*

53 VA. CONST. of 1870, art. VI, § 20.

54 *See* VA. CONST. art. IV, § 14.

> general law's operation be suspended for the benefit of any private corporation, association, or individual.[55]

Section 15 accomplishes several things. The first sentence directs the General Assembly to pass general laws not merely in the enumerated categories but "in every other case which, in *its* judgment, may be provided for by general laws."[56] The convention moved this language from the 1902 Constitution to apply to all other legislation not covered by the enumerated cases; this directive notably applies only to the legislature, not the courts. Section 15 instructs that laws not falling into any of the enumerated categories must be general, *provided that* the Assembly in *its judgment* finds a general law appropriate. The text specifically references the General Assembly's judgment, taking the question out of the hands of the judiciary.[57] Section 15 therefore acts as a sort of canon of construction, directing the General Assembly not to construe the provision as an exhaustive list.

The rest of section 15 is more mundane. The second sentence extends the general-law mandate to amendments and repeal. If a law is general but the amendment of the law would have the effect of reducing it to a special law, then the amendment violates the provision. The third sentence prohibits the General Assembly from surrendering its power of taxation, and the fourth prohibits the General Assembly from exempting individuals or corporations from a law. Taken together, sections 14 and 15 significantly reduced the power of the legislature to pass special laws.[58] The 1971 Constitution and later amendments changed little regarding the special legislation prohibition.[59]

---

55 *Id.* § 15.

56 *Id.* (emphasis added).

57 *See supra* notes 44–46 and accompanying text.

58 The 1902 Constitution also established a special legislation committee to determine whether proposed legislation conformed with the new requirements of the constitution. *See* VA. CONST. of 1902, art. IV, § 51.

59 Most notably, the new constitution eliminated the standing committee on special legislation and renumbered the sections. *Compare* VA. CONST. art. IV, § 14, *with* VA. CONST. of 1902, art. IV, § 63. The first new paragraph added a legislative vesting clause and a couple canons of construction concerning the scope of legislative authority. *See* VA. CONST. art. IV, § 14. The second new paragraph, added in 1994, explicitly granted the General Assembly power to govern the application of statute of limitations to intentional torts committed against a minor. *See* VA. CONST. art. IV, § 14; 1994 Va. Acts 1270. In 2005, the Assembly struck the last paragraph prohibiting the "grant of a charter of incorporation to any church or religious denomination." 2005 Va. Acts 1861. The most recent amendment has yet to be adopted, but as proposed would insert the following paragraph into section 14:

> The General Assembly may suspend or nullify any or all portions of any administrative rule or regulation by a joint resolution agreed to by a majority of the members

B. *The 1902 Constitutional Convention*

The history of Virginia's 1902 Constitutional Convention provides insight into the original understanding of Virginia's special legislation provision. The Committee on the Legislative Department submitted a report to the Convention on August 28, 1901, recommending several changes to Article IV of the Virginia Constitution.[60] William G. Robertson, a member of the Committee on the Legislative Department, spoke on the general purpose of the special legislation provision.[61] Mr. Robertson began by reading the provision in the existing constitution.[62] He lamented that the current provision was "restricted with reference to a very few matters," and "confined practically to the sale of infants' lands, . . . to divorces, . . . and to other matters where jurisdiction had been given to the courts."[63] He thus proposed a list that would greatly expand the cases in which the General Assembly would be prohibited from passing local or special laws.[64]

Mr. Robertson offered three principle justifications for the expanded list. First, he stated that it is the duty of the legislature to pass general laws and "look[] after the interests of the Commonwealth *generally* . . . ."[65] To ensure that the Assembly fulfill their duty of passing general laws, the Committee thought it necessary to restrict the power of the legislature to do otherwise.[66] The expanded list prevented the legislature from passing special legislation respecting "a large number of subjects . . . that our Legislatures have been called upon to deal with."[67] The purpose was "to

---

> elected to each house. The General Assembly may by general law authorize a legislative committee or legislative committees acting jointly or a legislative commission to suspend any or all portions of any administrative rule or regulation while the General Assembly is not in a regular session, within such restrictions and upon such conditions as may be prescribed. An administrative rule or regulation suspended by such committee or commission shall be suspended until the end of the next regular session.

2017 Va. Acts 1403.

60 *See* REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION, STATE OF VIRGINIA, HELD IN THE CITY OF RICHMOND, JUNE 12, 1901, TO JUNE 26, 1902, at 188–94 (1906) [hereinafter 1902 CONVENTION].

61 *See id.* at 651.

62 *Id.*; *see also* VA. CONST. of 1870, art. VI, § 20.

63 1902 CONVENTION, *supra* note 60, at 651.

64 *Id.*

65 *Id.* (emphasis added).

66 *Id.*

67 *Id.*

have general laws with reference to all such subjects."[68] Thus, the proposal's supporters specifically intended to bind the legislature.

Second, the Committee intended this provision to combat the pervasive problem of lobbyists. Mr. Robertson claimed that "one of the greatest evils which has surrounded our Legislature has been the presence of the lobby . . . ."[69] The interests of the corporations that lobby for special legislation were, he argued, counter to the interests of the people of Virginia.[70] The allowance of special laws encouraged lobbyists to seek individualized favors with little regard for the general welfare of Virginia residents. The special legislation provision would cut down on the passage of individualized laws and at least partially solve the lobbying problem.

Third, special laws consumed the time and attention of the legislature, and the Committee thought them inappropriate subjects for the consideration of the General Assembly. "[T]he greatest evil," in fact, was "that the time of the members has been taken up with paltry, trivial matters, that no Legislature of a great State ought ever to have to deal with."[71] Members of the Assembly regularly proposed special legislation to deal with local problems.[72] The new provision would restore this time to the Assembly so that they could focus on passing legislation applicable to the entire state, and the localities could address their own unique problems.[73]

After Mr. Robertson finished his opening remarks, the floor opened for debate. Nearly the entire discussion centered on the provision prohibiting special legislation "[a]uthorizing the opening, working, altering, maintaining or vacating of roads, highways, streets, alleys, town plats, cemeteries, graveyards, or public grounds not owned by the State."[74] Though limited to this single enumerated case, the debate over special road legislation illustrates the Convention members' understanding of special legislation.

The debate began when J. Thompson Brown of Bedford County[75] submitted an amendment rewording the provision to exclude roads and highways.[76] Mr. Brown believed it was a mistake to "tak[e] out of the hands

---

68 *Id.* at 652.

69 1902 CONVENTION, *supra* note 60, at 651.

70 *Id.* at 652.

71 *Id.*

72 *Id.* at 661.

73 *Id.* at 652.

74 *See id.* at 656–82.

75 1902 CONVENTION, *supra* note 60, at 2.

76 *Id.* at 658.

of the Legislature the power to enact special road laws."[77] The problem, as supporters of the amendment saw it, was twofold. First, the supporters argued that road laws required special legislation. Virginia is a geographically diverse state that renders the subject of roads wholly unsuitable to government by general laws.[78] Beverly A. Hancock, representing Chesterfield, Manchester, and Powhatan Counties, argued that "the very fact that hundreds of applications for special laws have been made to the General Assembly in the last twenty or thirty years indicates a general dissatisfaction with a general road law."[79]

Second, the supporters argued that the General Assembly was the appropriate body to pass the local road legislation, not local boards. The Boards of Supervisors charged with passing local laws in their respective counties had difficulty agreeing what needed to be done about the roads.[80] Samuel P. Waddill of Henrico County claimed "that the people of a county are so divided in opinion as to what should and what should not be done that you cannot get them to agree upon any proposition . . . ."[81] Mr. Hancock added that special laws allow the General Assembly to consider the needs of surrounding counties, which is something the local boards would not do.[82] The proposed solution was one of expediency[83]: the General Assembly could pick up where local boards had failed by passing special road laws.[84]

While the amendment's supporters argued from practicality, its opponents staked their argument on principle. Both sides agreed that special laws were necessary to accommodate the needs of the various counties.[85] While the amendment's supporters argued that this power

---

77 *Id.*

78 *Id.*

79 *Id.* at 664.

80 *Id.* at 658.

81 1902 CONVENTION, *supra* note 60, at 661.

82 *See id.* at 664.

83 *Id.* at 672 ("I see no reason why we should be governed by a mere matter of sentiment which is urged in favor of leaving everything to the local authorities, on the theory of bringing it as close as possible to the people, if it is not a practical thing to do.").

84 *Id.* at 658–59. Others bolstered Brown's argument by pointing to the success of Virginia's roads as the result of special laws passed by the Assembly. *Id.* at 659.

85 *See id.* at 671 ("Sir, I claim that we do need local legislation. There can be no question about that. It is admitted by all gentlemen on this floor, even the ardent advocate of the report, the gentleman from Brunswick (Mr. Turnbull) must admit, that owing to the varied and local conditions throughout the State of Virginia, local laws relating to the maintenance and operation of public roads are absolutely necessary. The question is how are we going to arrive at those local laws. Shall we

should remain with the General Assembly, Robert Turnbull of Brunswick County[86] argued that the "county authority should have the right to work their roads as they think proper," because "if there is one subject that the county authority can act on intelligently it is how to work the roads in their own county."[87] Mr. Turnbull rested his argument on the principle that "if a member of the Legislature comes down here and proposes a law which is not suitable to all of the people it ought not to be passed."[88] Rev. Richard McIlwaine aptly summarized the point:

> [B]y this continual legislative action in regard to work within counties you are interfering with local self-government, and, if I understand it, the doctrine of local self-government lies at the very foundation of republican government. . . . Are we to let one man come from the county as its representative in the Legislature and because he and a clique in the county think that such and such legislation ought to be adopted is he to get the Legislature to pass action which is mandatory upon those people, without their knowledge and without their consent?[89]

The Reverend's statement gets to the heart of the debate: special laws allow a few delegates from a county to invoke the power of the General Assembly against the county's consent. Special legislation was the proper province of the localities, not the state legislature.

Although Mr. Brown's amendment passed by a 40–26 vote, the Convention ultimately struck the clause barring special legislation for roads, streets, and similar projects from the new Constitution entirely.[90] For roads, at least, the Convention concluded that the General Assembly should be able to pass special legislation.

The text and history of Virginia's special legislation provision reveal a concern for individualized lawmaking and a growing skepticism of legislative interest in public welfare. The provision is rooted in both principle and practicality to limit the power of the General Assembly and strengthen local autonomy.

---

depend upon the Legislature of Virginia for legislation for road purposes, or shall we go to a board of supervisors . . . ?").

86 *Id.* at 2.

87 1902 CONVENTION, *supra* note 60, at 660.

88 *Id.* at 661; *see also id.* at 665–66 ("[T]o reply to a remark of the gentleman from Rockingham (Mr. Keezell) that the people in the different parts of the county cannot agree as to how these improvements shall be made in the different parts of the county, the people must learn how to do that. We learned it in Prince Edward. . . . It seems to me, sir, that the question is an absolutely simple one that has to be solved. . . . [T]he people of the counties must learn to agree with one another as to what is the most important improvement to make, then what comes next, and then what comes next.").

89 *Id.* at 673.

90 *Id.* at 682.

II. Virginia's Special Legislation Jurisprudence

Virginia's special legislation provision currently suffers from an "ongoing discursive poverty" that is the result of the court's failure to develop "independent constitutional discourse."[91] Federal equal protection doctrine has not brought clarity to the provision, as this Part will show. Instead, the importation of rational basis has muddled the special legislation analysis. Virginia courts' jurisprudence over the years is confusing and lacks a consistent thread of reasoning. This Part nevertheless attempts to outline some fundamental principles that have guided the courts through the special legislation provision.

Given the absence of a constitutional definition, the judiciary is tasked with defining local, special, and private laws.[92] Virginia courts have repeatedly cited "the most satisfactory short definition" of special legislation,[93] originally articulated by the Supreme Court of New Jersey:

> 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 limitation, it would operate. The test of a special law is the appropriateness of its provisions to the objects that it excludes.[94]

The operative test is whether a law imposes an "arbitrary separation." Virginia identifies an arbitrary separation according to "general principles of law and general rules of statutory construction rather than upon definitions or precedants."[95] Virginia's test for an arbitrary separation is whether the legislation "bears a reasonable and substantial relation to the object sought to be accomplished by the legislation."[96] In other words, the court looks to the legislative reasons for a classification.[97] Because "[e]very presumption is made in favor of the constitutionality of an act of the Legislature,"[98] the court defers to the legislature concerning the "necessity for and the reasonableness of classification."[99] Mirroring the logic

---

91 *See* Long, *supra* note 3, at 721.

92 R. S. H., *supra* note 18, at 861.

93 Martin's Ex'rs v. Commonwealth, 102 S.E. 77, 79 (Va. 1920); *see also* R. S. H., *supra* note 18, at 861.

94 Budd v. Hancock, 48 A. 1023, 1024 (N.J. 1901).

95 *Martin's Ex'rs*, 102 S.E. at 79.

96 Willis v. Mullett, 561 S.E.2d 705, 709 (Va. 2002) (citation and internal quotations omitted).

97 *Martin's Ex'rs*, 102 S.E. at 80.

98 *Ex parte* Settle, 77 S.E. 496, 497 (Va. 1913).

99 *Martin's Ex'rs*, 102 S.E. at 80.

underlying rational basis review,[100] the court has held that the legislature need not provide a reason for the classification; the court may constructively assign a reason it deems plausible.[101] The burden of showing that a classification is arbitrary rests on the party seeking to invalidate the statute.[102]

Notwithstanding this strong presumption in favor of the legislature, Virginia courts have on occasion held statutes unconstitutional that they found contain arbitrary classifications. The most frequent challenges are to statutes that distinguish counties on the basis of population.[103] For example, a law that applies to a single, named county is special legislation.[104] A law that applies different standards to different named counties is also special legislation.[105] Similarly, a law that defines a class so restrictively that it applies to only one locality is special legislation.[106]

Section A outlines several principles that the Virginia Supreme Court applies to special legislation challenges. Section B discusses the role the equal protection doctrine has played in these cases and attempts to explain the confusion of this doctrine and the special legislation analysis. Together, these Sections provide a background of the current state of Virginia special legislation jurisprudence.

A. *Overview of Special Legislation Jurisprudence in Virginia*

The Virginia Supreme Court has developed several fundamental principles regarding the Constitution's special legislation provision. The court recognized early on the basic textual point that the Constitution limits the prohibition on special laws to a set of enumerated subjects.[107] In

---

100 Aaron Belzer, *Putting the "Review" Back in Rational Basis Review*, 41 W. ST. U. L. REV. 339, 339 (2014).

101 *See Martin's Ex'rs*, 102 S.E. at 80.

102 Polglaise v. Commonwealth, 76 S.E. 897, 901 (Va. 1913) (citing a rational basis test applied by the US Supreme Court in Lindsley v. Nat. Carbonic Gas Co., 220 U.S. 61 (1911)).

103 R. S. H., *supra* note 18, at 863–64.

104 Smith v. Bd. of Sup'rs, 165 S.E. 526, 528 (Va. 1932).

105 Shelton v. Sydnor, 102 S.E. 83, 88 (Va. 1920).

106 Shulman Co. v. Sawyer, 189 S.E. 344, 345–46 (Va. 1937) (holding that a statute exempting "cities having a population of not less than one hundred and twenty-five thousand nor more than one hundred and fifty thousand" was a special provision because it applied only to Norfolk). *But cf.* City of Newport News v. Elizabeth City Cty., 55 S.E.2d 56, 63–65 (Va. 1949) (holding that "classifications based on territorial area are justified for the same reason because they reflect the differences in the amount, degree, and character of public service and governmental organization," even when the territorial classification affected only Elizabeth City and Arlington counties).

107 Commonwealth v. Ferries Co., 92 S.E. 804, 805–06 (Va. 1917).

an important break from other states, Virginia rejected the closed class test[108] and established that the fundamental test of a general law is one of classification.[109]

Soon after Virginia adopted its 1902 Constitution, the supreme court held that not every special law is unconstitutional. First, classification is a matter of degree, and not every classification rises to the level of unconstitutionality.[110] Second, the court paid close attention to the enumerated clauses and constrained the special legislation provision to its text. For example, in 1917, the Virginia Supreme Court upheld a statute refunding unlawfully assessed taxes to a corporation.[111] Although the court acknowledged that the statute was indeed special legislation, it held that it did not run afoul of any of the explicit prohibitions in section 14.[112] The act did not violate the Constitution because the act refunded taxes that were *illegally* collected, and the relevant constitutional section prohibits only special legislation "refunding money *lawfully* paid into the treasury."[113] The act was therefore valid—though special—legislation.

Virginia was also quick to dismiss the distinction between an open class and a closed class. In *Martin's Executors v. Commonwealth*,[114] the Virginia Supreme Court upheld a statute that classified counties according to population under the 1910 census in order to establish a basis for fixing the maximum compensation for certain state officers.[115] The court held that the statute did not violate the Virginia Constitution's provision forbidding special laws affecting the compensation of public officers.[116] The petitioners argued that the statute froze the class by basing it on an old census, thereby preventing anyone from joining or leaving the class.[117] The court disagreed and dismissed the distinction between an open and closed class; in so doing, the Virginia Supreme Court rejected an

---

108 *See* Martin's Ex'rs v. Commonwealth, 102 S.E. 77, 81 (Va. 1920); Schutz, *supra* note 20, at 51.

109 *See Ex parte* Settle, 77 S.E. 496, 496 (Va. 1913).

110 *See* Mandell v. Haddon, 121 S.E.2d 516, 525–26 (Va. 1961) ("All classifications import some degree of discrimination, but the legislature is not required to achieve 'mathematical nicety.'" (quoting Lindsley v. Nat. Carbonic Gas Co., 220 U.S. 61, 78 (2011)).

111 Commonwealth v. Ferries Co., 92 S.E. 804, 805–06 (Va. 1917).

112 *Id.*

113 VA. CONST. art. IV, § 14(9) (emphasis added); *Ferries Co.*, 92 S.E. at 805.

114 102 S.E. 77 (Va. 1920).

115 *Id.* at 78.

116 *Id.*; *see also* VA. CONST. art. IV, § 14(14) (previously section 63(14)).

117 *Martin's Ex'rs*, 102 S.E. at 81.

important analytical tool employed by many other courts.[118] The court acknowledged its departure and firmly committed itself to a class legislation test.[119]

The overarching test is whether the classification is arbitrarily narrow with respect to its object.[120] In *Ex parte Settle*,[121] decided in 1913, the Virginia Supreme Court considered a statute providing for the appointment of trial judges "in all counties in this state having a population greater than 300 inhabitants per square mile."[122] Because only Alexandria County had such a large population at the time, the classification seemed extraordinarily narrow.[123] The court nevertheless upheld the statute as general because it determined that the needs of a "thickly settled community" regarding the administration of justice were unique, and therefore Alexandria reasonably required a different standard.[124] Thus, although the class was narrow, the court did not find that it violated section 14 because it was not *arbitrarily* narrow with respect to its object.[125]

Thirty years later, the court departed from *Settle* by holding a similar provision *un*constitutional. *Dean v. Paolicelli*[126] concerned a statute that prevented federal officers and employees from holding office under the Virginia Constitution.[127] An amendment to the statute provided that it shall not be construed "[t]o prevent any United States government employee, otherwise eligible, from holding any office under the

---

118 *See* Schutz, *supra* note 20, at 51 ("A closed class is one to which no objects will be added in the future. The closed-class test has been used to strike down legislation that, for example, ties the classification to historical facts.").

119 *Martin's Ex'rs*, 102 S.E. at 81 (distinguishing language from Kraus v. Lehman, 83 N.E. 714 (Ind. 1908)) (stating that a statute is valid if it "is so framed that other places may come within the classification and operation of the statute on acquiring the necessary population"); *see also* Schutz, *supra* note 20, at 51–52 ("The most common examples [of the closed class test] involve laws related to local governments that apply to cities with a population within a certain range. Such classifications become closed when the legislation limits the population determination to a particular year or a particular census." (citing City of Miami v. McGrath, 824 So. 2d 143 (Fla. 2002); City of Scottsbluff v. Tiemann, 175 N.W.2d 74 (Neb. 1970))).

120 *See* R. S. H., *supra* note 18, at 864.

121 77 S.E. 496 (Va. 1913).

122 *Id.* at 496.

123 *Id.* at 497.

124 *Id.*; *see also* Riddleberger v. Chesapeake W. Ry., 327 S.E.2d 663, 665 (Va. 1985) (interpreting the holding in *Settle* as finding a rational relationship between the population density requirement and the purpose of the statute).

125 *See* R. S. H., *supra* note 1818, at 864.

126 72 S.E.2d 506, 517–18 (Va. 1952).

127 *Id.* at 509.

government of any county in this state having a population in excess of three hundred inhabitants per square mile . . . ."[128] The statute classified according to exact same standard as the one challenged in *Settle*.[129] But, departing from *Settle*, the court held that the statute in *Dean* was an unreasonable and arbitrary exclusion to an otherwise general law; the court provided the unsatisfactory explanation that "[the amendment's] infirmity so patently appears upon its face that the usual presumption of constitutionality of a legislative act does not protect it."[130] The contradiction between *Settle* and *Dean* illustrates the difficulty of the class legislation test.

The class legislation and rational basis tests share the same fundamental difficulty: they require judges to ascertain the purpose (or "object") of the statute.[131] Virginia judges' hesitancy to take a more active role in this judgment led them to maximize the level of deference they gave the legislature.[132] Rational basis affords the legislature similar deference,[133] and thus courts began to confuse the doctrines.

B. *Rational Basis and the Confusion of the Special Laws Doctrine*

The Virginia Supreme Court employed rational basis language early in section 14's history. Committing itself to the class legislation test in *Martin's Executors*, the court stated that "if any state of facts can be reasonably conceived that would sustain [the law], that state of facts at the

---

128 *Dean*, 72 S.E.2d at 509–10; *see also* VA. CONST. of 1902, art. IV, § 64 (applying the prohibition on special laws to amendments that have the effect of turning an otherwise general law into a special law).

129 *Dean*, 72 S.E.2d at 509–10; *Ex parte* Settle, 77 S.E. 496, 496 (Va. 1913).

130 *Dean*, 72 S.E.2d at 517–18; *cf.* Joy v. Green, 76 S.E.2d 178, 183 (Va. 1953) (holding that another section of the same statute allowing federal employees engaged in departmental service to sit on the school board was not an arbitrary classification).

131 Schutz, *supra* note 20, at 75.

132 *See Settle*, 77 S.E. at 497 ("Every presumption is made in favor of the constitutionality of an act of the Legislature. A reasonable doubt as to its constitutionality must be solved in favor of the validity of the law, and the courts have nothing to do with the question whether or not the legislation is wise and proper, as the Legislature has plenary power, except where the Constitution of the state or of the United States forbids, and it is only in cases where the statute in question is plainly repugnant to some provision of the Constitution that the courts can declare it to be null and void.")

133 Schutz, *supra* note 20, at 75–77; *see also* Heller v. Doe, 509 U.S. 312, 320 (1993).

time the law was enacted must be assumed."[134] This is remarkably similar to the rational basis test under the federal equal protection doctrine.[135]

Deferential language percolated through the Virginia courts but did not develop into a full-fledged rational basis test. For example, in *Joyner v. Centre Motor Co.*,[136] the Virginia Supreme Court invalidated a statute that set licensing requirements for car dealers.[137] The statute provided for licenses to sell new and used cars only to dealers who had a manufacturer's franchise.[138] The court found that this was an arbitrary classification that excluded other dealers "who are equally fit and capable of dealing in the subject matter involved."[139] Far from having to conceive of a justification for the law, the court dismissed out of hand the justification provided by the Commissioner.[140] The Commissioner argued that the law's purpose was to prevent frauds upon the public, and the statutory classification was valid because it used dealer franchise contracts as a proxy for determining which dealers were trustworthy.[141] The court acknowledged both that vehicle fraud is a serious problem and that the legislature should be accorded every reasonable deference.[142] The court nevertheless declared the law void as an arbitrary selection because it found no reason to believe that non-franchised car dealers would be any more likely to engage in fraud.[143] "[T]he need for classification and its reasonableness are primarily matters for legislative determination, yet wholly arbitrary selection can never be justified by calling it classification."[144]

Over time, the Virginia Supreme Court began to merge the special legislation analysis with the equal protection doctrine.[145] In 1980, the court invalidated a statutory amendment exempting group insurance policies from certain requirements.[146] The prior law prohibited insurance

---

134 Martin's Ex'rs v. Commonwealth, 102 S.E. 77, 80 (Va. 1920).

135 *See Heller*, 509 U.S. at 320 ("[A]ny reasonably conceivable state of facts that could provide a rational basis for the classification" must be assumed.).

136 66 S.E.2d 469 (Va. 1951).

137 *Id.* at 474.

138 *Id.* at 470.

139 *Id.* at 473.

140 *Id.* at 472.

141 *Id.*

142 *Joyner*, 66 S.E.2d at 473.

143 *Id.* at 473–74.

144 *Id.* at 474.

145 *See* Blue Cross of Va. v. Commonwealth, 269 S.E.2d 827, 838 (Va. 1980); Standard Drug Co. v. Gen. Elec. Co., 117 S.E.2d 289, 296 (Va. 1960).

146 *Blue Cross of Va.*, 269 S.E.2d at 837–38.

companies from denying coverage for services performed by licensed optometrists, opticians, and psychologists.[147] The amendment exempted group commercial insurance policies from this requirement, effectively requiring that the defendant insurance provider be the sole insurer for the named services.[148] The defendant argued that the amendment violated the special legislation provision and equal protection doctrine because it promoted "no legitimate state end."[149] The court agreed.[150] Despite the multiple justifications for the amendment provided by the parties,[151] the court found "no conceivable justification for requiring only one insurer to cover the services of psychologists, optometrists and opticians."[152] The court did not distinguish between the special legislation and equal protection claims, simply holding the amendment invalid.[153]

The Virginia Supreme Court has occasionally attempted to keep special legislation analysis distinct from equal protection analysis. For example, in *Willis v. Mullett*,[154] the court analyzed the section 14 claim separate from the federal claims.[155] *Willis* involved multiple constitutional challenges to Virginia's medical malpractice statute of limitations for minors.[156] Under Virginia law, if an infant is entitled to bring a tort claim the statute of limitations will not toll until the child reaches majority age.[157] The contested statute exempted medical malpractice from the law by requiring that medical malpractice claims be brought on behalf of the infant within two years of the incident giving rise to the claim.[158]

The patient claimed that the statute was unconstitutional under: (1) federal due process; (2) federal equal protection; (3) Virginia due process; (4) Virginia equal protection; and (5) Virginia special legislation.[159] The Virginia Supreme Court merged the due process claims, holding that the

---

147 *Id.*

148 *See* VA. CONST. art. IV, § 15 (applying the prohibition on special laws to amendments that have the effect of turning an otherwise general law into a special law); *Blue Cross of Va.*, 269 S.E.2d at 837.

149 *Blue Cross of Va.*, 269 S.E.2d at 837.

150 *Id.* at 838.

151 Namely, distinctions in tax provisions, reporting requirements, and regulations amounting to a need for the amendment to encourage competition. *See id.* at 837–38.

152 *Id.*

153 *Id.* at 838.

154 561 S.E.2d 705 (Va. 2002).

155 *Id.* at 708.

156 *Id.* at 707.

157 *Id.*

158 *Id.* The medical malpractice exemption contained an exception for children under the age of eight, who have until their tenth birthday to bring the claim. *Id.*

159 *Id.* at 708.

statute did not implicate a fundamental right and passed the rational basis test.[160] The court similarly validated the law under federal equal protection,[161] and it dismissed the state equal protection claim entirely.[162] The court kept the special legislation analysis separate, holding under Virginia precedent that the statute bore a "reasonable and substantial relation to public welfare,"[163] and therefore did not violate section 14.[164] On its face, this analysis seems to preserve the rule from *Ex parte Settle* and subsequent cases that the statute must be sufficiently general with respect to its object.[165] But as the sphere of possible "objects" broadened to include the "public welfare," the *Settle* test lost its teeth.[166]

Virginia jurisprudence in these cases presents an inconsistent application of rational basis. The hook of rational basis scrutiny is that the court must accept "any state of facts" that would justify the legislation.[167] The Virginia Supreme Court has consistently applied this test to special legislation challenges. In *County Board of Supervisors v. American Trailer Co.*,[168] the court declared a special law unconstitutional while recognizing its duty "to indulge every reasonable doubt in favor of the constitutionality of a legislative act and to hold it valid if any state of facts can be reasonably conceived that would sustain it."[169] The court later upheld a statute in *Love v. Lynchburg National Bank & Trust Co.*[170] by quoting almost precisely the same language.[171] Twenty years later in

---

160 *Willis*, 561 S.E.2d at 709–11.

161 *Id.* at 711.

162 *Id.* at 711 n.5 ("Article I, Section 11 of the Constitution of Virginia, the anti-discrimination clause, does not apply to this statute because its classification is based solely on the type of tort claim made by an infant, not his 'religious conviction, race, color, sex, or national origin,' as proscribed in this constitutional provision." (citations omitted)).

163 *Id.* at 711.

164 The court also resolved the due process claims separately after holding that the anti-discrimination clause of Article I, section 11 of the Virginia Constitution did not apply to this statute. *Id.* at 711 n.5. It then held that the statute was valid under the Equal Protection Clause of the Fourteenth Amendment to the US Constitution. *Id.* at 711.

165 *See* Dean v. Paolicelli, 72 S.E.2d 506, 517–18 (Va. 1952); *Ex parte* Settle, 77 S.E. 496, 497 (Va. 1913).

166 *Willis*, 561 S.E.2d at 711.

167 *See* Heller v. Doe, 509 U.S. 312, 320 (1993).

168 68 S.E.2d 115 (Va. 1951).

169 *Id.* at 121.

170 140 S.E.2d 650 (Va. 1965).

171 *Id.* at 653. ("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.").

Riddleberger v. Chesapeake Western Railway,[172] the court again invalidated a special law, this time without even mentioning whether it was employing the "any state of facts" test.[173]

Even in cases where the court purports to imagine "any state of facts" that might support the legislation, it does not afford the legislature quite as much deference as the test might suggest.[174] In *American Trailer Co.*, the court declared unconstitutional a law that effectively exempted Fairfax County from tax regulations concerning trailer lots, allowing Fairfax to levy its own taxes on trailer lots.[175] The proffered legislative justification was that Fairfax adjoins a county with a high population density (i.e., Arlington County), and trailer camps "present problems with respect to schools, health and safety . . . ."[176] The court rejected this justification because it did not account for counties adjoining similarly populous cities.[177] The court reasoned that if trailer lots present health and safety problems, then population density is relevant only to the extent that it means larger trailer lots.[178] But if that is the justification, there is no reason to exclude similarly populated cities.[179] If the court were truly looking for a set of facts to uphold the statute, it could have simply made more of a point of the fact that Arlington was more populous than any of the other counties and applied *Ex parte Settle* to hold that the needs of a "thickly settled community" require a different standard.[180] Instead, the court determined that "[n]othing in the act suggests that to be the case and nothing in this record or out of it has indicated why that should be true."[181] The court did not attempt to justify the statute even though it almost certainly could have. By placing the burden on the state to provide a

---

172 327 S.E.2d 663 (Va. 1985).

173 *See id.* at 667–68. The dissent criticized the lack of deference the majority provided the legislature, quoting both *Love* and *Martin's Ex'rs*. *See id.* at 670 (Cochran, J., dissenting) ("If any state of facts reasonably can be conceived to sustain a challenged statute, that state of facts must be assumed to have existed when the statute was adopted." (citing Love v. Lynchburg Nat'l Bank & Tr. Co., 140 S.E.2d 650, 653 (Va. 1965); Martin's Ex'rs v. Commonwealth, 102 S.E. 77, 80 (Va. 1920))); *see also* Blue Cross of Va. v. Commonwealth, 269 S.E.2d 827, 837–38 (Va. 1980) (using the "any set of facts" test in the context of the police power to determine whether there was a substantial relation between the statute and its object, but not employing the same test when analyzing the special laws provision).

174 McCullough, *supra* note 8, at 356.

175 Cty. Bd. of Supervisors v. Am. Trailer Co., 68 S.E.2d 115, 121 (Va. 1951).

176 *Id.* at 121.

177 *Id.*

178 *Id.*

179 *Id.*

180 *See Ex parte* Settle, 77 S.E. 496, 497 (Va. 1913); *see also Am. Trailer Co.*, 68 S.E.2d at 119 n.1.

181 *Am. Trailer Co.*, 68 S.E.2d at 121.

justification, the court undermined the deferential "any state of facts" test that it purported to employ.

Further confusing the matter, the Virginia Supreme Court occasionally uses the special legislation test as a proxy for whether the statute passes rational basis scrutiny. In *Pulliam v. Coastal Emergency Services of Richmond, Inc.*,[182] the court upheld Virginia's medical-malpractice cap because it bore a "reasonable and substantial relation to the General Assembly's objective to protect the public's health, safety, and welfare by insuring the availability of health care providers in the Commonwealth."[183] Although the court again engaged in separate equal protection analysis, it held that the law passed rational basis review "primarily for the reasons previously enunciated ... regarding special legislation."[184] Whether this means that the tests for the two doctrines are substantially similar or simply that the rational basis test is a lower bar than the special legislation test is unclear.

The Virginia Supreme Court positioned itself to adopt an equal protection framework from the beginning. Early on, the court foreclosed the closed class test and established arbitrary classification as the fundamental test for special legislation. It also adopted a presumption of deference in favor of the legislature. These are the ingredients of rational basis, so it is understandable that the court collapsed the analysis. Nevertheless, these doctrines should remain distinct (and if possible be further distinguished), as Part III argues.

III. Virginia Courts Should Independently Interpret the Constitutional Prohibition on Special Legislation

The Virginia Supreme Court should decouple special legislation analysis from the equal protection doctrine for several reasons. First, textually, the two provisions are entirely different. The US Constitution contains nothing resembling a prohibition on special legislation. Second, the history of the special legislation provision reveals that it was intended to solve a different set of problems than the equal protection doctrine. The amendments reveal an intent to constrain the General Assembly and limit legislative deference. Third, Virginia already has a robust equal protection provision. Interpreting the special legislation provision as a mirror of equal protection is incoherent and renders the special legislation clause

182 509 S.E.2d 307 (Va. 1999).

183 *Id.* at 317; *see also* VA. CODE ANN. § 8.01-581.15.

184 *Pulliam*, 509 S.E.2d at 318.

superfluous. Fourth, employing equal protection principles has harmed, not helped, judicial application of the provision. It is time to bring clarity to this area of Virginia law.

A. *The Textual Distinction*

The most basic difference between the two doctrines is that they share none of the same language. If state court deference to federal interpretations makes any sense at all, it is in the scenario that the federal interpretation is based on similar language. For example, interpreting Virginia's equal protection clause to mean the same thing as the federal Equal Protection Clause has an intuitive rationale—although Judge Sutton takes issue with state court deference even then.[185] But even if interpreting similar language similarly is reasonable, one must consider the inverse: that dissimilar language should be interpreted differently. That is precisely the scenario that section 14 presents; textually, section 14 bears no resemblance to anything in the US Constitution. And if Judge Sutton is correct that deference is unreasonable even when the language is *identical*, then Virginia courts should interpret section 14 without deference to the US Supreme Court. Either way, the Virginia Supreme Court should restore independent interpretation of the special legislation provision.

The text of Article IV, section 14 of the Virginia Constitution is not remotely similar to the text of the Fourteenth Amendment. The textual analysis of the Virginia provision in Part I.A proves this (if a mere reading of the two texts did not). The special legislation provision specifically applies to the legislature, while the Equal Protection Clause does not.[186] Section 14 also applies only to an enumerated set of cases, unlike the Fourteenth Amendment. Moreover, the US Supreme Court has explicitly held that the US Constitution does not contain any prohibition against class legislation.[187] The Supreme Court has thus effectively affirmed the

---

185 *See* SUTTON, *supra* note 1, at 174–78.

186 *Compare* VA. CONST. art. IV, § 14, *with* U.S. CONST. amend. XIV, § 1. This is not to say that the courts have not applied the Equal Protection Clause to the legislature—merely that the Virginia provision is written in active voice as a command to the legislature, while the Equal Protection Clause is not. *See also* Randy Barnett, *Forward: What's So Wicked About Lochner?*, 1 N.Y.U. J.L. & LIBERTY 325, 331 (2005) (arguing that "the Equal Protection Clause is aimed mainly at the executive branch of state governments and mandates that protection of proper laws be provided equally to all persons").

187 *See* District of Columbia v. Brooke, 214 U.S. 138, 149 (1909) ("The defendant in error . . . does not refer to any provision of the Constitution of the United States which prohibits Congress from enacting laws which discriminate in their operation between persons or things.").

thesis of this Comment, so even the most ardent federal-deference advocate must concede that the two provisions mean different things.

Part IV contains a more complete analysis of the special legislation provision. For now, it suffices to say that language conveys meaning, and different language conveys different meaning. Attributing the same meaning to Article IV, section 14 as the Fourteenth Amendment "depart[s] from the words of the law."[188]

B. *The Historical Distinction*

The history of Virginia's prohibition on special legislation discussed in Part I supports interpreting the section 14 claims independently of equal protection claims. William Robertson introduced the provision to combat the growing trend of special legislation.[189] The provision sought to remedy three primary ills: local laws, lobbying, and wasting the time and attention of the legislature. The convention was more concerned with legislation being too specific rather than too arbitrary; what mattered to the convention was whether a law naming specific objects was the proper territory of the legislature, not whether the objects themselves were proper. The debate over the road law amendment illustrates this point. No one at the convention suggested that general road laws were desirable.[190] Everyone agreed on the premise that the object of the special legislation was proper and that roads therefore required special legislation. The contentious point was whether the special road laws were the proper responsibility of the General Assembly or the local governments.[191] The convention concluded that the General Assembly was the proper body for considering special road laws, and it therefore struck the language from the prohibition.[192] But in all the other cases enumerated in the provision, the convention thought the General Assembly ought not pass local, special, or private legislation.

The Equal Protection Clause is not a prohibition on special legislation. Rather, equal protection is concerned with arbitrary classifications.[193] But as the Virginia Constitutional Convention shows,

---

188 ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 56 (2012) (quoting THE DIGEST OF JUSTINIAN book 32, ¶ 69 (Marcellus)).

189 *See* 1902 CONVENTION, *supra* note 60, at 651.

190 *Id.* at 672.

191 *Id.*

192 *Id.* at 682.

193 David E. Bernstein & Ilya Somin, *The Mainstreaming of Libertarian Constitutionalism*, 77 LAW & CONTEMP. PROBS. 43, 53 (2014).

those who drafted the special legislation provision did not care whether classifications were arbitrary. The Convention was concerned with (1) whether a classification was specific, and (2) whether a classification was the proper subject of the General Assembly. A road law that arbitrarily classifies its objects may run afoul of the Equal Protection Clause, but not the prohibition on special legislation. Similarly, a law granting privileges to corporations may not be arbitrary, but it is almost certainly special legislation and therefore not the proper task of the General Assembly.

Additionally, the history of the special legislation provision militates against rational basis deference. The constitutional amendments progressively diminish deference to the legislature. The 1870 Constitution applied to only one category of legislation and deferred to the "judgment of the General Assembly."[194] The modern version simply bars the General Assembly from passing special legislation in twenty different cases.[195] It also requires general legislation in all other cases, and only in those unenumerated cases does it defer to the judgment of the legislature.[196] The history of the provision reveals an intent to expand its application and restrict legislative deference—a history clearly in conflict with rational basis scrutiny. Various interpretations of the special legislation provision are discussed in Part IV.

C. *Virginia Already Has an Equal Protection Clause*

The Virginia Constitution already has a robust equal protection doctrine. Article I, section 11 of the Virginia Constitution guarantees "the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin . . . ."[197] The Virginia Supreme Court applies the federal equal protection framework to Article I, section 11 challenges.[198] The court has also noted that "[t]he due process guarantees of Article I, Section 11 of the Constitution of Virginia are virtually the same as those of the United States Constitution."[199] One might argue that lockstep interpretation is appropriate when the language is so similar. That is, a due process clause in the Virginia Constitution might be coextensive with the Due Process Clause in the US Constitution.

---

194 VA. CONST. of 1870, art. VI, § 20.

195 *See* VA. CONST. art. IV, § 14.

196 *Id.* § 15.

197 VA. CONST. art. 1, § 11.

198 *See* Willis v. Mullett, 561 S.E.2d 705, 708–09 (Va. 2002).

199 *Id.* at 708.

Ditto an equal protection clause. But even if lockstep interpretation is appropriate between similar language, the mere existence of an equal protection doctrine in the Virginia Constitution is evidence that the prohibition on special legislation should not be read merely as a "species of equality law."[200] Lumping together the special legislation analysis with the equal protection analysis is really just "lockstepping" the Virginia Constitution with itself.[201] Tying together the provisions in this way violates the basic maxim that ineffectiveness in textual interpretation should be avoided.[202] Thus, as a textual matter, that the Virginia Constitution already contains an equal protection clause indicates that the prohibition on special legislation probably means something else.

D. *Combining the Doctrines Confuses and Constricts the Rights of Virginians*

As discussed in Part II, the court's interpretation of the special legislation provision is confused. And the more the court looked to equal protection principles, the more confused it became. The Fourteenth Amendment has revealed itself to be an imperfect vessel for the prohibition on special legislation. Supreme Court precedent on the Fourteenth Amendment is an even shoddier construction of an imperfect vessel. If the Virginia Supreme Court wishes to bring clarity and consistency to its own constitution, it must decouple its interpretation of the special legislation provision from the confused and inconsistent equal protection jurisprudence.

Even if the US Supreme Court's Fourteenth Amendment jurisprudence were crystal clear, combining special legislation and equal protection claims into a single analysis constricts Virginians' rights. As Justice McCullough notes, when the Virginia Supreme Court declines to interpret a provision independently, it foregoes the possibility that a broader set of rights is protected.[203] Lockstep interpretation thus effectively nullifies independent Virginian rights.[204] A petitioner challenging a law under both provisions will prevail under the provision that protects a broader set of rights. This is precisely why Judge Sutton encourages petitioners to brief the state and federal claims

200 Long, *supra* note 3, at 761.

201 *See* Williams, *supra* note 8, at 1509.

202 *See* SCALIA & GARNER, *supra* note 188, at 63.

203 McCullough, *supra* note 8, at 348.

204 *Id.*

independently.[205] It is not necessarily certain that interpreting the special legislation provision independently would protect a broader array of rights than the equal protection doctrine would protect (although given the deference of rational basis it is *nearly* certain). But even if the prohibition on special legislation protects a smaller subset of Virginians' rights than equal protection, it does not follow that the two doctrines should be combined. Lockstepping *guarantees* that no additional rights will be protected. An independent analysis at least preserves the possibility that within the "smaller" subset there still may be some right that the Equal Protection Clause would not cover that the prohibition on special legislation would.

IV. Reconciling the Special Legislation Provision with Equal Protection Today

The thesis of this Comment is not merely theoretical; independent analysis of the special legislation provision is consistent with modern equal protection jurisprudence. There are at least three different interpretations of section 14 that would keep it distinct from federal equal protection doctrine. This Section discusses the closed class test, the class legislation test, and the structural restraint interpretation.[206]

A. *The Closed Class Test*

The first tenable doctrine is the closed class test.[207] This is the simplest of the doctrines.[208] Under the closed class interpretation, the definition of a special law has nothing to do with the arbitrariness or narrowness of a classification, but is instead concerned with the ability of objects to join the class in the future.[209] A statute that applies to only one person today might not be special if the statute would (or could) apply to others in the future.[210] A statute that precludes others from falling under its authority is "closed" and therefore special.[211] Recalling an example from Section II.A, in *Martin's Executors v. Commonwealth*, a statute affecting the

205 SUTTON, *supra* note 1, at 202.

206 *See* Schutz, *supra* note 20, at 51–52; *see also* Long, *supra* note 3, at 741–49 (summarizing the various special legislation tests employed by state courts).

207 *See* Schutz, *supra* note 20, at 51.

208 *Id.*

209 *See id.*

210 Long, *supra* note 3, at 745.

211 *Id.*

compensation for public officers was fixed to the 1910 census.[212] The statute closed the class by restricting it to an old census—no one could enter or leave the legislation's classification.[213] Prohibiting this type of "freezing" legislation at least ensures that legislatures are passing laws according to general criteria. This entirely eliminates means-end analysis. Indeed, regardless of the arbitrariness of the classification, "legislatures are free to favor or disfavor economic activity so long as natural persons remain free to enter [the class]."[214]

Although simple and consistent,[215] this interpretation faces several problems. First, the history of Virginia's provision,[216] and the history of special legislation in general, provide little to no support for a closed class test.[217] Second, the closed class test is not consistent with typical special legislation concerns about individual rights or special interest groups.[218] Third, and most important, the Virginia Supreme Court has already dismissed the closed class test.[219] A return to this test would require that the court overturn one of its seminal cases interpreting section 14. Despite these difficulties, adopting the closed class test would still be more coherent than giving up the provision entirely.

B. *The Class Legislation Test*

The class legislation test prohibits arbitrary classification by requiring a relevant relationship between the classification and the purpose of the

---

212 Martin's Ex'rs v. Commonwealth, 102 S.E. 77, 78 (Va. 1920).

213 *Id.* at 81.

214 Long, *supra* note 3, at 747.

215 *See* Schutz, *supra* note 20, at 51.

216 *See supra* Part I.

217 *See* Long, *supra* note 3, at 745 (noting that the closed class test bears some likeness to the "immutable characteristics" doctrine of federal equal protection); *see also* Schutz, *supra* note 20, at 54–56.

218 *See* Schutz, *supra* note 20, at 54–55.

219 *See* Martin's Ex'rs v. Commonwealth, 102 S.E. 77, 81 (Va. 1920) (upholding the legislature's use of a historical census to classify counties and rejecting the petitioners' argument that the law must be able to adjust to changes in population); *compare with* Schutz, *supra* note 20, at 51 ("The closed-class test has been used to strike down legislation that, for example, ties the classification to historical facts. The most common examples involve laws related to local government that apply to cities with a population within a certain range. Such classifications become closed when the legislation limits the population to a particular year or a particular census." (citations omitted)).

statute.[220] This interpretation is most in line with Virginia precedent,[221] and it is therefore substantially similar to current equal protection jurisprudence.[222] The difference between the class legislation test and rational basis scrutiny is mostly one of degree.[223] The distinct test for special legislation would take the form of heightened scrutiny when analyzing the arbitrariness of laws falling within the provision's enumerated subjects. That Virginia already has equal protection principles in its constitution supports this test. If the special legislation provision is to do any work apart from the existing Virginia equal protection doctrine, it might be in the form of heightened scrutiny for classifications on the enumerated subjects.

The enhanced "fair and substantial relationship" test is an example of a stricter class legislation test.[224] Virginia currently follows a "fair and substantial relationship" test,[225] but under the enhanced version of this test the court would not accept "any state of facts," but only those facts "that have substantial basis in actuality."[226] The defendant, not the court, bears the burden of demonstrating a substantial relationship between the statute's means and ends.[227] The court could even go a step further and conduct its own review of the statute to ensure that it "substantially further[ed] the statutory objective."[228] The enhanced test is compelling because it addresses the unique problem of special legislation, that the

---

220 *See* Schutz, *supra* note 20, at 52.

221 Virginia's current test examines whether the law bears "a reasonable and substantial relation to the [regulated] object." *See* Willis v. Mullett, 561 S.E.2d 705, 709 (Va. 2002).

222 Under current equal protection doctrine, the courts examine every legislative classification through means-end review. *See* Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON C.R.L.J. 219, 291 (2009).

223 Schutz, *supra* note 20, at 53.

224 Donald Marritz, *Making Equality Matter (Again): The Prohibition Against Special Laws in the Pennsylvania Constitution*, 3 WIDENER J. PUB. LAW 161, 201–13 (1993).

225 *See Willis*, 561 S.E.2d at 709 (holding that Virginia's test requires a "reasonable and substantial relation" between the statutory means and ends).

226 Marritz, *supra* 224, at 211 (quoting Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 21 (1972)).

227 *Id.* at 212.

228 *Id.* at 213 (quoting Kroger Co. v. O'Hara Twp., 392 A.2d 266, 275–76 (Pa. 1978)); *see also* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 799 n.17 (2006) ("The Lochner era Court required a 'reasonable relationship' between economic legislation and 'some purpose within the competency of the state'—language similar to today's rational basis test—while insisting upon an acutely narrow view of what counted as a legitimate purpose. As a result, the Court invalidated many economic laws adopted by Congress or the states." (citations omitted)).

legislature is ill equipped to be the judge of what legislation is special.[229] This interpretation also does not require a radical shift from Virginia's current precedent. It is reminiscent of intermediate scrutiny,[230] or perhaps rational basis "plus."[231] Despite the appeal, an enhanced class legislation test suffers from many of the same shortcomings as the closed class test. First, class legislation tests are weakly grounded in the text.[232] Second, the history of prohibitions on special laws does not justify a class legislation test.[233] Finally, Virginia has probably—though not certainly—rejected this heightened scrutiny.[234]

C. *A Structural Restraint Interpretation*

A third possible interpretation of the provision is the structural restraint model proposed by Anthony Schutz.[235] This model rests on the claim that prohibitions on special laws are procedural or structural protections rather than individual-rights protections.[236] A special law is one that identifies objects—that is, a law that provides individualized treatment.[237] A prohibition on special laws prohibits the legislature from passing legislation that identifies objects, but it also—and indeed primarily—restricts the legislature from passing laws that are *functionally* special.[238] A law is functionally special if it is an attempt by the legislature

---

229 *See* Schutz, *supra* note 20, at 59; *see also* 1902 CONVENTION, *supra* note 60, at 652, 661.

230 Lawrence G. Sager, *Of Tiers of Scrutiny and Time Travel: A Reply to Dean Sullivan*, 90 CAL. L. REV. 819, 821 (2002) (writing that intermediate scrutiny requires "an exceedingly persuasive justification" (citing United States v. Virginia, 518 U.S. 515, 533 (1996))).

231 Thomas B. Nachbar, *Rational Basis "Plus"*, 32 CONST. COMMENT. 449, 449–50 (2017); *see also* Long, *supra* note 3, at 736–37 (referring to this higher standard for special legislation as "rational basis with teeth").

232 Schutz, *supra* note 20, at 56. The test suffers from the obvious textual deficiency that the special legislation and equal protection provisions were drafted in entirely different language. It is difficult to justify why two completely different provisions should be functionally identical.

233 *Id.* at 55–56.

234 *See, e.g.*, Riddleberger v. Chesapeake W. Ry., 327 S.E.2d 663, 670 (Va. 1985) (Cochran, J., dissenting) ("If any state of facts reasonably can be conceived to sustain a challenged statute, that state of facts must be assumed to have existed when the statute was adopted."); Cty. Bd. of Supervisors v. Am. Trailer Co., 68 S.E.2d 115, 121 (Va. 1951) (striking down a law while simultaneously recognizing its duty "to indulge every reasonable doubt in favor of the constitutionality of a legislative act and to hold it valid if any state of facts can be reasonably conceived that would sustain it").

235 Schutz, *supra* note 20, at 40–43.

236 *Id.* at 57–64 (concluding that the history and text of special legislation provisions support a structural rationale).

237 *Id.* at 62–64.

238 *Id.* at 64.

to avoid the special laws prohibition by passing general legislation that has the *effect* of identifying objects.[239]

Identifying functionally special laws is a two-step process.[240] The first step is a simple mandate: lawmakers may not pass legislation that identifies objects.[241] Stated in the imperative, lawmakers must pass legislation that classifies according to standards or criteria.[242] This is a low bar that simply restricts the legislature from "naming names."[243] Nevertheless, the virtue of this first step is its simplicity. It is rooted in the text of the provision, comports with the history of the provision,[244] and provides a clear rule for judges, legislators, and citizens.[245]

Step two is more complicated, but, stated simply, is the implementation of step one.[246] Judicial review of general laws is necessary because legislatures have an incentive to evade step one by passing general laws that provide for individualized treatment.[247] If a law applies to a very narrow class, this is "*some evidence* that a law was written for an individual case."[248] The special legislation provision is triggered by a concern that the law provides for individualized treatment.[249] Class size is the "primary indicium" of specialized treatment.[250] After the individualized-treatment trigger, the court weighs three factors to determine whether the legislature has evaded the general law requirement. First, the closed class test is "one way of detecting evasion."[251] Second, the class legislation test can reveal evasion when a classification is irrelevant to the object of the statute.[252] Third, legislative history will sometimes be helpful in

---

239 *Id.*

240 *Id.*

241 Schutz, *supra* 20, at 64.

242 *Id.*

243 *Id.* at 66.

244 C. V. Meredith, delegate to the 1902 Convention, implied that a prohibition on special legislation would only prohibit naming counties. *See supra* text accompanying note 91.

245 Schutz, *supra* note 20, at 64.

246 *Id.* at 66.

247 *Id.* at 67.

248 *Id.* (emphasis added).

249 *Id.* at 68–69, 73 ("This means that legislation involving larger classes should not be subject to judicial review under these provisions.").

250 *Id.* at 68.

251 Schutz, *supra* note 20, at 70.

252 *Id.* at 70–71.

uncovering individualized concern behind the legislation,[253] including whether the law was primarily influenced by lobbying efforts.[254] The weighing of these factors may uncover whether the legislature passed a functionally special law by evading the requirement for general laws.[255]

Though doctrinally sound, the structural restraint doctrine has its problems. For one, it requires the courts to do a considerable amount of work weighing factors that are often difficult to assess.[256] The individual-treatment trigger is also difficult to formulate and could result in judicial overreach.[257] But anyone complaining about difficult tests and judicial overreach faces an uphill battle in arguing that the Supreme Court's Fourteenth Amendment jurisprudence presents better options.

The saving grace of the structural restraint interpretation is that it requires the least reworking of Virginia precedent. Rather than shifting to a different test, the structural restraint interpretation takes a step back, framing Virginia's current precedent in a coherent model. It reformulates the special laws provision such that Virginia's current test is understood through a structural rationale. Through this lens, *Ex parte Settle* and *Dean v. Paolicelli* are compatible. In both of those cases the court purported to examine the reasonableness of setting apart Alexandria County by population in light of the object of the statute.[258] The court reached different conclusions in each case, but *Dean*'s departure was unsatisfactory. The departure makes sense, however, if *Dean* required the legislature to justify why it evaded the requirement to pass general laws in that instance.[259] Because the legislature could not provide a link between the classification and the object of the statute, the court could have explicitly said that the classification was evasive.[260] Reframing the test as a structural inquiry negates rational basis deference[261] and offers a coherent model to the special laws provision.

---

253 *Id.* at 71–72; *see* Willis v. Mullett, 561 S.E.2d 705, 711 (Va. 2002) (examining subcommittee reports to determine that the classification bore "a reasonable and substantial relation" to the object of the statute).

254 Van Kley, *supra* note 43, at 142.

255 Schutz, *supra* note 20 at 73 ("[T]hese provisions are not equal-protection provisions in the sense that some courts have made them out to be.").

256 *See id.* at 75–76.

257 *Id.* at 80–84.

258 *See* Dean v. Paolicelli, 72 S.E.2d 506, 509–10 (Va. 1952); *Ex parte* Settle, 77 S.E. 496, 496 (Va. 1913).

259 *Dean*, 72 S.E.2d at 517–18.

260 *See* Schutz, *supra* note 20, at 70–71.

261 *Id.* at 76.

Despite their shortcomings, all of the proposed frameworks avoid a fatal flaw: the elimination of the special legislation provision by overly deferential interpretation. Each one of the three interpretations provides a framework for an independent analysis of the Virginia Constitution that avoids tying it to an ill-fitted, inconsistent, incoherent test. There are multiple interpretations of the special legislation provision that would give it force, but Virginia courts currently stand poised to adopt an interpretation that would render it meaningless.

Conclusion

The Virginia Supreme Court has consistently disposed of independent jurisprudence when evaluating rights provided under the Virginia Constitution that are analogous to federal rights. Article IV, section 14, however, is distinct from anything in the US Constitution, and it requires independent treatment. The Virginia Supreme Court is currently on track to adopt a failing doctrine derived from different language under a different constitution. This is a mistake. The Virginia Supreme Court has a duty to interpret the Virginia Constitution, and it should do so by preserving the Virginia Constitution's prohibition on special legislation.