INTEGRITY OR INTERFERENCE?: EVALUATING THE CONSTITUTIONALITY OF GEORGIA'S ELECTION INTEGRITY ACT*

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Recent political earthquakes such as the assassination attempt against former president Donald Trump and President Joe Biden's withdrawal from the 2024 campaign quickly overshadowed the various court proceedings involving the former president. Tucked even further back in the corner of the electoral process is the litigation involving Georgia's controversial election law, the Election Integrity Act (EIA). Nevertheless, issues such as absentee voting—a key element of the EIA litigation—are likely to reemerge. While many polls show Donald Trump leading Kamala Harris, the race remains tight, with most polls showing the candidates inside the margin of error. Winning the competition for absentee ballots in battleground states like Georgia could mean the difference between winning and losing the entire election in 2024.

Georgia's Election Integrity Act, passed in the wake of the 2020 presidential election, was an immediate source of controversy.[1] News outlets and corporate leaders pounced on the law, conflating justifications for the EIA with Donald Trump's claims that the Georgia election was stolen.[2] Major League

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* Note from the Editor: The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. To join the debate, please email us at info@fedsoc.org.

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[1] Press Release, Office of Georgia Governor Brian Kemp, Governor Kemp Responds to President Biden's Attack on Election Integrity Legislation (Mar. 26, 2021), https://gov.georgia.gov/press-releases/2021-03-26/governor-kemp-responds-president-bidens-attack-election-integrity.

[2] Sanya Mansor & Madeleine Carlise, *Companies Condemn Georgia's Restrictive Voting Law Amid Pressure from Advocates*, TIME MAG. (Apr. 2, 2021), https://time.com/5952337/corporations-condemn-georgia-voting-law/.

Baseball even pulled the All-Star Game from Atlanta. And yet, both Governor Brian Kemp and Georgia Secretary of State Brad Raffensperger denied that widespread voter fraud occurred in 2020—a stance that created a rift between Kemp and Trump.[3] Nonetheless, President Joe Biden described the EIA as "Jim Crow in the 21st Century" and "an atrocity," announcing the Justice Department was "taking a look" at the measure.[4]

Soon after Kemp signed the EIA, a series of lawsuits challenged multiple provisions of the law, alleging violations of the Fourteenth Amendment of the United States Constitution and the Voting Rights Act. These cases were consolidated into *In re Georgia Senate Bill 202*.[5] The plaintiffs asserted discrimination, undue burden on the right to vote, and abridgment of free speech and expression.

After two years of back and forth, a federal district judge declined to issue a preliminary injunction halting enforcement of key provisions of the EIA.[6] In his opinion, U.S. District Judge J.P. Boulee stated that, "After weighing the factors [allegedly indicating that the Legislature intended to discriminate against black voters when it passed S.B. 202], the Court cannot find that Plaintiffs are substantially likely to succeed on their claims pursuant to the Fourteenth and Fifteenth Amendments."[7] The still pending case raises a host of sensitive issues.

Plaintiffs, including the United States Department of Justice, sought to enjoin, among others, four absentee ballot related provisions: (1) limitations on the number of drop boxes allowable in each county; (2) limitations on the location of the drop boxes and the hours of drop box accessibility; (3) the deadline for submitting applications to vote absentee; and (4) the

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[3] Richard Luscombe, *Governor Brian Kemp tells Trump Georgia's 2020 election 'was not stolen,'* THE GUARDIAN (Aug. 15, 2023), https://www.theguardian.com/us-news/2023/aug/15/georgia-governor-brian-kemp-trump-2020-election-not-stolen.

[4] Maegen Vazquez and Kate Sullivan, *Biden calls Georgia law 'Jim Crow in the 21st Century' and says Justice Department is 'taking a look,'* CNN POLITICS (Mar. 26, 2021), https://www.cnn.com/2021/03/26/politics/joe-biden-georgia-voting-rights-bill/index.html.

[5] *In re* Ga. S. Bill 202, No. 1:21-MI-55555-JPB, 2023 U.S. Dist. LEXIS 182482, at *32 (N.D. Ga. Oct. 11, 2023). These cases include *New Ga. Project v. Raffensperger*, *Sixth Dist. of the Afr. Methodist Episcopal Church v. Kemp*, and *VoteAmerica v. Raffensperger*. Among the plaintiffs are the New Georgia Project, the Black Voters Matter Fund, the Georgia State Conference of the NAACP, the Urban League of Greater Atlanta, and the United States of America. Defendants include Governor Kemp, Georgia Secretary of State Raffensperger, the Republican National Committee, and the National Republican Congressional Committee.

[6] *In re Ga. S. Bill 202*, 2023 U.S. Dist. LEXIS 182482, at *92.

[7] *Id.*

requirement that voters applying for an absentee ballot provide their driver's license or state identification card number.[8]

Plaintiffs allege the EIA imposes severe and significant burdens on eligible Georgia voters' right to vote.[9] Specifically, they charge that the law's increased regulation of absentee voting and mobile voting units, its prohibition of line relief, and other new rules will burden disabled voters, voters of color, and others who attempt to vote.[10] After the district court denied their request for a preliminary injunction, plaintiffs indicated their determination to persevere. The ACLU of Georgia asserted that it would "never stop advocating on behalf of our clients and voters across the state."[11] Raffensperger praised the ruling. A staunch advocate of the statute, he asserted the law "strengthens election integrity while increasing the opportunity for Georgia voters to cast a ballot."[12]

Notably, the United States Constitution does not guarantee the right to vote by absentee ballot. Nor does it guarantee the right to vote in a manner that is easy or convenient.[13] But while states are given a wide berth in administering their elections, the Constitution and the federal courts forbid states from intentionally discriminating against certain voters in regulating their electoral processes. This limitation stems primarily from the Equal Protection Clause of the Fourteenth Amendment. The justification for the EIA, as noted in the General Assembly's findings and declarations, was that the 2018 and 2020 elections stressed Georgia's electoral system, causing voters of all political ideologies to lose confidence in the system.[14] Supporters of the law argue the EIA does not discriminate against any group of eligible voters.[15]

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[8] *Id.* at *42-60.

[9] *Id.*

[10] *Id.*

[11] Kate Brumback, *A Judge Has Declined to Block Parts of Georgia's Election Law, As Legal Challenges Play Out*, ASSOCIATED PRESS (Oct. 13, 2023), https://apnews.com/article/georgia-voting-rights-5c977dd933560cc7118c954ef5193e60.

[12] Press Release, Off. of Ga. Sec'y of State Brad Raffensperger, Court Rejects Biden Administration Challenge to Georgia's Election Integrity Act (Oct. 11, 2023), *available at* https://sos.ga.gov/news/court-rejects-biden-administration-challenge-georgias-election-integrity-act.

[13] *See also* Lyle Denniston, *Constitution Check: Is there a right to vote before election day?*, NATIONAL CONSTITUTION CENTER (Sept. 30, 2014), https://constitutioncenter.org/blog/constitution-check-is-there-a-right-to-vote-before-election-day.

[14] Election Integrity Act of 2021, 2021 Ga. SB 202 § 2(1).

[15] *Id.*

Opponents insist the legislation is a form of voter suppression and blatant discrimination.[16]

This article considers opposing viewpoints regarding the constitutionality of the EIA's absentee voting provisions under the Equal Protection Clause of the Fourteenth Amendment. Section I assesses the history of voting rights and defines absentee voting. It also describes the complex social and political landscape that led to the passage of the EIA. Section II analyzes judicial interpretations of the Equal Protection Clause in the context of voting rights and ballot access. The Fifteenth Amendment and the Voting Rights Act (VRA) are addressed only to the extent they highlight the central role of the Fourteenth Amendment and its Equal Protection Clause. Section III considers the scholarly debate surrounding absentee voting, the Fourteenth Amendment, and voting rights generally. Section IV pulls together the various threads of the debate over the EIA and absentee voting. In doing so, it contemplates how the debate evolved and how it might proceed in the future, while also considering how the Equal Protection Clause might best be applied to such debates.

I. RATIONALE FOR AND PROVISIONS OF THE EIA

The Georgia legislature passed the EIA during a period of growing voter skepticism about the legitimacy of national elections. This broader landscape is worthy of closer examination. Before the Florida recount in 2000, approximately 3 percent of Americans didn't think their vote was counted.[17] After the razor thin margins of the 2000 and 2004 elections, along with the Florida recount and hanging chad debacle, pollster John Zogby found that 9 percent of Americans didn't trust the vote count or had some doubts.[18] Breaking the data down further, 18 percent of blacks didn't trust the vote count, and neither did 13 percent of Latinos.[19] And in 2008, 40 percent of voters told Rasmussen Reports that there was fraud or voter suppression of some kind during the election.[20] Prior to the 2020 election, a 2019 Gallup poll registered an increase in voter mistrust of elections. According to the survey, only 40 percent of respondents were confident that U.S. elections were conducted

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[16] Brumback, *supra* note 11.

[17] JOHN FUND, STEALING ELECTIONS: HOW VOTER FRAUD THREATENS OUR DEMOCRACY 13 (2008).

[18] *Id.*

[19] *Id.*

[20] *Id.*

honestly; 59 percent were not.[21] Heading into 2024, the Public Affairs Council has registered yet another drop in confidence, with only 37 percent of Americans believing "the 2024 elections will be both 'honest and open.'"[22] Thus, dating back to 2000, the trend is clear. The republic is suffering from a growing crisis of confidence in the fundamental machinery of its democratic process.[23] Although widely criticized, the Georgia legislature and Governor Kemp sought to address this problem by passing and implementing the EIA.

A. Reasoning Behind the EIA

Much of the asserted need for the EIA revolved around problems with absentee voting. One challenge that arises in analyzing absentee voting issues is that states may define the term "absentee voting" differently. Each may have its own unique rules for registering, voting, and counting absentee ballots. Some states have massive vote by mail elections where all voters are mailed ballots. In most states, however, and for the purposes of this article, absentee voting occurs when a voter requests an absentee ballot and then returns the ballot, either by mail or by dropping it off directly at a local election official's office.[24]

In crafting the Election Integrity Act, the Georgia legislature posited the idea that there was a "significant lack of confidence in Georgia election systems."[25] It cited as problematic both "allegations of rampant voter suppression and many electors concerned about allegations of voter fraud."[26] The

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[21] R.J. Reinhart, *Faith in Elections in Relatively Short Supply in U.S.*, GALLUP (Feb. 13, 2020), https://news.gallup.com/poll/285608/faith-elections-relatively-short-supply.aspx.

[22] *Few Americans Believe 2024 Elections Will Be 'Honest and Open,'* PUB. AFFS. COUNCIL, (Oct. 2023), https://pac.org/impact/few-americans-believe-2024-elections-will-be-honest-and-open.

[23] A long history of attacks on black voting rights exacerbates the problem. These took the form of, first, literacy tests, and later, the understanding and grandfather clauses in state constitutions. The understanding clause allowed a voter registrar to read part of the state constitution to a potential voter, who, if he could appropriately interpret what had been read to him, would be allowed to vote. The grandfather clause eliminated property and literacy requirements only for people who had been able to cast a legal ballot prior to Reconstruction, permitting illiterate whites to vote while disenfranchising illiterate and non-property-owning black citizens who were not permitted to vote until after the Civil War. *See* RALPH ERIC CRISS, THE BOSS OF NEW ORLEANS: MARTIN BEHRMAN AND MACHINE POLITICS IN THE CRESCENT CITY 38 (2023).

[24] Atanu Das, *Mitigating Potential Vote-By-Mail Fraud*, 34 HARV. J.L. & TECH. DIG. 1-2 (2020), *available at* https://jolt.law.harvard.edu/digest/mitigating-potential-vote-by-mail-fraud-while-simultaneously-increasing-vote-by-mail-ballot-acceptance-by-utilizing-facial-recognition-and-multi-factor-authentication-technology.

[25] Election Integrity Act of 2021, § 2(1).

[26] *Id.*

many court challenges from "all sides" were also noted as problematic.[27] In an effort to address these issues, the legislature passed and Governor Kemp signed S.B. 202, the Election Integrity Act. The goal, they said, was to make it "easy to vote and hard to cheat."[28]

Among other things, the legislature sought to address local problems processing absentee ballots—a challenge compounded by special interest groups seeking to influence the election.[29] These groups—both liberal and conservative—often mail to registered voters multiple absentee ballot applications with pre-filled voter information that is incorrect.[30] The legislature sought to clarify other rules related to absentee ballot applications.[31] The length of the absentee ballot process, it said, contributed to confusion.[32] This led in some cases to voters showing up to vote for what they allegedly believed was the *first time*, when in fact they had *already* voted.[33] In addition, the legislature asserted that many absentee ballots issued in the last days leading up to an election were either invalid, not returned, or returned late.[34] These concerns yielded a desire for a more tightly regulated, easier to understand absentee ballot process. Solutions included a more definite period of absentee voting to assist electors in understanding the election process "while also ensuring that opportunities to vote are not diminished."[35]

Another absentee voting problem was drop boxes—a pandemic-era solution for the challenge of social distancing.[36] The drop boxes had been created by an emergency rule that no longer existed post-pandemic.[37] Unfortunately, in some counties, the process of counting absentee ballots was both messy and untimely.[38] Nevertheless, the legislature permanently extended a

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[27] *Id.* at § 2(2). For examples of electoral controversy, see Press Release, Off. of Ga. Sec'y of State Brad Raffensperger, State Election Board Refers Voter Fraud Cases for Prosecution, (Sept. 11, 2020), *available at* https://sos.ga.gov/news/state-election-board-refers-voter-fraud-cases-prosecution-0.

[28] Election Integrity Act of 2021, § 2(17).

[29] *Id.* at § 2(8).

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.* at § 2(9).

[34] *Id.*

[35] *Id.*

[36] *In re Ga. S. Bill 202*, 2023 U.S. Dist. LEXIS 182482, at *42-43; Election Integrity Act of 2021, §§ 2(3), 2(10), & 2(17).

[37] *In re Ga. S. Bill 202*, 2023 U.S. Dist. LEXIS 182482, at *44.

[38] Election Integrity Act of 2021, §§ 2(5)-(6).

manageable form of the drop box process.[39] It created a plan to process and scan absentee ballots more efficiently, count votes more quickly and accurately, and hopefully boost confidence in Georgia's electoral process among all voters.[40] Another controversial change included new absentee ballot voter identification rules.[41]

B. Absentee Ballot Drop Boxes

As lawsuits against the above changes mounted, the district court consolidated them into a single action, *In re Georgia Senate Bill 202*.[42] Plaintiffs soon requested a temporary injunction to prevent implementation of the EIA's new drop box regulations.[43] The pandemic-era emergency measures were implemented to accommodate voting at a time when many were fearful about gathering in crowds. They became popular among civil rights groups and many in the Democratic Party, who wanted to make the temporary changes permanent.[44] The State Election Board's emergency rule had allowed local election officials to launch drop box programs at multiple locations without limitation on the number or placement of drop boxes, other than a requirement that they be located on "generally accessible" property owned by county or city government.[45] The emergency drop box rule also allowed drop box locations to open forty-nine days before Election Day, up to and including Election Day.[46] Lastly, the emergency rule required the surveillance of drop boxes, along with mandates for sufficient lighting and video monitoring.[47]

The new rules under the Election Integrity Act stipulate that either "a board of registrars or an absentee ballot clerk shall establish at least one drop box as a means for absentee by mail electors to deliver their ballots to the

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[39] *Id.* at § 26(c)(1).

[40] *Id.* at §§ 2(3)-(4).

[41] *In re Ga. S. Bill 202*, 2023 U.S. Dist. LEXIS 182482, at *42-46; Election Integrity Act of 2021, § 25(C)(i).

[42] *In re Ga. S. Bill 202*, 2023 U.S. Dist. LEXIS 182482.

[43] *Id.* at *60.

[44] Mark Niesse, *How Georgia's voting law works,* AJC POLITICS, May 6, 2021, https://www.ajc.com/politics/how-georgias-new-voting-law-works/GF6PLR44PNESPKR5FXCBE7VEOY/ (last accessed on July 13, 2024); Election Integrity Act of 2021, § 2(10).

[45] *In re Ga. S. Bill 202*, 2023 U.S. Dist. LEXIS 182482, at *42-44.

[46] *Id.*

[47] Election Integrity Act of 2021, § 26(c)(1).

board of registrars or absentee ballot clerk."[48] The number of drop boxes is subject to a numerical limitation: the lesser of the number of early voting locations in the county or one drop box for every 100,000 active registered voters.[49] Additional drop boxes are required to be distributed evenly by population across a county. In other words, the number and location of drop boxes cannot be manipulated to give a strategic advantage to any party or group. Finally, the law requires that drop boxes be located inside the office of the board of registrars, absentee ballot clerk, or advance voting locations.[50] Moreover, drop boxes are available only during early voting hours and must be under constant surveillance by a person. Video surveillance alone is not sufficient to comply with the law.[51]

Other rules regulate labeling of drop boxes, security of drop boxes, orderly and secure ballot collection from drop boxes, and procedures for reporting irregularities to the secretary of state.[52] Plaintiffs argued that these changes disproportionately impact black voters because voters in counties with larger black populations would see the greatest reduction in the number of drop boxes under the EIA as compared with the number available under the emergency rule.[53]

In arguing for their preliminary injunction, plaintiffs asserted that drop boxes were popular, often located outside of the physical buildings on government property, and mostly available 24 hours a day and seven days a week.[54] This popularity came with a price, however, because the former drop box rules resulted in many voter fraud complaints.[55] Issues raised in these complaints included poor security and lack of monitoring.[56] Some of the alleged misconduct involved ballot harvesting.[57] Notably, the defendants did not allege widespread voter fraud. Rather, they argued the EIA was necessary to address these substantial complaints from both sides, restore confidence in Georgia's electoral processes, and preserve limited resources allocated to investigate and address the issues.[58]

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[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] Election Integrity Act of 2021, §§ 26(c)(2)-(4).
[53] *In re Ga. S. Bill 202*, 2023 U.S. Dist. LEXIS 182482, at *44-45.
[54] *Id.* at *43.
[55] *See* State Election Board Refers Voter Fraud Cases for Prosecution, *supra* note 27.
[56] *Id.*
[57] *Id.*
[58] Election Integrity Act of 2021, §§ 2(1), (3), & (4).

C. Third Party Interference

Absentee ballot applications are often sent to voters through the mail by third party groups attempting to mobilize Republicans or Democrats for a specific candidate or slate of candidates. These direct mail packages are sometimes designed to look and feel as if they come from an official government source. Receiving multiple absentee ballot applications may create confusion among younger, less experienced voters and among seniors who may have already requested a ballot or even cast their vote. While this may be manageable in small counties or low turnout elections, it can be a significant burden on local elections officials in larger counties, especially in high turnout situations such as a presidential election. To address this issue, the legislature tightened the state's absentee ballot application rules, mandating that:

> All persons or entities, other than the Secretary of State, election superintendents, boards of registrars, and absentee ballot clerks, that send applications for absentee ballots to electors in a primary, election, or runoff shall mail such applications only to individuals who have not already requested, received, or voted an absentee ballot in the primary, election, or runoff.[59]

Such entities are required to compare their mailing list with "the most recent information available about which electors have requested, been issued, or voted an absentee ballot in the primary, election, or runoff and shall remove the names of such electors from its mail distribution list."[60]

D. Identification and Verification of Absentee Voters

Georgia's absentee ballot statute formerly required that,

> In order to be found eligible to vote an absentee ballot by mail, the registrar or absentee ballot clerk shall compare the identifying information on the application with the information on file in the registrar's office and, if the application is signed by the elector, compare the signature or mark of the elector on the application with the signature or mark of the elector on the elector's voter registration card.[61]

The new language in SB 202 requires that, "Upon receipt of a timely application for an absentee ballot," the appropriate local official must verify the identity of the applicant and determine their eligibility.[62] This must be done

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[59] *Id.* at § 25(a)(3)(A).
[60] *Id.*
[61] *Id.* at § 25(b)(1) (stricken from the statute in mark-up).
[62] *Id.*

by comparing the information on the applicant's driver's license or identification card with the information "on file in the registrar's office."[63]

Another provision plaintiffs targeted is the requirement that voters applying for an absentee ballot provide their driver's license or state identification card number.[64] Prior to passage of the EIA, Georgia's absentee voters had to provide two things to fulfill identification requirements: (1) their date of birth and (2) their signature. Both of these had to match what was in the voter file.[65] This signature-match requirement generated many lawsuits.[66] To resolve the situation, the EIA eliminated the signature match and substituted a requirement that an absentee voter provide his or her Georgia driver's license number or identification card number on the absentee ballot application.[67] Other options include providing a current utility bill, bank statement, government check, paycheck, or other government document showing the voter's name and address.[68] An individual who does not possess a valid ID may obtain one free of charge.[69] The second step in the process is providing the identification number on the absentee ballot envelope when it is submitted.[70] Here too, an exception is made. If a voter lacks such identification, he need only write the last four digits of his Social Security number to confirm his identity.[71]

Defendants justify the identification requirements based on the state's interests in (1) administering its elections, (2) preventing fraud, and (3) increasing voter confidence.[72] According to defendants, the signature-match process took election officials three to four minutes per voter, while the more

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[63] *Id.*

[64] *Id.* at § 25(a)(1)(C)(i).

[65] *In re Ga. S. Bill 202*, 2023 U.S. Dist. LEXIS 182482, at *58-59 (explaining the pre-EIA process of verifying a voter).

[66] Press Release, *Georgia Largely Abandons Its Broken "Exact Match" Voter Registration Process*, CAMPAIGN LEGAL CENTER (Apr. 5, 2019), *available at* https://campaignlegal.org/press-releases/georgia-largely-abandons-its-broken-exact-match-voter-registration-process.

[67] Election Integrity Act of 2021, §§ 2(1)-(2).

[68] *Id.* at § 29(a)(1)(D).

[69] *Id.* Furthermore, the Georgia Secretary of State's website states, "If you do not have one of the six acceptable forms of photo ID, the State of Georgia offers a free ID card. An ID card can be issued at any county registrar's office or Department of Driver Services Office free of charge." *Voter Identification Requirements*, OFF. OF GA. SEC'Y OF STATE BRAD RAFFENSPERGER, https://sos.ga.gov/page/georgia-voter-identification-requirements (last visited July 14, 2024).

[70] Election Integrity Act of 2021, § 29(a)(1)(D).

[71] *Id.*

[72] *In re Ga. S. Bill 202*, 2023 U.S. Dist. LEXIS 182482, at *56.

objective ID verification takes less than one minute.[73] But plaintiffs argue that the new identification rules unfairly impact black voters because approximately 55 percent of the registered voters lacking a driver's license are black.[74]

E. Application Deadlines

In Georgia, voters have long been required to complete an absentee ballot application for each election in which they wish to vote absentee. Previously, a voter could request an absentee ballot 180 days prior to the date of the election.[75] To reduce the pressure on local elections officials and allow for faster processing of both applications and ballots, this was reduced to 78 days prior to the election. In addition, the request must now be made no less than 11 days prior to the election (increased from 4 days prior to the election).[76] There is no special excuse or reason required to obtain an absentee ballot.[77] The court noted that many local elections officials supported these changes.[78]

In requesting a preliminary injunction, plaintiffs asserted that more black voters returned their absentee ballots between eleven and four days before an election after early voting hours concluded, and therefore that because the EIA reduced the number of days in which absentee ballots could be returned, black voters would be more impacted than others.[79] In opposition, defendants argued that the tighter timeframe eliminates inefficiencies, reducing complaints from county election officials who are increasingly overwhelmed by the number and timing of absentee ballots.[80] Many officials reported that absentee ballots requested toward the end of the allowable timeframe often went unused because the application simply could not be processed in time for the voter to receive it, vote, and return it.[81] Defendants therefore argued that Georgia's legislature enacted the provision to ensure that more ballots were properly cast and counted and to improve the state's electoral system for all voters regardless of race.[82] The new rules, they believed, would restore

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[73] *Id.*
[74] *Id.* at *57.
[75] Election Integrity Act of 2021, § 25(a)(1)(A) (note stricken text in final bill mark-up).
[76] *Id.*
[77] *Id.*
[78] *In re Ga. S. Bill 202*, 2023 U.S. Dist. LEXIS 182482, at *90.
[79] *Id.* at *69-72.
[80] *Id.* at *72.
[81] *Id.* at *51.
[82] *Id.*

voter confidence in Georgia's electoral system by eliminating inefficiencies and allowing local election officials to focus on other early voting activities.[83]

Plaintiffs also argued that the EIA's combination of a shorter return window with a shorter application period disproportionately impacted black voters, who use absentee voting more than whites. Moreover, they asserted, black voters are more likely than white voters to submit applications late in the election cycle. Defendants argued that only a tiny number of absentee ballot requests were rejected for being late, regardless of race. Both sides presented expert testimony supporting their respective positions.[84]

Taking each of these arguments into consideration, the district court denied plaintiffs' motion for summary judgment.[85] Judge Boulee reasoned that the plaintiffs had not demonstrated a substantial likelihood of success on the merits—the standard for a preliminary injunction—on their claims that the EIA intentionally discriminated against black voters in violation of the Fourteenth Amendment, Fifteenth Amendment, and Section 2 of the VRA.[86] Because of this, the court did not reach consideration of irreparable harm and whether the balance of equities favored injunctive relief.[87] Based on the case law in this area, Judge Boulee's application of the Equal Protection Clause of the Fourteenth Amendment was on target.

III. Applicable Constitutional Law

Case law related to the Fourteenth Amendment and absentee voting—and thus to the constitutionality of Georgia's EIA—addresses four main issues: (1) the fundamental right to vote, (2) intentional discrimination on the basis of race, (3) balancing undue burdens on ballot access with a state's interest in administering orderly elections, and (4) the political question doctrine.

A. Fundamental Voting Rights

Both the United States Supreme Court and lower federal courts have ruled on several absentee ballot-related cases. In *McDonald v. Board of Election Commissioners of Chicago*, the Supreme Court held that the right to vote

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[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.* at *54 (quoting Church v. City of Huntsville, 30 F.3d 1332, 1342 (11th Cir. 1994)).

absentee is discretionary and that laws may vary, even within a state.[88] Plaintiffs—unsentenced prisoners awaiting trial—contended that a county's statutory scheme violated the Equal Protection Clause of the Fourteenth Amendment because a distinction allowing absentee balloting to those physically incapacitated but not to those judicially incapacitated was not reasonable.[89] Moreover, other pretrial jail inmates incarcerated in different counties could qualify for an absentee ballot.[90] The Court upheld the county regulations, reasoning that neither race nor wealth was a factor, the inmates were not prohibited by the statute from voting, and many other classes of persons were not entitled to receive absentee ballots.[91] The Fifth Circuit Court of Appeals has relied on the holding in *McDonald* to distinguish between "the right to vote," which is protected by the Equal Protection Clause and "a claimed right to receive absentee ballots," which is not.[92]

B. Intentional Discrimination

If the Georgia legislature acted in an intentionally discriminatory manner against black voters, the EIA must be held unconstitutional. In *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, the Supreme Court of the United States identified the following non-exhaustive list of factors that a court should consider when assessing a facially neutral law for allegedly racially discriminatory intent: (1) the impact of the challenged law, (2) the historical background, (3) the specific sequence of events leading up to its passage, (4) the procedural and substantive departures, and (5) the contemporary statements and actions of key legislators.[93] "The Eleventh Circuit has supplemented the *Arlington Heights* list to include the following additional factors: (6) 'the foreseeability of the disparate impact;' (7) 'the knowledge of that impact;' and (8) 'the availability of less discriminatory alternatives.'"[94]

Equal protection under the Fourteenth Amendment is a prominent feature of this thread of jurisprudence. For example, in *Department of Homeland Security v. Regents of the University of California*, the Court noted that to plead

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[88] 394 U.S. 802, 803 (1969).

[89] *Id.* at 802.

[90] *Id.* at 806.

[91] *Id.* at 802.

[92] *See* Tex. Democratic Party v. Abbott, 978 F.3d 168 (5th Cir. 2020).

[93] *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 253 (1977).

[94] Greater Birmingham Ministries v. Sec'y of State for State of Ala., 992 F.3d 1299, 1322 (11th Cir. 2021).

forbidden animus for purposes of an equal protection claim, "a plaintiff must raise a plausible inference that an 'invidious discriminatory purpose was a motivating factor' in the relevant decision."[95] "Possible evidence includes disparate impact on a particular group, 'departures from the normal procedural sequence,' and 'contemporary statements by members of the decision making body.'"[96] The Court further stated, "'The wisdom' of those decisions 'is none of our concern.'"[97] In *Crawford v. Marion County Election Board*, the Court held that "a state 'violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard.'"[98] The term "invidiously discriminate" has been used to describe conduct prohibited under that standard.[99]

This Fourteenth Amendment jurisprudence features prominently in the present litigation in Georgia, which concerns absentee voting laws that make no explicit mention of race. In rejecting plaintiffs' request for an injunction, Judge Boulee noted the important case of *Greater Birmingham Ministries v. Alabama*, which requires that "claims brought pursuant to the Fourteenth and Fifteenth Amendments are subject to a two-prong burden-shifting test."[100] Under the first prong, a plaintiff must prove that "the law will have a discriminatory impact and that it was adopted with discriminatory intent."[101] Plaintiffs must establish *both* intent *and* effect were discriminatory, or else their constitutional claims fail.[102] The second prong moves the burden to the defendant, who must demonstrate that the law would have been enacted *without* the allegedly discriminatory component. In the Georgia lawsuit, the plaintiffs failed to show that the law had a discriminatory intent *or* effect, so there was no need to shift the burden to the defendants, and Judge

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[95] 140 S. Ct. 1891 (2020). For a discussion of the similarities and differences between "animus" and "discriminatory intent," see William Araiza, *Regents: Resurrecting Animus/Renewing Discriminatory Intent*, 51 BROOKLYNWORKS 983, 1032-33 (2021) (noting that "animus can be understood as a direct pathway to ultimate constitutional conclusions about the invidiousness of government action challenged as violating equal protection.").

[96] *Dep't of Homeland Sec.*, 140 S. Ct. at 1915.

[97] *Id.*

[98] 553 U.S. 181, 189 (2008) (quoting Harper v. Virginia Bd. of Elections, 383 U.S. 663, 666 (1966)).

[99] *Id.*

[100] *See In re Ga. S. Bill 202*, 2023 U.S. Dist. LEXIS 182482, at *62-63 (quoting *Greater Birmingham Ministries*, 992 F.3d at 1321).

[101] *Id.* (quoting League of Women Voters of Fla. Inc. v. Fla. Sec'y of State, 66 F.4th 905, 922 (11th Cir. 2023)).

[102] *Id.* (quoting *Greater Birmingham Ministries*, 992 F.3d 1299.).

Boulee thus refused their request for a preliminary injunction. In coming to this conclusion, he considered each of the factors identified in *Village of Arlington Heights*.[103]

C. Balancing States' Interests and Burdens on Ballot Access

What was the intent behind the EIA? If Georgia's goal was to create more efficient election processes, and the law is facially race-neutral, the Supreme Court may allow such a goal to overcome incidental disparate impacts because the two are balanced against each other.[104] There is a caveat, however. Such a law cannot unduly burden voting rights; if it does, the disparate impact will outweigh the state's goal. In *Storer v. Brown*, the plaintiffs were a group of congressional and presidential candidates who appealed a district court's dismissal of claims that restrictions on ballot access for independent candidates violated the Qualifications Clause of the United States Constitution and their rights to free association and equal protection under the First and Fourteenth Amendments of the Constitution.[105] The Supreme Court held that, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes."[106] The Supreme Court affirmed in part, holding that California's law did not violate the Qualifications Clause or the First and Fourteenth Amendments because

> It appears obvious to us that the one-year disaffiliation provision furthers the State's interest in the stability of its political system. We also consider that interest as not only permissible, but compelling and as outweighing the interest the candidate and his supporters may have in making a late rather than an early decision to seek independent ballot status.[107]

Two of the most important cases in this area are *Anderson v. Celebrezee* and *Burdick v. Takushi*. These two cases created the *Anderson-Burdick* framework, a test used to assess the balance between a state's interest in regulating elections and the burden it places on voters. In *Anderson v. Celebrezee*, the Court struck down an Ohio statute requiring independent candidates for president to file a statement of candidacy no later than March in order to

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[103] *Id.* at *63.
[104] *See* Storer v. Brown, 415 U.S. 724 (1974).
[105] *Id.*
[106] *Id.* at 730.
[107] *Id.* at 736.

appear on the general election ballot in November.[108] The Court described the law as an unconstitutional burden on voting and on the associational rights of candidates' supporters, reasoning that voters' freedom of choice and freedom of association in a nationwide election outweighed the state's interest in setting an early deadline for independent candidates.[109] In *Burdick v. Takushi*, on the other hand, the Supreme Court held that a prohibition on write-in voting, enacted as part of the state's comprehensive election scheme, did not impermissibly burden the right to vote because the legitimate interests asserted by the state were sufficient to outweigh the limited burden that the write-in voting ban imposed upon state voters.[110]

Under *Anderson* and *Burdick*, courts weigh the nature and scope of the burden a statute imposes on the right to vote against the interests that supposedly justify that burden.[111] This requires courts to consider the state's apprehensions themselves and whether they create a need to impose such a burden.[112] Moreover, the *Anderson-Burdick* framework follows a categorical approach, requiring plaintiffs to prove that legislation such as the EIA discriminates against a broad swath of voters if it is to be held unconstitutional.[113] A court cannot take into account the individual circumstances of a small number of random voters. An entire category of voters must be impacted.[114]

Finally, in one of the cases immediately involving the EIA, *New Georgia Project v. Raffensperger*, the Eleventh Circuit held that "the district court misapplied the *Anderson-Burdick* framework when it enjoined the State

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[108] Anderson v. Celebrezze, 460 U.S. 780 (1983).

[109] *Id.* at 782.

[110] Burdick v. Takushi, 504 U.S. 428 (1992).

[111] *See* Andrew Maxfield, Note, *Litigating the Line Drawers: Why Courts Should Apply* Anderson-Burdick *to Redistricting Commissions*, 87 U. CHI. L. REV. 1845, 1864 (2020), *available at* https://lawreview.uchicago.edu/print-archive/litigating-line-drawers-why-courts-should-apply-anderson-burdick-redistricting.

[112] *Id.*

[113] *Id.*

[114] *Crawford*, 553 U.S. at 204 (Scalia, J., concurring). *See also* Clingman v. Beaver, 544 U.S. 581 (2005) (holding "that states may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder," and that "the Constitution grants states broad power to prescribe the time, place and manner of holding elections for senators and representatives, which power is matched by state control over the election process for state offices"); Common Cause/Georgia v. Billups, 554 F.3d 1340 (11th Cir. 2009) (holding "legitimate state interests" justified requiring photo identification "in detecting and deterring voter fraud").

defendants' enforcement of a long-standing Georgia absentee ballot deadline."[115] The statutory deadline required absentee ballots received by 7:00 p.m. on Election Day to be counted.[116] The lower court had substituted its own deadline, mandating that any ballot postmarked by and received within three days of Election Day be counted.[117] This lower court ruling was overturned because Georgia's long-standing absentee ballot deadline was reasonable and nondiscriminatory.[118] Furthermore, its interest in maintaining that deadline once absentee voting had already begun was at least "important" and more likely "compelling."[119]

D. Political Question Doctrine

The political question doctrine is relevant in considering the EIA because federal courts sometimes refuse to hear challenges to government action affecting elections and voting, reasoning that elections are to be left to the democratic branches and that judicial interference would therefore be improper. Certainly, mere political motivation does not invalidate an election law. In *Rucho v. Common Cause*, for example, the Supreme Court held that partisan gerrymandering claims present political questions beyond the reach of the federal courts.[120] The Court reasoned that "[f]ederal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions."[121] It emphasized that the judicial branch must not engage in the factional politics of the major parties, but instead must create rational rules and measurable standards anchored in the Constitution or laws derived from it.[122] The Supreme Court nonetheless accepts judicial review as the norm rather than the exception, even where election laws are concerned.[123] In other words, while political questions are beyond the reach of federal courts, as a practical matter, not all election-related questions are political questions lying outside the scope of judicial review.

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[115] New Ga. Project v. Raffensperger, 976 F.3d 1278, 1280 (11th Cir. 2020). *See* Ga. Code Ann. §§ 21-2-386(a)(1)(F), 21-2-403 (West 2024).

[116] *New Ga. Project*, 976 F.3d at 1280.

[117] *Id.*

[118] *Id.*

[119] *Id.* at 1281.

[120] 139 S. Ct. 2484 (2019).

[121] *Id.* at 2487.

[122] *Id.*

[123] *See* Moore v. Harper, 143 S. Ct. 2065, 2069 (2023).

The mere fact that a suit seeks protection of a political right does not mean it presents a political question.[124] In *Baker v. Carr*, the Court held that under the Constitution, citizens of all states must be allowed to vote without restraint, making judicial review appropriate where necessary to apply the constitutional guarantees of equal protection to election laws.[125] Nevertheless, in a more recent case, *Jacobson v. Florida Secretary of State*, the Eleventh Circuit found that a complaint related to the placement of candidates' names on the ballot presented a nonjusticiable political question.[126] The court reasoned there were "no judicially discernable and manageable standards or objective measures to identify violations" of the candidates' First and Fourteenth Amendment rights.[127] This was true even if candidates who appear first on the ballot enjoy an advantage.[128] "Partisan motivations," the court said, "do not doom a racially *nondiscriminatory* election law if 'valid neutral justifications' also support the law."[129]

IV. SCHOLARLY COMMENTARY

In October 2023, when Judge Boulee declined to enjoin the EIA absentee ballot provisions described above, he stated that "the Court cannot find that Plaintiffs are substantially likely to succeed on their claims pursuant to the Fourteenth and Fifteenth Amendments."[130] Fourteenth Amendment and absentee voting case law support Boulee's decision. Moreover, his application of the Equal Protection Clause to the EIA is reinforced by most election law

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[124] Baker v. Carr, 369 U.S. 186 (1962) (holding that "a state statute effected an apportionment that deprived plaintiffs of equal protection of the laws in violation of the Fourteenth Amendment presented a justiciable constitutional cause of action, and the right asserted was within reach of judicial protection under the Fourteenth Amendment, and did not present a nonjusticiable political question").

[125] *Id.* at 211. Here the court explained that:

> The nonjusticiability of a political question is primarily a function of the separation of powers . . . whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.

Id.

[126] 974 F.3d 1236 (11th Cir. 2020).

[127] *Id.* at 1242.

[128] *Id.*

[129] *Id.* (emphasis added) (quoting *Crawford*, 553 U.S. at 204).

[130] *See In re Ga. S. Bill 202*, 2023 U.S. Dist. LEXIS 182482, at *92.

scholarship. It is noteworthy, however, that while many scholars agree on the substance and meaning of current election law jurisprudence, several find the Fourteenth Amendment an inadequate tool for protecting voting rights in the 21st century.

For example, Professor Edward Foley, Director of Election Law at the Moritz College of Law at Ohio State University, asserts that "the judicial evaluation of electoral rules under the prevailing Fourteenth Amendment jurisprudence is woefully indeterminate."[131] This is "problematic," he says, because it opens the door to judges' "partisan preferences" in deciding controversial cases, including those related to absentee voting.[132] According to Foley, the judiciary's challenge in curtailing excessive partisanship in the application of election laws is due to an over-reliance on equal protection as the applicable constitutional standard for judicial review.[133]

In a recent article, Foley notes that judges' reliance on equal protection and historic Warren Court victories makes sense given their early effectiveness in safeguarding voting rights.[134] But, he says, equal protection is inadequate to protect against legislation that reduces voting rights for all voters—that is, legislation like the EIA that reduces ballot access for all—not just for certain classes of voters.[135] Foley therefore advocates a switch from the *Anderson-Burdick* framework to a due process balancing in situations in which "retrogression" is the constitutional concern, as opposed to discrimination against a particular group.[136] Retrogression, says Foley, may include a broad backslide in voting rights among all voters—one that is not limited to a specific group or class of voters.[137]

Professor Foley's recommended solution for partisan over-reaching is the Due Process Clause of the Fourteenth Amendment which, he asserts, "can work to invalidate both partisan gerrymanders and legislative changes

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[131] Edward B. Foley, *Voting Rules and Constitutional Law*, 81 GEO. WASH. L. REV. 1836 (2013).

[132] *Id.* at 1836.

[133] *Id.* at 1836.

[134] Edward B. Foley, *Due Process, Fair Play, and Excessive Partisanship: A New Principle for Judicial Review of Election Laws*, 84 U. CHI. L. REV. 655, 747 (2017).

[135] *Id.* at 660 ("Due process, instead, provides a more promising basis for constraining partisan overreach.").

[136] *Id.* at 747 ("When the constitutional concern is one about retrogression—the legislative rollback of previously existing rights—and does not involve the unequal treatment of individuals, as an adjustment in the available days for early voting does not, then the proper constitutional analysis lies in due process, and not equal protection.").

[137] *Id.*

to voting laws aimed at securing an unfair partisan advantage."[138] In the context of the EIA litigation, applying Foley's proposal would mean that plaintiffs would not have to show intentional discrimination against a specific class of citizens to invalidate the law, as is required under the Equal Protection Clause of the Fourteenth Amendment.[139] Instead, they would have to show only that changes to absentee voting procedures had the broad effect of reducing opportunities to vote for all Georgia citizens.[140] This analysis would eliminate the balancing of the burden of new absentee rules against the state's interest in administering elections under *Anderson-Burdick*. There would be no consideration of the state's interest in administering elections.[141] Foley would suggest, however, that this balancing of burdens is a "poor doctrinal vehicle in considering the constitutionality of laws that cut back on the availability of voting opportunities."[142] Under any circumstance, however, the plaintiffs would be required to overcome the political question doctrine.

One scholar, Ben Wallace, writes that the Court has "consistently recognized that voting in federal elections and having that vote counted is a fundamental right," but he opines that this fundamental right is left with the individual states.[143] Wallace notes that, "Regardless of what process states are constitutionally required to afford to voters, the actual process of registering, voting, administering elections, and counting ballots has become quite complex."[144] He argues that this complexity causes thousands of voters every year to lose out on the opportunity to vote or to have their votes counted.[145] Precinct rules, identification laws, and provisional ballots can all create problems, even if fashioned with the best of intentions.[146] Here, Wallace argues, procedural due process could assist in preserving voting rights.[147] As applied to voting rights, procedural due process requires that a state ensure ballots are fairly

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[138] *Id.* at 661.
[139] *Id.*
[140] *Id.*
[141] *See Burdick*, 112 S. Ct. at 2059.
[142] Foley, *Due Process, Fair Play, and Excessive Partisanship*, *supra* note 134, at 686.
[143] Ben F.C. Wallace, *Charting Procedural Due Process and the Fundamental Right to Vote*, 77 OHIO ST. L.J. 647, 648–49 (2016).
[144] *Id.* at 649.
[145] *Id.* at 648.
[146] *Id.*
[147] *Id.*

treated and, upon reasonable consideration of their eligibility, included in the total vote count.[148]

In the absentee voting context, Wallace identifies *Raetzel v. Parks/Bellemont Absentee Election Board* as an important illustration of how procedural due process can be employed.[149] There, a federal district court in Arizona applied the *Mathews* test to reach its decision.[150] The *Mathews* analysis is a three-factor balancing test to determine whether the procedures used to deprive someone of a voting right comply with due process. The factors to be weighed are (1) the private or individual interest that is implicated; (2) the risk of "erroneous deprivation" through the procedures currently in place and the probable value of any additional procedures; and (3) the government interests at stake, including any "fiscal and administrative burdens" that additional procedures would create.[151]

In *Raetzel*, the court determined that voting is a fundamental liberty interest requiring constitutionally adequate due process and that Arizona's method of validating absentee ballots was unconstitutional. The biggest red flag was the complete lack of notice before or after a ballot was invalidated.[152] The law permitted members of Absentee Ballots Boards to vote on a challenged ballot privately without notice to the voter, either of the challenge proceeding or of its outcome.[153] The case is an example of how procedural due process can be used to preserve absentee voting rights, and it illustrates Wallace's point that procedural due process under the Fifth and Fourteenth Amendments could serve as a means of protecting voting rights, both absentee and otherwise, by offering "an alternative basis for a claim against voting laws which are restrictive, but not necessarily discriminatory."[154] Wallace argues that procedural due process could also encourage uniformity in state and local election procedures and assist in further developing a body of law that could help protect voting rights.[155]

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[148] Saucedo v. Gardner, 335 F. Supp. 3d 202, 205 (D.N.H. 2018). ("Having induced voters to vote by absentee ballot, the State must provide adequate process to ensure that voters' ballots are fairly considered and, if eligible, counted.").

[149] Wallace, *supra* note 143, at 660. *See* Raetzel v. Parks/Bellemont Absentee Election Bd., 762 F. Supp. 1354 (D. Ariz. 1990).

[150] *Raetzel*, 762 F. Supp. at 1358.

[151] Mathews v. Elridge, 424 U.S. 319, 335 (1976).

[152] *Raetzel*, 762 F. Supp. at 1354.

[153] *Id.*

[154] Wallace, *supra* note 143, at 650.

[155] *Id.*

Like Foley and Wallace, Delaram Takyar argues for a new approach to guaranteeing voting rights. Her proposal would leverage the Fourteenth Amendment's Penalty Clause, which provides for reducing representation in Congress when a state violates voting rights.[156] Takyar argues, "The Clause has been almost entirely ignored for decades, despite some early efforts to effectuate it, but penalizing states for disenfranchisement efforts might offer a long-lasting solution to voting right infringement."[157] Takyar links her proposed solution, published in 2021, to "recent efforts by some Republican states to codify increased voting restrictions, such as a new voting rights law in Georgia."[158] Takyar cites as additional reasons for her sense of urgency the fact that "Republicans in 43 states have proposed laws to limit voting, proposing reforms such as stricter voter ID requirements and limiting opportunities for mail-in voting."[159] It's difficult to gauge what a proposal like his would mean for the EIA because a court would have to come to the conclusion that the law did, indeed, violate voting rights before the state's representation could be reduced as a penalty. And to do that, it would begin by balancing the burden placed on voting with the state's need for orderly administration of elections; as we've seen, this balancing would not likely yield the conclusion that the EIA is disproportionately burdensome. Moreover, to the extent Republicans simply sought some political advantage without intentionally discriminating against a certain class of voter, the obstacle posed by the political question doctrine could arise.

The various solutions proposed by Foley, Wallace, and Takyar highlight the interplay among the United States Constitution, state constitutions, and state legislatures. This interdependence is an important dynamic in the regulation of absentee voting. John Fortier and Norman Ornstein argue that the regulation of absentee voting has historically been a "decentralized activity," despite the fact that the Constitution gives Congress the ultimate authority to regulate the times, places, and manner of federal elections.[160] When Congress is silent, states often act.

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[156] Delaram Takyar, *"The Cornerstone of the Stability of our Government": Electoral Reform in the Aftermath of the 2020 Election*, YALE L. & POL'Y REV., https://yalelawandpolicy.org/inter_alia/cornerstone-stability-our-government-forgotten-penalty-clause-and-electoral-reform (last visited May 24, 2024).

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. MICH. J.L. REFORM 483, 486 (2003).

But "decentralized" does not necessarily mean irregular or disparate rules are always allowed. In *Bush v. Gore*, the Supreme Court insisted on "uniform treatment of voters"—a concept that became known as the "Uniformity Principle."[161] Professor Michael Morley points out that "Courts have also generally refused to apply the Uniformity Principle—and allowed jurisdictions to intentionally treat various voters differently—in certain discrete contexts."[162] This is because, in part, the Supreme Court has held that the fundamental right to vote does not extend to absentee ballots. Based on that holding, many courts have allowed states to limit absentee eligibility to specific groups of voters. Scholars considering the relevance of *Bush v. Gore*'s Uniformity Principle have generally agreed that it does not fully apply to absentee and early voting.[163]

V. ANALYSIS AND EVALUATION

The Supreme Court permits significant restrictions on absentee voting. But to the extent a state offers absentee voting beyond limited federal requirements (related, for example, to members of the United States military serving overseas), there are constitutional limits on such state restrictions.[164] States cannot intentionally discriminate on the basis of race or create an "undue burden" on a class of voters. Such an undue burden includes restrictions that unfairly or unnecessarily limit ballot access or other opportunity to participate in free and fair elections, especially for certain categories of voters or candidates who find their political effectiveness as a group collectively limited.[165]

According to some scholars, these guardrails are insufficient. Foley, Wallace, Takyar, and others seek to explain and fill gaps in voting rights jurisprudence—gaps which they say leave voters exposed to political exploitation.

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[161] Michael T. Morley, Bush v. Gore*'s Uniformity Principle and the Equal Protection Right to Vote*, 28 GEO. MASON L. REV. 229, 230-31 (2020), *available at* https://lawreview.gmu.edu/print_issues/28-1-morley/.

[162] *Id.* at 258.

[163] *Id.*

[164] Congress enacted the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) in 1986. It requires that states allow certain members of the United States military and United States citizens living overseas to vote absentee. In 2009 Congress amended the UOCAVA, establishing new registration and voting procedures states are required to follow in all federal elections. *The Uniformed And Overseas Citizens Absentee Voting Act*, U.S. DEP'T OF JUST., https://www.justice.gov/crt/uniformed-and-overseas-citizens-absentee-voting-act (last visited May 24, 2024).

[165] *Anderson*, 460 U.S. at 787.

Some of their ideas and illustrations involve absentee voting directly, or they involve overlapping principles that could apply to absentee voting situations. They are concerned that equal protection law, though a valuable tool, is insufficient to stem what they view as a general assault on voting rights across all categories of voters. Foley advocates for a shift to protecting voting rights through substantive due process, Wallace believes that procedural due process is key, and Takyar supports using the Fourteenth Amendment's Penalty Clause to deter restrictive voting laws. So while their methods are different, each finds the currently predominant equal protection approach insufficient by itself.

The core challenge, as these scholars see it, is that legislatures, voting, and indeed politics are essentially political. That's not going to change anytime soon because of the Supreme Court's longstanding and appropriate reservations about interfering with the legislative process based on political and policy considerations.[166] In this way, the scholars' proposed solutions are flawed, but they are nonetheless important illustrations of a growing frustration with politics. Such irritation is visible in a noticeable absence of objectivity in much of the scholarly literature and media coverage surrounding the EIA—both of which are often emotional and activist rather than analytical and objective.

The assertion that Georgia's changes to absentee voting laws favor Republicans is, at a minimum, debatable. And even when there is political intent behind absentee voting restrictions, an objective analysis of absentee voting patterns yields surprising results. For example, a group of scholars hypothesized in 2017 that voting laws may influence who turns out in various ways. Using county-level vote returns in the 2004, 2008, and 2012 presidential elections, the authors found that, "contrary to conventional wisdom, the results show that early voting generally helps Republicans."[167] They are not alone. Many campaign professionals stand by the argument that, all other things being equal, the candidate who better mobilizes his or her absentee and other early voting supporters is more likely to win, regardless of party affiliation.[168]

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[166] *See, e.g.*, Fed. Commc'ns Comm'n v. Beach Commc'ns, Inc., 508 U.S. 307 (1993) ("Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for the courts to judge the wisdom, fairness or logic of legislative choices.").

[167] Barry C. Burden et. al., *The Complicated Partisan Effects of State Election Laws*, 70 POL. RSCH. QUARTERLY 564, 576 (2017).

[168] *See, e.g.*, Tal Axelrod, *Republicans launch new effort to boost early voting, breaking with Trump's past criticism*, ABC NEWS (Nov. 20, 2023), https://abcnews.go.com/Politics/republicans-launch-

Case law is unambiguous that states can and must retain the right to regulate their elections, including by imposing absentee voting rules that don't intentionally discriminate against any racial group or unduly burden the right to vote in free and fair elections. The basic tenets for executing such elections are anchored in the Fourteenth and Fifteenth Amendments to the Constitution and the Voting Rights Act. More specifically, the Fourteenth Amendment's Equal Protection Clause plays a significant role in distinguishing legitimate restrictions on absentee voting from illegitimate ones that would violate the Equal Protection or Due Process Clauses.

Because the Equal Protection Clause directs that all citizens be treated equally under the law, there are limitations on disparate treatment of certain categories of citizens. For example, a state is free to deny felons the right to vote, or it may have minimum age requirements or residency requirements before voter eligibility—but all such classifications are subject to Fourteenth Amendment Equal Protection Clause constraints. For example, if a state passed a law that allowed absentee voting only for Republicans—or for active duty military, or for white people, or for heterosexuals, or for owners of real property—such laws would not *necessarily* be unconstitutional, but they would be subjected to further scrutiny to ensure compliance with the Equal Protection Clause. The *basis* of the discrimination and the *burden* it creates are what matter. The key is that laws may not "categorically deny the franchise to a class of citizens based on 'invidious' discrimination."[169]

The Supreme Court made this clear in *Anderson v. Celebrezze* and *Burdick v. Takushi*.[170] Generally speaking, when government action allocates "burdens or benefits based on race, ethnicity, or national origin, courts will impose a rigorous, 'strict scrutiny' test to decide whether it violates constitutional equal protection principles."[171] The strict scrutiny test requires a law

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new-effort-boost-early-voting-breaking/story?id=99908627. *See also* Bill Barro, *Abrams strategy to boost turnout: Early voting commitments*, ASSOCIATED PRESS (Nov. 20, 2023), https://apnews.com/article/2022-midterm-elections-voting-rights-biden-presidential-georgia-79f42eb29feb778a1ca6543f3cbf63e0.

[169] *The Anderson-Burdick Doctrine: Balancing the Benefits and Burdens of Voting Restrictions*, SCOTUSBLOG, https://www.scotusblog.com/election-law-explainers/the-anderson-burdick-doctrine-balancing-the-benefits-and-burdens-of-voting-restrictions/ (last visited May 24, 2024).

[170] Alexander Egber, *The Anatomy of an* Anderson-Burdick *Challenge*, ARIZ. ST. L.J. (Mar. 31, 2022), https://arizonastatelawjournal.org/2022/03/31/the-anatomy-of-an-anderson-burdick-challenge/.

[171] April Anderson, *Equal Protection: Strict Scrutiny of Racial Classifications*, CONG. RSCH. SERV. (June 30, 2023), https://crsreports.congress.gov/product/pdf/IF/IF12391.

be "narrowly tailored to serve a compelling government interest."[172] However, in *Anderson* and *Burdick*, the Court recognized that virtually all election laws impose some type of burden, making a strict scrutiny standard of review impractical.[173] Instead, the Court developed the *Anderson-Burdick* test, which balances the government's asserted interests and the burden on the voter. Under this test, strict scrutiny is applied only if the burden is severe. Otherwise, courts are free to measure the scale of the burden to determine which level of scrutiny should be applied.[174]

In light of existing law and the insignificant burden Georgia's Election Integrity Act places on voters, the EIA will receive a relatively low level of judicial scrutiny.[175] This is true despite the noise coming from outside the legal system. Special interest groups, political parties, and hypersensitive corporate executives are unlikely to derail the law despite their best efforts. And yet the passionate difference of opinion regarding the EIA and its absentee voting provisions comes as no surprise given the political context in which the law was passed. It is a momentous occasion when an incumbent president of the United States is defeated and alleges the election was stolen. Yet it is important to separate Donald Trump's election claims from Georgia's election law changes. After all, Georgia's Republican Governor Brian Kemp, who signed the EIA into law, has adamantly disagreed with Trump about election fraud in Georgia. Speaking hypothetically, two things could be true at the same time: Trump's claims could be false (or true), and the state of Georgia could revise its absentee voting law in a way that is consistent with the Constitution and devoid of discrimination. The two events are not necessarily connected. Not only is evidence of discrimination required to overturn the law, but the restriction of absentee voting rights is not, in and of itself, discriminatory.

VI. CONCLUSION

In *politics*, both sides typically seek a "devil figure" to help agitate and organize opposition to the other candidate and solidify their own support. This devil figure strategy works best when paired with a wedge issue such as

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[172] *Id.*

[173] Egber, *supra* note 170.

[174] *Id.*

[175] *See Crawford*, 553 U.S. at 204 (rejecting the facial invalidity of an Indiana photo identification law). *See also* Ariz. Democratic Party v. Hobbs, 18 F.4th 1179 (9th Cir. 2021) ("The law here neutrally and nondiscriminatorily applies to all voters equally.").

racial discrimination, inflation, or national security. In the hot political context of the 2020 and 2022 elections, Democrats in Georgia found their devil figure in former President Trump and their wedge issue in SB 202. But in *law*, the bottom line is that there is no constitutional right to vote absentee, by mail, or early, and that the Supreme Court permits non-discriminatory restrictions on such methods of voting for the purpose of efficiently administering elections. Sometimes, perceived rights associated with these methods of voting simply do not exist.

Nevertheless, as more people choose to vote absentee or vote early in-person, opportunities for covert intentional discrimination grow. Intentionally racially discriminatory absentee voting laws are not tolerable under the Fourteenth Amendment. Scholars have asked whether current constitutional tools such as equal protection are adequate to protect voting rights, not just for particular racial groups but for broader populations of voters who seek the convenience of absentee voting. In the midst of this debate, one thing is certain—virtually all public opinion surveys tell the same story of growing distrust in U.S. elections. The only way to reverse that trend is to protect the sanctity of every voter's choice on Election Day through basic safeguards and efficiencies like those found in the EIA.

Other Views:

- Complaint, U.S. v. Ga., No. 1:21-cv-02575-JPB (N.D. Ga. June 25, 2021), *available at* https://www.justice.gov/opa/press-release/file/1406456/dl.
- Brendan Williams, *Blocking the Ballot Box: The Republican War on Voting Rights*, 28 WM. & MARY J. RACE, GENDER & SOC. JUST. 389 (2022), *available at* https://scholarship.law.wm.edu/wmjowl/vol28/iss2/5/.
- Stanley Dunlap, *Georgia's controversial 2021 voting law overhaul survives preliminary legal challenge*, GA. RECORDER (OCT. 13, 2023), https://www.culawreview.org/journal/georgias-election-integrity-act-of-2021-how-strict-voter-id-requirements-negatively-impact-people-of-color.
- Stephen Fowler, What Does Georgia's New Voting Law SB 202 Do?, Ga. Pub. Broad., Mar. 27, 2021, https://www.gpb.org/news/2021/03/27/what-does-georgias-new-voting-law-sb-202-do.