Castañon v. US: Examining Barriers to Justice for the Bar & Litigants in DC

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***Castañon v. US*:**
Examining Barriers to Justice for the Bar & Litigants in DC

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Examining Barriers to Justice for the Bar & Litigants in DC

About the Speakers
(Listed Alphabetically)

Johnny Barnes is an experienced Washington, DC practitioner and former Congressional aide. He served as Chief of Staff to DC Delegate Walter Fauntroy and other members, serving on Capitol Hill during the formative years of DC Home Rule. He has taught at DC-area law schools, and helped create the "Street Law" program at Georgetown University Law Center. He has practiced law in DC and the Virgin Islands, often taking cases opposing unchecked development, protecting environmental and health rights of DC residents, and other public interest cases. From 2001-12 he was Executive Director of the ACLU of the National Capital Area. Barnes is an honorably discharged Army Officer (Combat Engineers) and a graduate of Central State University and Georgetown Univ. Law Center.

James S. Bubar (Moderator) is a DC practitioner, specializing in Litigation, Business Law and Communications Law. He has served as co-chair of the DC Affairs Community for five terms, and currently serves on the Bar's Committee on Communities. Bubar participated in drafting the amicus brief before the US Supreme Court in *Angelica Castanon, et al. v. United States* (judgment affirmed October 4, 2021). He received his J.D. from the University of California Hastings College of the Law (now UC College of the Law, San Francisco), and his undergraduate degree from UC Santa Cruz.

Jon S. Bouker is Partner and Government Relations Practice co-leader at ArentFox Schiff LLP. He represents clients before Congress, the White House and federal agencies (particularly the General Services Administration), the government of the District of Columbia, and surrounding counties. Bouker is the Co-Chair of the firm's Pro Bono Committee. Before entering private practice, he served as chief counsel and legislative director to Congresswoman Eleanor Holmes Norton (D-DC) while at the same time serving as minority counsel to Congressman Henry Waxman (D-CA), then ranking member of the House Government Reform Committee. Bouker holds degrees from Georgetown University Law Center, and Georgetown University.

Hon. Thomas Davis, a partner Holland & Knight LLP, is a former Republican Congressman from the Northern Virginia region. He joined the firm in 2019. From

1995 to 2008, Mr. Davis represented Virginia's 11th Congressional District, chairing the D.C. Subcommittee from 1995 to 1999 and the House Oversight Committee from 2003 to 2007. He chaired the National Republican Congressional Committee from 1999 to 2003. Before his election to Congress, he served as Chairman of the Fairfax Country Board of Supervisors and as President of the Washington Metropolitan Council of Governments. Davis received his J.D. from the University of Virginia and undergraduate degree from Amherst College.

TAB ONE

No. 20-1279

IN THE SUPREME COURT OF THE UNITED STATES

ANGELICA CASTAÑON, ET AL.,
Petitioners,

v.

THE UNITED STATES OF AMERICA, ET AL.,
Respondents.

ON PETITION FOR APPEAL TO
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE DISTRICT OF COLUMBIA AFFAIRS COMMUNITY OF THE DISTRICT OF COLUMBIA BAR, AND OTHER CONCERNED DISTRICT OF COLUMBIA LEGAL ORGANIZATIONS AND PROFESSIONALS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS AND REVERSAL

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INTERESTS OF *AMICI CURIAE*[1]

I. The Importance of Granting D.C. Residents Full and Equal Democratic Rights.

The District of Columbia Affairs Community of the District of Columbia Bar ("D.C. Affairs Community"), other concerned Legal Organizations ("Legal Organization *Amici*"), and District of Columbia Legal Professionals ("Individual *Amici*") (collectively, the "*Amici*")[2] join this case as *amici curiae* because they believe that failure of the U.S. Government to ensure that Washington, D.C. ("D.C.") citizens have their own elected representatives in Congress who vote in their constituents'

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[1] Counsel of record for all parties received notice of *Amici Curiae's* intention to file this brief at least ten days before the due date. All parties consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than *Amici,* their members, or their counsel made a monetary contribution to fund this brief.

[2] The views expressed are those of the D.C. Affairs Community. The D.C. Bar itself made no monetary contribution to fund the preparation or submission of this brief. Moreover, the views expressed herein have been neither approved nor endorsed by the D.C. Bar, its Board of Governors, or its general membership. In addition, the views expressed of past bar presidents represent only those of such individuals and not those of any bar association to which they belong or led.

interests and work to redress constituents' concerns violates basic principles of justice.[3]

All individual *Amici* live, work, or are based in D.C., and all work to advance justice and the rule of law. *Amici* believe this brief will assist the Court by discussing ways that D.C.'s lack of voting representation in the U.S. House of Representatives poses potential and often real disadvantages to them as legal organizations and lawyers.

II. The Interests of the D.C. Affairs Community.

The D.C. Affairs Community has a keen interest in D.C. "Home Rule" and administration of justice in D.C. The D.C. Affairs Community conducts programs and issues public statements on issues of vital concern to lawyers practicing in D.C. and citizens of D.C. Past programs included public forums for candidates for D.C. Mayor and Council, legislation like the local family leave act and public-financing of local elections, public-safety issues, fiscal issues such as D.C.'s annual budget and budget autonomy, D.C. statehood and congressional voting rights, the initiative and referendum process, and current affairs covered by the local press. In additional to public statements, the Community has submitted testimony before Congress and D.C. Council, and filed *amicus* briefs on Home Rule matters. The Community along with most D.C. Bar

[3] A list of the *Amici* is included in the accompanying Appendix 1.

former presidents were granted standing to file *amicus curiae* briefs in *Banner v. United States*, 303 F. Supp. 2d 1 (D.D.C. 2004) (regarding D.C.'s fiscal health, *id*. at 3 n.1), *aff'd*, 428 F.3d 303 (D.C. Cir. 2005), and 547 U.S. 1143 (2006) (petition for *certiorari*).

III. The Interests of Other Legal Organization *Amici*.

Legal Organization *Amici* serve members who live or work, and represent clients who reside or have significant interests, in D.C. In addition to the D.C. Affairs Community, Legal Organization *Amici* include the Bar Association of the District of Columbia; Greater Washington Area Chapter, Women Lawyers Division of the National Bar Association; Washington Bar Association; and Women's Bar Association of the District of Columbia. All Organizational *Amici* work to pursue justice, advance American ideals and equality, and support and improve the justice system. Like the individual *Amici,* many of whom are past leaders of these organizations, these groups have supported self-government for D.C. citizens and, accordingly, have a unique interest in the ability of D.C. citizens to govern themselves.

IV. The Interests of Individual *Amici*.

Individual *Amici* live or work in D.C., and either represent clients who reside or have significant interests in D.C., or support self-governance for resi-

dents of D.C. (or both). They include past presidents of D.C. bar associations and other leaders in the D.C. legal community.[4]

Individual *Amici* represent and advise clients on matters in D.C. and elsewhere. They work on issues of great concern to their clients, whether businesses or individuals, paying or pro-bono. Individual *Amici* bring an important voice to this discussion as recognized leaders in the D.C. legal community. They have sought to enhance self-government for D.C. citizens and, accordingly, have a unique interest in the ability of D.C. citizens to govern themselves. *Amici* explain disadvantages, large and small, that affect their efforts to advance their missions and to support the rule of law, administration of justice, and rights of D.C. citizens to petition Congress for a redress of grievances.

INTRODUCTION

In this case, eleven registered D.C. voters sought voting representation in Congress for all American citizens living in D.C. *Castañon v. United States*, 444 F. Supp. 3d 118, 123 (D.D.C. 2020) (Pet. Appx.

[4] The American Bar Association, one of the world's largest voluntary professional organizations, passed a resolution in 1999, supporting "the principle that citizens of [D.C.] should not be denied the fundamental right belonging to other American citizens to vote for voting members of the Congress, which governs them." *See* ABA, 2019–2020 Policy and Procedures Handbook, Resolution 99A115, at 300, https://www.americanbar.org/about_the_aba/aba-policy-and-procedures-handbook/ (last visited April 12, 2021).

B). Plaintiffs alleged the lack of voting representation in Congress infringes on the equal protection and due process rights of all adult American citizens living in D.C. *Id.* Plaintiffs sued federal officials who have substantial authority to apportion seats in the House of Representatives, in their official capacity, including the Secretary of Commerce. *Id.*

Although D.C. has a Delegate in the House of Representatives, the Delegate cannot vote. 2 U.S.C. § 25a(a). Thus, Plaintiffs sought a declaration that the Delegate must have the same powers and privileges afforded to other Members of the House of Representatives, including the power to vote on all legislation considered by the House. Pet. Appx. B at 18a. Plaintiffs sought injunctive relief to require federal officials to include D.C. residents in the Secretary of Commerce's calculations used to apportion congressional seats. *Id.*

On March 12, 2020, a three-judge panel of the U.S. District Court for the District of Columbia, dismissed Plaintiff's motion for summary judgment and, held that the Constitution foreclosed Plaintiffs' claims challenging apportionment of congressional seats. *Id.* at 149. The district-court panel therefore dismissed Plaintiffs' claims related to apportionment. *Id.*

On September 16, 2020, the district court panel denied Plaintiffs' motion for reconsideration. *Castañon v. United States*, No. CV 18-2545, 2020 WL 5569943, at *1 (D.D.C. Sept. 16, 2020) (Pet. Appx. C). Plaintiffs petitioned for appeal to this Court under 28 U.S.C. § 1253(b) and 28 U.S.C. § 2101(b).

Because the District Court's errors affect the rights of more than 700,000 citizens of D.C., *Amici* file this brief in support of Plaintiffs.

SUMMARY OF ARGUMENT

This case raises serious constitutional questions about the lack of voting representation in the U.S. Congress for Americans who live in D.C. This appeal focuses, as set forth in the Petitioners' Jurisdictional Statement, on Congress's failure to ensure voting representation in the House of Representatives for citizens of D.C. This Court should note probable jurisdiction and resolve these issues in Petitioners' favor for the following reasons.

First, D.C.'s lack of voting rights and representation contradicts the Constitution's promises of equal protection, due process, and rights of association; and sometimes may cause *Amici* to explore other ways to advocate for clients in D.C. given the lack of any voting representation in Congress and, specifically, in the House of Representatives.

Second, D.C.'s lack of voting representation negatively affects the administration of justice. Three recent examples include:

(i) the events of January 6, 2021, where a violent mob breached the U.S. Capitol in an attempt to prevent Congress from certifying results of the 2020 presidential election. It took hours for D.C.'s Mayor to gain approvals needed from the Federal Government to deploy D.C.'s National Guard to protect the U.S. Capitol;

(ii) inability of D.C. courts to function during Federal Government shutdowns; and

(iii) ongoing delay in appointing judges to serve on D.C.'s local courts.

Third, D.C. does not control budgeting and appropriation of its local tax dollars. This is the injustice that fueled the American Revolution. It was wrong then, and it is wrong now. Politicians not elected by D.C. citizens frequently grandstand and take positions contrary to D.C.'s duly enacted legislation and D.C.'s interest.

Finally, D.C. residents cannot adequately petition the Federal Government for a redress of grievances because they lack voting representation in Congress. This violation of the First Amendment should also be remedied, now.

ARGUMENT

I. D.C.'s Lack of Voting Representation May Force Lawyers to Explore Other Ways to Advocate for Clients in D.C.

A. In Taking the Lawyers' Oath, D.C. Lawyers, Like Other Lawyers Practicing in the United States, Swear to Uphold the Constitution.

D.C. Bar members swear to uphold the Constitution and "demean" themselves "uprightly and according to law."[5] Ethics rules obligate D.C. lawyers

[5] The oath reads: "I . . . do solemnly swear (or affirm) that as

to represent clients with diligence and competence, and "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[6] Because of D.C.'s lack of voting representation, lawyers often must explore alternative methods to advocate for D.C. clients.

B. Lawyers Must Consider Whether Their Advocacy for D.C. Clients Is Affected by the Lack of D.C. Voting Representation.

A key tenet of self-government is the ability of citizens to control state and local government matters, a prerogative enjoyed by citizens in the 50 states. Those governments enjoy local "budget autonomy"—the ability to spend locally-generated tax dollars without congressional appropriation. They also enjoy legislative autonomy—the ability to enact and implement local laws without congressional review.[7] Lawyers participate in such matters in states and localities around the country, but

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a member of the Bar of this Court, I will demean myself uprightly and according to law; and that I will support the Constitution of the United States of America." D.C. Court of Appeals, Attorney Oath of Admission to the D.C. Bar, https://www.dccourts.gov/sites/default/files/2017-07/DCCA%20Rule%2046%20Admission%20to%20the%20Bar.pdf.

[6] Rule 1.1, Competence, American Bar Association, Center for Professional Responsibility, Model Rules of Professional Conduct (2020), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/ (last visited April 1, 2021).

[7] *See, e.g.*, *H.R. 960 & H.R. 1045, Greater Autonomy for the Nation's Capital: Hr'g Before H. Subcomm. on Fed. Workforce,*

must consider whether their advocacy for D.C. clients will be affected by congressional representatives who do not answer to citizens in D.C.

The D.C. Home Rule Act—signed into law on December 24, 1973 by President Nixon after decades of agitation—was intended to ensure that D.C. citizens had power over local affairs.[8] The Home Rule Act sought "to the greatest extent possible, consistent with the constitutional mandate, [to] relieve Congress of the burden of legislating upon essentially local District matters," and grant D.C. power "to all rightful subjects of legislation."[9] The Home Rule Act expressly authorizes D.C.'s Council and voters to amend key provisions and amend congressional enactments directed exclusively to D.C.[10]

Americans living in D.C. have no voting representation in the House of Representatives and no representation at all in the Senate.[11] While the

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Postal Serv., & D.C., 111th Cong. (2009); *Budget Autonomy for D.C.: Restoring Trust in Our Nation's Capital: H'rg Before H. Comm. on Gov't Reform*, 108th Cong. (2003).

[8] *District of Columbia v. John R. Thompson Co.* found no barrier to Congress's delegation of power to D.C., subject to Constitutional limitations and Congress's power to revise the authority granted. 346 U.S. 100, 109 (1953).

[9] D.C. Code § 1-201.02(a); D.C. Code § 1-203.02.

[10] D.C. Code § 1-206.02(a)(3).

[11] D.C. residents also elect a "shadow" Representative in the House and two "shadow" Senators in the U.S. Senate. None has a vote. From time to time, D.C.'s Delegate has been allowed a vote in a committee of the House but not a vote on the floor. D.C.'s Delegate has never had a full vote in the House like other Representatives. (D.C.'s shadow Senators,

Home Rule Act makes it difficult for Congress to veto D.C. legislation,[12] Congress routinely threatens to nullify laws supported in D.C. Lawyers representing clients with interests before the D.C. government must consider whether their work on such issues may be affected later by Congress; these considerations are foreign to lawyers and clients in the 50 states. Decisions about where businesses locate (and provide jobs) are affected by D.C.'s lack of power and control as businesses may choose a jurisdiction with a voting Representative and two Senators.

D.C. clients are often subject to positions of representatives who answer only to voters outside D.C. and, as experience shows, are impervious to opinions and needs of those in D.C. Lawyers thus lack a meaningful way to petition the Government for redress of grievances for D.C. clients or to express views that could affect public policy and legislation as effectively as possible because D.C. has no vote in Congress.

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by contrast, do not have any vote and cannot participate in key Senate functions like withholding unanimous consent or placing a "hold" on nominations.).

[12] D.C. legislation becomes law unless both Congress and the President overturn it during the congressional review period. Congress has disapproved D.C. legislation three times: S.J. Res. 84, 102d Cong. (1991) (height of buildings); H.R. Res. 208, 97th Cong. (1981) (decriminalizing sodomy); S. Con. Res. 63, 96th Cong. (1979) (preventing foreign chanceries in residential neighborhoods).

II. D.C.'s Lack of Representation in Congress Constrains the Administration of Justice.

Consistent with their missions, *Amici* work to advance the administration of justice and rule of law. The "Core Purpose" of the D.C. Bar, of which the D.C. Affairs Community is a part, since its creation by the District of Columbia Court of Appeals in 1972, is "[t]o enhance access to justice, improve the legal system, and empower lawyers to achieve excellence."[13] D.C.'s lack of representation in Congress impedes these goals in many ways.

First, Congress serves a dual role vis-à-vis D.C., as both a national legislature and as the local legislature for D.C.[14] The Home Rule Act created the Council, D.C.'s local legislature. However, Congress retained the right to review all D.C. legislation. That constrains D.C. leaders' ability to legislate for constituents and subjects them to "second-guessing" and political grandstanding by officials unresponsive to D.C.'s citizens. Under the D.C.

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[13] *See, e.g.*, D.C. Bar, https://www.dcbar.org/About/Who-We-Are/Mission ("Core Purpose" tab; last visited April 1, 2021).

[14] The District Clause authorizes Congress "[t]o exercise exclusive Legislation in all Cases whatsoever" over the "Seat of the Government of the United States." U.S. CONST. art. I, § 8, cl. 17. The Founders envisioned that "a municipal legislature for local purposes, derived from their own suffrages, will of course be allowed them." There is no evidence that the Founders discussed disenfranchising citizens of the federal district. THE FEDERALIST NO. 43 (James Madison).

Budget Autonomy Act,[15] D.C. is entitled to control the budgeting of D.C.-generated tax revenues. Congress disregards that law, regularly imposing its will on D.C. and its budget.

Second, Congress often contravenes, or threatens to contravene, the express will of D.C. voters on critical public-policy choices, which are left to state and local governments in the 50 states. D.C.'s local budget allocating D.C.-taxpayer-raised revenue (more than $8.6 billion in recent years) cannot become law until Congress affirms it. D.C. residents have no vote on riders that Congress proposes to the D.C. budget, even if they would undo decisions made by legislators accountable to D.C. residents.[16] Since D.C. was granted "Home Rule," the House of Representatives has threatened to do so even more frequently. Having votes in Congress would not in itself cure the problem, nor give D.C.'s residents equal standing with those in the 50 states as full

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[15] Local Budget Autonomy Amendment Act of 2012, A. 19-632, 60 D.C. Reg. 1724 (Feb. 15, 2013); (D.C. Code § 1-204.46(a)).

[16] Eugene Boyd, Congressional Research Service R41772, *District of Columbia: A Brief Review of Provisions in District of Columbia Appropriations Acts Restricting the Funding of Abortion Servs.* (Aug. 27, 2015), https://www.everycrsreport.com/reports/R41772.html; *DC Officials Cite Gun Control Hypocrisy in Condemning Sen. Marco Rubio*, Associated Press (Apr. 3, 2018), https://www.cbsnews.com/news/dc-officials-cite-gun-control-hypocrisy-in-condemning-sen-marco-rubio; P. Smith, *Feature: Congress Moves to End Ban on DC Needle Exch. Funding*, StoptheDrugWar.org (June 7, 2007), https:// stopthedrugwar.org/chronicle/2007/jun/07/feature_congress_moves_end_ban_d.

and equal American citizens. However, having such representation would help to ameliorate that inequity, and eliminate the affront to that most fundamental of American ideals—no taxation without representation.

As a result of this anti-democratic structure, D.C. residents have no say in key rights and responsibilities of citizens in a democratic society.

A. Lack of Control Over D.C.'s Own Tax Dollars: Unlike State and Local Governments in the 50 States, D.C. Currently Cannot Control Expenditure and Appropriation of Its Own Tax Dollars.

D.C.'s lack of voting rights affects the most basic of issues: war and taxes. For years, D.C. has asked Congress for authority to spend its local dollars without affirmative approval from Congress to enact and implement local laws without congressional review.[17] Our Founders declared independence from Great Britain and fought the Revolution over just these issues. Acting through the federal appropriations process, and even after court approval of D.C.'s Budget Autonomy Act, concern continues about Congress's involvement in D.C.'s budget. For example:

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[17] *See, e.g.*, *H.R. 960 & H.R. 1045, Greater Autonomy for the Nation's Capital: H'rg Before H. Subcomm. on Fed. Workforce, Postal Serv., & D.C.*, 111th Cong. (2009); *Budget Autonomy for D.C.: Restoring Trust in Our Nation's Capital: Hr'g Before H. Comm. on Gov't Reform*, 108th Cong. (2003).

- D.C.'s more than 712,000 residents pay more federal taxes per capita than residents of any state in the country and pay more federal taxes than 22 states, but have no vote in Congress over those tax and spending decisions.[18]
- D.C. residents have fought in every war since the Revolution, but have no vote on whether to go to war, how to compensate veterans of those wars, or how to pay for them.
- D.C. residents have no vote in Congress on D.C.'s budget—which is larger than that of 12 states—or efforts to revise or delay D.C. laws. Federal budget impasses prevent D.C. from spending D.C. tax dollars on basic services.[19]

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[18] *E.g.,* 700,000 residents cited in H.R. 1, 116th Cong. § 2201, *Findings Relating to D.C. Statehood* (passed in the House Mar. 8, 2019) ("H.R. 1 Findings"); 705,000 residents cited in *Washington, D.C. Admission Act, Hr'g Before H. Oversight and Reform Comm. on D.C. Statehood*, H.R. 51, 117th Cong. (2021); *see also* https://www2.census.gov/programs-surveys/popest/technical -documentation/file/layouts/2010-2020/nst-est2020.pdf (last visited Apr. 1, 2021) (estimating 712,816 residents on July 1, 2020 (released December 2020)).

[19] For example, the 2018–2019 Federal Government shutdown, the longest in history, immediately affected D.C.'s legal community. Hundreds of law graduates faced uncertainty over whether the Committee on Admissions could administer the bar exam in February. Swearing-in ceremonies for those who passed the bar exam were postponed, and issuance of D.C. bar numbers delayed. Lawyers' applications for waiver into the D.C. Bar were "frozen," causing concerns about jobs

- D.C. is stronger financially than most jurisdictions (even after the economic ravages of the COVID-19 pandemic), with a $16.96 billion budget for fiscal year 2021[20] and a $3.25 billion general-fund balance as of September 30, 2020.[21] D.C. has an AAA rating, an accomplishment achieved by only ten of the U.S. largest cities, and a rate higher than 32 states.[22]

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and completing legal work. Karen Sloan, *Shutdown Imperils DC Bar Exam, Swearing-In Postponed*, Law.com (Jan. 24, 2019, 1:58 pm), https://www.law.com/newyorklawjournal/2019/01/24/shutdown-imperils-dc-bar-exam-swearing-in-postponed-389-56431/; Natalie Delgadillo, *Thanks to the Shutdown, Hundreds of Would-Be Lawyers Are Still Waiting To Get Barred in D.C.*, DCist (Feb. 21, 2019, 11:18 pm); https://dcist.com/story/19/02/21/thanks-to-the-shutdown-hundreds-of-would-be-lawyers-are-still-waiting-to-get-barred-in-d-c/. Because D.C.'s courts and marriage bureau were shut down, D.C. couples were unable to get married. Zoe Tillman, *This Couple Was Turned Away from Getting Their Marriage License in DC During the Government Shutdown*, BuzzFeed News (Jan. 2, 2019, 2:40 pm), https://www.buzzfeednews.com/article/zoetillman/marriage-license-dc-government-shutdown-weddings.

[20] Gov't of Dist. of Columbia Fiscal Year 2021 Approved Budget and Financial Plan (https://cfo.dc.gov/sites/default/files/dc/sites/ocfo/publication/attachments/DC_OCFO_Budget_Vol_1-Bookmarked-9-1-2020.pdf).

[21] Gov't of Dist. of Columbia, Ofc. of Chief Fin. Officer, 2020 Comprehensive Annual Financial Report at 48 (year ended Sept. 30, 2020) (https://cfo.dc.gov/page/comprehensive-annual-financial-report-2020).

[22] *H'rg Before H. Oversight and Reform Comm. on D.C. Statehood*, *supra* n.18.

- D.C.'s total personal income exceeds that of seven states. Its per-capita personal-consumption expenditures exceed those of any state, and its total personal-consumption expenditures exceed those of seven states.[23] Yet, D.C. must go, "hat in hand," to Congress on appropriations.
- D.C. collects income taxes, administers workers-compensation-and-unemployment insurance, and runs its Department of Motor Vehicles. It funds and provides services, such as police, public networks, and education to residents, businesses, commuters, and visitors. Thus, in many respects, D.C. already functions as a state.[24]

Congressional involvement creates serious governance problems. It costs D.C. millions in finance charges, disrupts budgeting, and risks government shutdowns, all causing unnecessary expenditures. The relief sought would bring D.C. voting representation at least in the House of Representatives—a right Americans in the 50 states take for granted.

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[23] H.R.1 Findings § 2201, *supra* n.17; *H'rg Before the H. Oversight and Reform Comm. on D.C. Statehood*, *supra* n.18.

[24] *H'rg Before H. Oversight and Reform Comm. on D.C. Statehood*, *supra* n.18. (D.C. Mayor testified that D.C. is "treated like a state in more than 500 citations in federal law").

B. Reduced Ability to Ensure D.C. (and National) Safety: Control Over the D.C.'s Metropolitan Police and National Guard Resides With the President.

It is fundamental to the administration of justice that local police should be accountable to residents. That is not the case in D.C. Ultimate authority is held by the President. The D.C. Self-Government and Governmental Reorganization Act permits the President to commandeer the D.C. police force for any federal purpose.[25] On June 2, 2020, it was revealed that the President considered using the local metropolitan police force for a photo opportunity at Lafayette Square the previous day.[26] The reverse situation presented itself on January 6, 2021, when local police came to the aid of Congress to quell an insurrection without being requested by the President.

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[25] The D.C. Home Rule Act provides, "Notwithstanding any other provision of law, whenever the President of the United States determines that special conditions of an emergency nature exist which require the use of the Metropolitan Police force for federal purposes, he may direct the Mayor to provide him, and the Mayor shall provide, such services of the Metropolitan Police force as the President may deem necessary and appropriate." D.C. Code § 1-207.40(a) (Dec. 24, 1973).

[26] Peter Hermann, *Trump administration considered taking control of D.C. police force to quell* protests, Wash. Post (Jun. 2, 2020, 8:15 pm), https://www.washingtonpost.com/local/public-safety/dc-police-takeover-george-floyd/2020/06/02/856a9744-a4da-11ea-bb20-ebf0921f3bbd_story.html.

While in most jurisdictions, Governors may call up the National Guard, D.C.'s Mayor has no such power, leading to substantial delay in summoning the National Guard on January 6, 2021.[27]

Lawyers assisting clients need to be able to appeal to local public officials that oversee the police.

As shown by the aftermath of January 6, 2021, the lack of adequate policing in and around Capitol Hill led to an extensive military presence to ensure the calm, and causing further disruption to law firms and lawyers based in D.C.

C. Lack of Control Over D.C.'s Courts: D.C. Does Not Have Control Its Own Courts.

Because they are not appointed by D.C. officials, D.C. judges are not accountable to D.C. voters or their elected representatives. Although D.C. has input, the President and Senate ultimately decide who serves on D.C.'s Superior Court and Court of Appeals.[28] The Federal Government's role in ap-

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[27] Mark Mazzetti & Luke Broadwater, *The Lost Hours: How Confusion and Inaction at the Capitol Delayed a Troop Deployment*, N.Y. Times (Feb. 21, 2021, 8:26 pm), https://www.nytimes.com/2021/02/21/us/politics/capitol-riot-security-delays.html.

[28] Members of the Judicial Nomination Commission ("JNC") are appointed by the Mayor, D.C. Council, D.C. Bar, Chief Judge of the U.S. District Court, and the President. https://jnc.dc.gov/page/jnc-members. The JNC selects three applicants for each vacancy. From those, the President sends one name to the Senate which votes for confirmation. https://jnc.dc.gov/page/jnc-application-process. D.C. has no

pointing local judges undermines judicial independence, a fundamental underpinning of democracy. Judges address issues of public import, great and small, and can affect citizens' most basic rights, depriving them of liberty and property.

In states, non-federal judges seated on courts of general jurisdiction are generally either elected or appointed by the jurisdiction's highest elected official and confirmed by the state/local legislature. Those judges then decide key state-law issues. Those issues should be decided in D.C. as they are in the 50 states, by a judiciary that is selected from the local community and subject to local accountability.[29] Instead, federal judges appointed by the

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Senators and, thus no vote in either the Committee or in the full Senate on such confirmations. Voting representation in the Senate would help restore this right.

[29] In 21st century practice, "contact us" tabs of Representatives and Senators will not even accept petitions from people with zip codes outside the district or state that member represents. If this appeal challenged D.C.'s lack of Senate representation, we would stress the role of "unanimous consent" in the Senate and point to discrimination against D.C. residents and businesses (e.g., when confronting nominations of persons deemed hostile to their interests or incompetent to address them, or when choosing to assert a "hold" in order to force attention to grievances). *See* Congressional Research Service, 96-548, V. Heitshusen, *The Legislative Process on the Senate Floor: An Introduction* (updated July 22, 2019).

However, even in absence of Senate representation, Presidents and Congress would be more likely to defer to recommendations or objections of a full-fledged House Representative on nominations of U.S. District Court judges, D.C. Superior Court judges, and U.S. Attorneys than they do to D.C.'s non-voting Delegate.

President decide key D.C.-law issues with no accountability to D.C.

Due to the Senate's failure to confirm nominees, D.C.'s Court of Appeals has been without one of its eight Associate Judges since 2013, and another since 2017. Of the D.C. Superior Court's 61 judges, 10 judgeships remain vacant. These vacancies increase workload and thus cause disruptions, as confirmed by press reports.[30] As a result, D.C. courts cannot always resolve cases as timely or efficiently as other courts. The significance of such local control cannot be underestimated.[31] It instills

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[30] *E.g.,* Martin Austermuhle, *Judges Say "Unprecedented" Vacancies at D.C. Court Are Slowing the Legal System*, DCist, (Apr. 15, 2019, 10:54 am), https://dcist.com/story/19/04/15/judges-say-unprecedented-vacancies-at-d-c-court-are-slowing-the-legal-system/ (it's "'slowing down the wheels of justice,'" quoting C.J. Blackburne-Rigsby). Progress in civil cases "has slowed significantly," https://www.chaikinandsherman.com/blog/2019/april/judicial-vacancies-slowing-justice-in-dc-courts-/. (last visited April 1, 2021).

[31] Bridget Bowman, *Congressional Judicial Backlog Creates Problem for D.C. Court*, Roll Call (Dec. 3, 2015), https://www.rollcall.com/news/senate-moves-dc-judges-amid-backlog-concerns; Letter to U.S. Senators from Council for Court Excellence (July 30, 2018), http://www.courtexcellence.org/uploads/ publications/73018_CCE_Ltr_to_Senators_re_DC_ judicial_vacancies.pdf; Martin Austermuhle, *In Brief Meeting, Bowser Presses Trump on Judge Backlog and New VA Medical Facility*, WAMU 88.5 Radio (Mar. 14, 2019), https://wamu.org/story/19/03/14/in-brief-meeting-bowser-presses-trump-on-judge-backlog-and-new-va-medical-facility/.

confidence in the judiciary, a vital part of its credibility and a foundation of democratic government.

D. Lack of Control Over D.C. Prosecutors: Prosecutors of Felonies and Many Misdemeanors in D.C. Are Unaccountable to D.C. Voters.

In the 50 states, prosecutors elected or appointed by local officials prosecute serious local crimes. That basic democratic function is curtailed in D.C. The U.S. Attorney for D.C., selected by the President, prosecutes all felonies and most misdemeanors. Federal prosecutors present cases to federal grand juries and try cases that can lead to the most serious of penalties, loss of liberty and property, in front of federal judges without involvement of anyone accountable to D.C. residents.

In contrast, D.C.'s Attorney General, elected by D.C. voters, has authority to prosecute only a narrow set of misdemeanors.[32] Though brought under the D.C. Code, those prosecutions are still brought in the name of the "United States," as crimes against the entire country.[33] Other jurisdictions enact criminal laws, and locally chosen prosecutors prosecute violations of those statutes. In D.C., final decisions on those issues are assigned to officials

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[32] For example, D.C.'s Attorney General is charged with prosecution of disorderly conduct and lewd, indecent, or obscene acts. D.C. Code § 23-101(a).

[33] *See, e.g., Goode v. Markley,* 603 F.2d 973 (D.C. Cir. 1979), (violations of D.C. Code are against a single sovereign, the United States, not against D.C. or its people).

who are not required to consult (and almost never consult) with those Americans who call D.C. home.

Local control provides an important check on prosecutorial discretion: It ensures that enforcement of criminal laws reflects concerns and values of the community. Unlike in all 50 states, where state and federal prosecutors are different entities, in D.C. local and federal prosecutors are one and the same. Therefore, the line between the two can become blurred. For example, in 2020, it was revealed that federal prosecutors had begun a targeted program whereby African American felons from certain D.C. neighborhoods who were caught illegally possessing guns were charged under federal statutes instead of D.C. laws.[34] The result was that defendants from three predominantly Black wards were subject to lengthier prison terms than defendants elsewhere in D.C. Prosecutors were able to hide the targeted nature and disparate impact of the program because all gun cases are handled by the U.S. Attorney's office, regardless of whether charged under federal or D.C. statutes. The federal prosecutors that implemented this discriminatory program face no accountability from D.C. officials or residents.

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[34] Spencer S. Hsu & Keith L. Alexander, *D.C. Crackdown On Gun Crime Targeted Black Wards, Was Not Enforced Citywide as Announced*, Washington Post (Sept. 3, 2020, 8:18 pm), https://www.washingtonpost.com/local/legal-issues/dc-crackdown-on-gun-crime-targeted-black-wards-was-not-enforced-citywide-as-announced/2020/09/03/f6de0ce2-e933-11ea-970a-64c73a1c2392_story.html.

E. Negative Effects on Penal Systems: Lack of Local Control Over the Penal System Impacts Client Representation.

The right to an attorney in criminal matters is a critical foundation of the American justice system. U.S. CONST. amend. VI. D.C.'s lack of Congressional representation harms lawyers' ability to represent and advocate for their incarcerated clients.

For example, the Revitalization Act closed the dedicated prison in (relatively close by) Lorton, Virginia.[35] "Since 2001, all people convicted of felonies . . . are now placed in the federal custody of the [Bureau of Prisons] and can be incarcerated in *more than 100 different federal prisons across the United States*."[36] This places obvious and substantial burdens on lawyers' ability to meet and confer with clients with ongoing appeals and to investigate complaints of prison conditions and discrimination.[37] Moreover, when clients are subjected to overcrowd-

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[35] National Capital Revitalization and Self-Government Improvement Act of 1997, Pub. L. No. 105-33, 111 Stat. 251, H.R. 1963, 105th Cong (1997).

[36] District Task Force on Jails & Justice, *Jails & Justice: A Framework for Change*, (Oct. 2019) at 13, http://www.courtexcellence.org/uploads/publications/Framework-ForChange.pdf (emphasis added).

[37] *See, e.g.*, Martin Austermuhle, *D.C. Inmates Serve Time Hundreds of Miles from Home. Is It Time to Bring Them Back?*, WAMU 88.5 Radio (Aug. 10, 2017), https://wamu.org/story/17/08/10/d-c-inmates-serving-time-means-hundreds-miles-home-time-bring-back/.

ing, inadequate health care and education, or denied other essential support due to underfunding, the purse strings are held by legislators with no political accountability to D.C. This situation further limits lawyers' ability to advocate for clients and to obtain meaningful redress.

A recent independent report suggests that, to the extent Congress permits D.C. to use its funds and change its laws, unwinding the Revitalization Act's interjection of federal prisons into the local criminal justice system may take a full decade.[38] The recommended plan also depends on intergovernmental cooperation of and payments from the federal Bureau of Prisons.[39]

D.C. lawyers advocating for clients through systemic reform are uniquely burdened by the lack of accountability of federal agencies to local voters, whether through legislation, congressional oversight, or appropriations.

III. Lawyers and Citizens in D.C. Lack the Right to Meaningfully Petition the Government.

The First Amendment to the Constitution explicitly guarantees Americans the right to petition the Government for a redress of grievances: "Congress shall make no law . . . abridging the freedom

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[38] District Task Force on Jails & Justice, *Jails & Justice: Our Transformation Starts Today*, (Feb. 2021) at 23–24, http://www.courtexcellence.org/uploads/publications/TransformationStartsToday.pdf.

[39] *Id*. at 60.

of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. It is fundamental that Americans have the right to participate meaningfully in their governance and petition the Government for a redress of grievances.

Lawyers are often the entryway, and the last resort, for exercise of this right. For D.C. residents and their lawyers, the right to petition the Government is diminished, as they do not have voting representatives in Congress to whom they can address grievances or who can remedy them.

F. Representation of D.C. Citizens in the Parole System: D.C.'s Lack of Control Over Parole Issues Raises Serious Constitutional Concerns.

In 1997, Congress, without any voting representatives from D.C., passed the Revitalization Act.[40] That Act supplanted local control with federal control over parole and supervised release determinations for D.C.'s prison population. For those convicted after August 5, 2000, the Revitalization Act replaced the discretionary parole system with a non-discretionary supervised release system.[41] This transfer of authority away from D.C.

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[40] National Capital Revitalization and Self-Government Improvement Act of 1997, Pub L. No. 105-33, tit, XI, 111 stat. 251, 712–87.

[41] This "truth in sentencing" supervised release system requires an inmate to serve a minimum of 85 percent of their

has adversely and uniquely impacted administration of justice for D.C. inmates who are either: (i) eligible for parole or (ii) subject to re-incarceration due to revocation of parole or supervised release.

Prior to the Revitalization Act, parole and revocation determinations were made by the D.C. Board of Parole ("DCBP"), a body consisting of five members appointed by D.C.'s Mayor subject to D.C. Council approval. The Act replaces DCBP with the U.S. Parole Commission ("USPC")—a body currently consisting of two presidentially appointed Commissioners, one from Maryland and one from Kentucky (with several vacancies).[42] Thus, officials who have no relationship to either the relevant community or to D.C.'s policy priorities determine the fate of affected D.C. residents.

The adverse impacts on the administration of justice are unmistakable. Due to geographic challenges noted above, inmates have difficulty accessing attorneys who specialize in parole matters—— or even family and community support—to help strengthen their case for early release or against revocation. Those released on supervision have reduced due-process rights, making them more vulnerable to re-incarceration for mere technical violations of terms of release. Since the USPC took

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sentence and conditions early release after that on program participation and good-time credits.

[42] Justice Policy Institute, "Restoring Local Control of Parole to the District of Columbia" (Dec. 2019) at 21–22, http://www.justicepolicy.org/uploads/justicepolicy/documents/DCParoleStudy.pdf.

over in 2000, according to D.C.'s Public Defender Service,[43] the revocation process has been significantly less transparent with many more supervision revocations involving only minor violations.

There is no dearth of analysis regarding D.C.'s parole-related policy problems and possible policy solutions. D.C.'s lack of control over parole and supervised release raises serious due-process and equal-protection concerns for those D.C. residents in the federal prison system for having committed local, not federal, offenses. D.C's lack of voting representation in Congress compounds these concerns by making restoration of local control that much less likely.

CONCLUSION

In 1949, President Truman wrote, "We should take adequate steps to assure that citizens of the United States are not denied their franchise merely because they reside at the Nation's Capital."[44] *Amici* agree. For all the reasons stated here and in the Petitioners' brief, *Amici Curiae* ask this Court to note probable jurisdiction, grant the relief

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[43] Avis E. Buchanan, *Improve D.C.'s parole practices,* The Washington Post (Aug. 14, 2015), https://www.washingtonpost.com/opinions/improve-dcs-parole-practices/2015/08/14/56b9f03c-3475-11e5-8e66-07b4603ec92a_story.html.

[44] Letter from President Truman to the Speaker of the House (July 25, 1949), https://www.trumanlibrary.gov/library/public-papers?month=7&endyear=5&searchterm=franchise&yearstart=5&yearend=All (last visited April 12, 2021).

sought by Petitioners, and right this ancient, festering wrong.

Respectfully submitted.

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Dated: April 14, 2021

APPENDIX

Appendix 1

This Appendix provides a list of the *Amici Curiae*:[1]

Concerned District of Columbia Legal Organizations:

1. District of Columbia Affairs Community of the District of Columbia Bar
2. Bar Association of the District of Columbia
3. Greater Washington Area Chapter, Women Lawyers Division, National Bar Association
4. Washington Bar Association
5. Women's Bar Association of the District of Columbia

Concerned District of Columbia Legal Professionals:

1. Jessica E. Adler, Esq.

[1] All individual *Amici Curiae* sign this brief in their individual capacities and not on behalf of any firm or organization.

Appendix 1

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4. Johnny Barnes, Esq.
5. Hon. Diane M. Brenneman
6. Dean Emerita Katherine ("Shelley") Broderick
7. MaryEva Candon, Esq.
8. Paulette E. Chapman, Esq.
9. Karen E. Evans, Esq.
10. Andrea C. Ferster, Esq.
11. Loretta J. Garcia, Esq.
12. Janine D. Harris, Esq.
13. Yolanda Hawkins-Bautista, Esq.
14. Josephine Nelson Harriott, Esq.
15. Christopher G. Hoge, Esq.
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22. Patrick McGlone, Esq.
23. Charles Miller, Esq.
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AMENDED COMPLAINT

Case No. 1:18-cv-02545-TSC

Absalom Jordan,
4335 4th St. S.E.
Washington, D.C. 20032

Plaintiffs,

v.

The United States of America,

Paul Ryan, in His Official Capacity as
Speaker of the House of Representatives
The United States Capitol, Room H232
Washington, D.C. 20515

Karen L. Haas, in Her Official Capacity
as Clerk of the United States House of
Representatives,
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Paul D. Irving, in His Official Capacity as
Sergeant at Arms of the United States
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Defendants.

TABLE OF CONTENTS

I. NATURE OF THIS ACTION

1. This action seeks to secure the right to full voting representation in the United States Congress for American citizens living in the District of Columbia, the seat of our national government. The denial of that right violates the constitutional guarantees of equal protection, due process, and the constitutional right of association.

2. As the United States Supreme Court explained in 1886, "the political franchise of voting is . . . . a fundamental political right, because preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). The Court also described the right to vote as "fundamental" in establishing the one person, one vote, principle in *Reynolds v. Sims*, 377 U.S. 533, 561–562 (1964) (citing *Yick Wo*, 118 U.S. at 370). The Court reiterated that this right to full voting representation is "fundamental" in striking down State poll taxes in *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 667 (1966) (quoting *Yick Wo*, 118 U.S. at 370) (quoting *Reynolds*, 377 U.S. at 561–562). As the Court explained in *Wesberry v. Sanders,* 376 U.S. 1, 17 (1964): "Other rights, even the most basic, are illusory if the right to vote is undermined." In short, "the fundamental right to vote . . . is at the heart of this country's democracy." *Burson v. Freeman*, 504 U.S. 191, 191 (1992).

3. Nevertheless, the right to voting representation in Congress has been wrongfully denied to the Americans who live in the District of Columbia, the capital of the Free World, since the federal government officially took control of the District as the country's national capital in 1801. The denial of this fundamental right has continued even though District residents have repeatedly petitioned Congress to grant them that right. And it has continued, for no just reason, even with the "continuing expansion of the scope of the right of suffrage" throughout the centuries since our country's founding. *Reynolds*, 377 U.S. at 555.

4. Members of Congress have correctly concluded that Congress has the constitutional authority to provide voting representation in Congress to District residents under the "District Clause," Article I, Section 8, Clause 17 of the U.S. Constitution. *See infra,* ¶ 104. Notwithstanding that recognition, Congress continues to deny the hundreds of thousands of Americans of voting age in the District their fundamental voting rights. It does so even though it has granted those same rights to other American citizens who, like District residents, do not live in a State, such as those who once lived in a State but now live overseas. And it continues to do so despite the fact that other American citizens who live on federal enclaves exercise their right to vote because Congress has taken action that requires States to permit them to vote even though they live on federal land. This disparate treatment violates the equal protection guaranteed to District residents by the Constitution.

5. Because the right to vote is fundamental under our Constitution, and because the reasons that right is fundamental apply foursquare to District residents, the continuing denial of that right to District residents also violates their constitutional right to due process, for reasons explained by the Supreme Court in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

6. The continued denial of voting representation in our national legislature also violates the constitutional right of District residents to band together to further their political beliefs. Because District residents may not band together and ask their voting representatives to take action consistent with their goals, they are denied the core protection guaranteed by the First Amendment right of association. *See generally Gill v. Whitford*, 138 S. Ct. 1916 (2018).

7. The denial of voting representation thus infringes the equal protection, due process, and association rights of Plaintiffs and the other Americans living in the District. These Plaintiffs, who are subject to all the responsibilities of citizenship—paying the taxes, obeying the

laws, and fighting in the wars authorized by Congress—are entitled to vote for representation in the Congress that sets those taxes, passes those laws, and authorizes those wars. Otherwise, Plaintiffs will continue to be deprived of the fundamental principle upon which our national government was founded—the consent of the governed.

8. Plaintiffs therefore seek declaratory and, if necessary, injunctive relief to secure the right to full Congressional voting representation for themselves and other District residents, and thus to eliminate this affront to our Nation's ideals and to District residents' fundamental rights.

9. Plaintiffs' constitutional challenges here are distinct from those raised nearly two decades ago in *Adams v. Clinton*, 90 F. Supp. 2d 35 (D.D.C. 2000), *aff'd* 531 U.S. 941 (2000). That decision does not preclude the constitutional challenges in this amended complaint because Plaintiffs here make three constitutional challenges that were not advanced by the *Adams* plaintiffs, were not decided by the *Adams* court, and are based on subsequent legal developments.

10. *First*, unlike the equal protection challenge in *Adams*, Plaintiffs' claims here are *not* dependent on District residents being characterized as citizens of a "State" for purposes of Article I, Section 2 of the Constitution. Instead, it is based on *Congress*'s refusal to exercise its authority to protect the voting rights of District residents in the face of its recognition, post-*Adams*, that it has the power to do so.

11. Congress clearly has the power to protect the constitutional rights of District residents. The District Clause gives Congress authority to grant voting congressional representation to Americans who do not live in a "State." Members of Congress confirmed—by overwhelming votes—their belief in Congress's power to grant voting rights to residents of the

District of Columbia in hearings held and legislation considered in 2007 and 2009. In 2007, the House of Representatives adopted the 2007 District of Columbia House Voting Rights Act, a bill designed to right this historical wrong. After it failed to act on the 2007 Act, the Senate took up the matter in the next Congress and adopted the 2009 District of Columbia House Voting Rights Act. Both the 2007 and 2009 bills provided that "the District of Columbia shall be considered a Congressional district for purposes of representation in the House of Representatives." H.R. 1905, 110th Cong. § 2(a) (2007); S.160, 111th Cong. § 2(a) (2009).

12. Congress acted decades ago to protect the fundamental voting rights of Americans living overseas who, like citizens living in the District, are not residents of any "State," by enacting the Uniformed and Overseas Citizens Absentee Voting Act of 1986, Pub. L. No. 99-410. Congress also used its "exclusive authority" over a federal enclave under Article I, Section 8, Clause 17 of the Constitution in a way that allowed residents of that enclave—the National Institutes of Health—to have voting representation in the State where that enclave was located—Maryland. As the Supreme Court held in *Evans v. Cornman*, 398 U.S. 419 (1970), once Congress used its "exclusive authority" to permit enclave residents to be subject to taxes and laws of the State comprising the enclave, equal protection principles compelled the conclusion that those residents must be permitted to vote in State and federal elections.

13. Congress's authority over federal enclaves is set forth in the same constitutional provision that contains the District Clause, using essentially the same language. Indeed, the District *is in effect* a federal enclave whose establishment, unlike many military bases and other properties purchased by the federal government, was foreseen when the Constitution was adopted. Yet even though Congress has comparable authority over enclaves and the District, Congress has refused to exercise that authority to afford voting representation to both. And as

noted, Congress took action to bring voting representation to citizens living overseas, but again, not to District residents. Accordingly, unlike the plaintiffs in *Adams*, Plaintiffs here do not claim they should be treated as residents of a State within the meaning of Article I, Section 2; to the contrary, their claim is that notwithstanding they are not residents of a State, they are nonetheless entitled to voting representation, just as Congress has provided that representation to those living overseas and in federal enclaves.

14. *Second*, Plaintiffs' due process challenge is distinct from the claims brought in *Adams* in 2000. Plaintiffs rely on the Supreme Court's recent decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), in which the Court explained that the due process inquiry requires two steps and incorporates equal protection principles. Under the *Obergefell* analysis, the Court first asks whether a fundamental right is implicated—there, the right to marry; here, the right to voting representation. The Court *then* asks whether the reasons giving rise to the fundamental right apply to the group in question—there, same-sex couples; here, District residents who are American citizens otherwise eligible to vote. The *Obergefell* Court also emphasized that fundamental rights are not "defined by who exercised them in the past." *Id*. at 2602.

15. Our history, buttressed by many Supreme Court decisions, confirms that the right to voting representation in Congress is a fundamental right. Application of the analysis set forth in *Obergefell* leads to the conclusion that, as the reasons for that fundamental right apply to District residents, that right can no longer be constitutionally denied them

16. *Third*, Plaintiffs' claim based on infringement of their First Amendment Association rights is also distinct from the claims advanced in *Adams*. Recent developments in First Amendment jurisprudence establish that interference with the right to vote necessarily interferes with the right to band together to seek redress of grievances. *See Vieth v. Jubelirer*,

541 U.S. 267, 314 (2004) (Kennedy, J., concurring) ("The First Amendment may be the more relevant constitutional provision in future cases" involving citizens' association rights in the electoral process); *Gill*, 138 S. Ct. at 1938 (Kagan, J., joined by Ginsburg, Breyer, & Sotomayor, JJ., concurring) ("[S]ignificant 'First Amendment concerns arise' when a [s]tate purposely 'subject[s] a group of voters or their party to disfavored treatment.'" (second alteration in original) (quoting *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring))); *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 935 (M.D.N.C. 2018) (finding First Amendment violations "by chilling voters, candidates, and parties' participation in the political process"); *Benisek v. Lamone*, 2018 WL 5816831 (D. Md. Nov. 7, 2018). While *Vieth*, *Gill*, *Common Cause*, and *Benisek* acknowledged a First Amendment right against the diminution of voting rights, District residents have an even stronger First Amendment claim: their situation is not simply a diminution of voting representation, but a complete denial of that representation.

17. Because of the infringement of their voting rights, District residents lack voting representatives in Congress to whom they may bring their grievances. That substantial burden on Plaintiffs' rights to association is not justified by any important, offsetting governmental interests, and accordingly violates the First Amendment. Indeed, there is no principled basis at all for continuing to deny to District residents the fundamental right to vote, a right the Supreme Court has said is essential to the exercise of all other rights under the Constitution.

II. JURISDICTION AND VENUE

18. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. § 1331, 28 § U.S.C. 1346(a), and 5 U.S.C. §§ 701–706, because Plaintiffs' claims arise under the United States Constitution.

19. A three-judge district court is requested pursuant to 28 U.S.C. § 2284(a), as Plaintiffs' action "challeng[es] the constitutionality of the apportionment of congressional districts." Pursuant to Rule 9.1 of the Rules of the United States District Court for the District of Columbia, Plaintiffs file an Application for a Three-Judge Court contemporaneously with this Amended Complaint.

20. Venue is proper in this District under 28 U.S.C. §§ 1391 (b)(1)–(2), (e), because all Plaintiffs and Defendants reside in this District and because a substantial part of the events and omissions giving rise to the cause of action have occurred here.

III. PARTIES

A. Plaintiffs

21. The Plaintiffs are United States citizens who reside in the various Wards of the District of Columbia. Their life experiences and viewpoints are diverse—but Plaintiffs are united in their desire to secure and exercise their fundamental right as citizens of this country: the right to fully participate in the electoral franchise and secure voting representation in Congress. Plaintiffs' names and backgrounds are set forth below.

22. Plaintiff Angelica Castañon, a resident of Ward 1, was born and raised in Southern California, where she lived until her mid-twenties, when she moved to New York to attend graduate school at Columbia University. After receiving her degree, she briefly moved to Paris before her career took her to Philadelphia, New York City, and then, in 2013, to the District of Columbia. Ms. Castañon now owns a home in the Columbia Heights neighborhood of the District. Since settling in Washington, Ms. Castañon has not been permitted to vote for voting representation in Congress by virtue of her residence in the District of Columbia.

23. Ms. Castañon grew up in poverty. For some time, she lived with her family in a rented garage and relied on food supplied by food banks and churches. As a child of color growing up in poverty, she remembers experiencing implicit bias in schools. In particular, she recalls her mother advocating to keep her in the general education population rather than in remedial classes that Ms. Castañon did not need. Ms. Castañon recalls her great grandmother's commitment to service, and in particular, her practice of inviting homeless people to eat with the family at their dinner table, no matter how strained the family's resources were. These memories instilled a duty of service in Ms. Castañon.

24. Ms. Castañon is currently employed as a Senior Policy Analyst for the National Education Association and serves as an Advisory Neighborhood Commissioner ("ANC") in the District of Columbia. She has won several community service awards, and in addition to her regular ANC duties, she takes on additional acts of service such as community walks to identify youth suffering from homelessness and addiction.

25. Ms. Castañon believes it is unfair that residents of the District of Columbia cannot elect voting representatives in the House of Representatives and Senate, despite paying federal taxes and despite the fact that the District's population is larger than that of other States. Ms. Castañon is concerned that District residents' lack of voting representation in Congress means that they miss out on influencing decisions that affect them, such as the Elementary and Secondary Education Act. Ms. Castañon is also concerned about individuals who come to the District to work for nonprofit organizations, and are silenced by their lack of voting representation as a result of their move. Ms. Castañon seeks the right to voting representation in Congress because voting makes her feel included by her country. Ms. Castañon feels that her lack of voting representation in Congress is hurtful.

26. Plaintiff Gabriela Mossi, a resident of Ward 1, is a native-born resident of the District of Columbia who spent part of her childhood living in Honduras. She moved back to the District as a young adult and has been politically active since her return. Despite her impressive civic involvement, she is not permitted to vote for voting representation in Congress by virtue of her residence in the District of Columbia.

27. Ms. Mossi regularly votes in District of Columbia elections, including for the position of the non-voting Delegate from the District of Columbia to the House of Representatives. She served three two-year terms as an Advisory Neighborhood Commissioner for the Adams Morgan neighborhood of the District. Ms. Mossi also serves on the boards of several not-for-profit organizations: the DC Latino Caucus, the Latino Economic Development Center, and the United Planning Organization. Ms. Mossi is a homeowner and a member of the Ontario Co-operative Association in Adams Morgan, a Ward 1 neighborhood.

28. Ms. Mossi is currently employed as the Executive Director of the Washington English Center, a community-based organization that offers English and literacy training to low-income adult immigrants in the greater Washington, D.C. area using volunteer tutors. Previously, Ms. Mossi worked as the Director of Program and Resource Development at the Greater Washington Hispanic Chamber of Commerce Foundation, where she designed and managed technical assistance and commercial revitalization programs for minority small business owners. Ms. Mossi's community service was publicly recognized in 2017 when she was included on the 2017 El Tiempo Latino/Washington Post Power 100 List. She also received the Community Service Leader of the Year Award from the Greater Washington Hispanic Washington Chamber of Commerce.

29. As someone who has dedicated her life to strengthening communities and has spent her career working with people who are investing time and money into strengthening their English skills, getting better trained for the changing workforce, and developing small businesses, Ms. Mossi feels strongly that District residents should have the opportunity to vote for voting Congressional representatives who are equal to their peers in Congress and responsive to their constituents.

30. Plaintiff Alan Alper, a resident of Ward 2, was born in Hamilton County, Tennessee and grew up with his family in Chevy Chase, Maryland. Mr. Alper lived briefly in Ohio, California, and Pennsylvania before settling in Washington, D.C. in 1998. Mr. Alper and his wife own a home in the Ward 2 Foggy Bottom neighborhood. He is well-acquainted with his neighbors and is involved in the Foggy Bottom Association and his local Advisory Neighborhood Commission. From the time when he was first able to register at the age of 18, Mr. Alper has made a point of exercising his right to vote. While living in Ohio, California, and Pennsylvania, Mr. Alper was able to vote for voting representatives in the House of Representatives and Senate. As a District resident, Mr. Alper is no longer able to vote for voting representatives in Congress.

31. Mr. Alper is a lifelong fan of the Washington Senators and Washington Nationals professional baseball teams. He was quoted in *The Washington Post* and on the Washington Nationals history website *National Pastime*, and had a dog named "Hondo" after Frank Howard of the Washington Senators. He is a 1979 graduate of the University of Maryland and earned his Athletic Trainer's Certification in 1980 from the National Athletic Trainers' Association. Mr. Alper has worked as an athletic trainer at District of Columbia area schools, including Georgetown University and Bethesda-Chevy Chase High School, and as a licensed massage

therapist at the Center for Integrative Medicine at George Washington University Hospital. He also taught massage at the George Washington University Exercise Science Department, and owned his own massage practice in the District. Currently, he is semi-retired.

32. Mr. Alper thinks it is unfair that residents of the District of Columbia cannot elect voting representatives in the House of Representatives and Senate. He believes the United States is founded on the principle that all citizens have a voice and a vote. Mr. Alper wants to vote for voting representatives in Congress, just as he did before moving to the District, because he believes it is his right as the same person who voted in Ohio, California, and Pennsylvania.

33. Plaintiff Deborah Shore, a resident of Ward 3, grew up in Pittsburgh, Pennsylvania. She attended Antioch College in Yellow Springs, Ohio and came to the District of Columbia in 1971 during her junior year of college, as part of her school's cooperative education program. In 1974, she founded a not-for-profit organization currently known as Sasha Bruce Youthwork, which draws on volunteer support to counsel homeless youth and out-of-town runaway children. As a District resident, Ms. Shore is no longer able to vote for voting representatives in Congress.

34. Ms. Shore volunteers on several boards, including the DC Alliance of Youth Advocates, the Public Defender Service for the District of Columbia, and the National Network for Youth. She has received several awards for her leadership in the not-for-profit sector. Most recently, she was awarded a Lifetime Achievement Award by the National Network for Youth. Ms. Shore was also named "Washingtonian of the Year" in 2016 and has been named as a White House Champion of Change.

35. Ms. Shore has been a regular voter throughout her adult life. She seeks to exercise her right to vote for voting congressional representatives for the District who support

programs and budgets that meet the needs of the youth and young adults she serves. Ms. Shore also thinks it is imperative that young adults of voting age in the District be allowed to exercise the same right to vote as young adults of voting age in any State. She believes that disenfranchising young adults who are of voting age exacerbates their feelings of disconnection, which contributes to a host of other challenges.

36. Plaintiff Laurie Davis, a resident of Ward 3, was born in Michigan and moved to the District to attend law school in 1976. Ms. Davis spent two years working as a *pro se* law clerk for the United States Court of Appeals for the Second Circuit in New York City from 1980 to 1982, and has lived in the District of Columbia since then. Ms. Davis settled in the District with her boyfriend, now husband, and got a job she loved with the Public Defender Service for the District of Columbia. She had clients all over the District, so she got to know it well. Ms. Davis likes the District for its size, livability, beauty, and people, and has raised two children here. However, as a District resident, she is no longer able to vote for voting representatives in Congress.

37. Ms. Davis is on the boards of the Public Defender Service for the District of Columbia, from which she retired, and the Washington Legal Clinic for the Homeless, which she helped found. She is a volunteer teacher at the Washington English Center, and volunteers on refugee support projects at Adas Israel Congregation. All four of Ms. Davis's grandparents were immigrants—two having immigrated from a country which was not a democracy at the time—and all became citizens of the United States. They believed very firmly in civic responsibilities, which included reading the newspaper, educating oneself, voting, and serving on juries when called. Ms. Davis was always taken along when her parents went to vote, to see what they believed was the most important thing one could do as a citizen. This emphasis from her

upbringing was reinforced by what she witnessed as a public defender working with mentally ill clients and as general counsel to the D.C. Department of Mental Health ("DMH"). Part of Ms. Davis's job at DMH, such as when enacting the Mental Health Civil Commitment Act of 2002, was working to ensure that Congress would not overturn the law once the District passed it. She saw the need for change, and the unique limits on the people of the District of Columbia in seeking to make change.

38. Ms. Davis thinks it is unfair that residents of the District have no way of making their views known through the ballot box, and no input into those who will enforce and interpret federal laws. She gladly pays federal taxes, but has no say in how that money is used. Ms. Davis wants to vote for voting representatives in Congress because she wants people to be elected to office who reflect values she holds dear, who will appoint people with integrity, and who will protect the environment. She thinks that residents of the District of Columbia suffer the ultimate disenfranchisement.

39. Plaintiff Silvia Martinez, a resident of Ward 4, was born in Germany and grew up spending the first thirteen years of her life moving wherever her Vietnam-War-veteran father was deployed. From the ages of thirteen to twenty-six, Ms. Martinez lived in Puerto Rico. She has voted consistently since becoming eligible to vote at eighteen years old. Ms. Martinez moved to Washington, D.C. in 1994 from Boston, Massachusetts. As a District resident, she is no longer able to vote for voting representatives in Congress.

40. Ms. Martinez believes strongly that it is important for people to give back to their communities, especially to the most vulnerable members of those communities. She began volunteering at fifteen years old. She serves on the board of VIDA senior centers, is Chair of the D.C. Latino Caucus, and is involved in a variety of political causes. Ms. Martinez is an associate

professor and director of the graduate program in the Department of Communication Sciences and Disorders at Howard University, is an Expert Consultant to the American Speech-Language and Hearing Association and Pan-American Health Organization Project, and is a frequently published researcher in her field. She has received many professional recognitions—most recently, she received the 2018 Excellence in Diversity Award from the Council of Academic Programs in Communication Sciences and Disorders.

41. Ms. Martinez thinks it is unfair that District residents cannot vote for voting representation in Congress, because what we conceive of as democracy in the United States is everyone having a voice through their vote and access to their representatives. She thinks that lack of representation at the federal level results in District residents being second-tier citizens. Ms. Martinez wants to vote for voting Congressional representatives for the District because she wants her voice to be heard. When bills come up before Congress, especially about education and health, she thinks she should be able to be heard by her representatives, instead of other people and their representatives making decisions for her.

42. Plaintiff Vanessa Francis, a resident of Ward 5, grew up in Southbury, Connecticut. She completed her undergraduate degree at the University of Houston, where she graduated *summa cum laude*. She moved to the District of Columbia in 2009. Ms. Francis completed her Master of Arts in Conflict Resolution at Georgetown University in 2011, and has lived in the District since 2015. Although she voted for voting representation in the House of Representatives and Senate when living in Connecticut and Texas, Ms. Francis is not currently permitted to vote for voting representation in Congress because she is a resident of the District of Columbia.

43. Ms. Francis has volunteered with the United Service Organizations, Inc. at Arlington and with the Capitol Area Food Bank. Her interest in veterans' affairs is related to her brother's service as a military psychologist. Ms. Francis works as an instructional designer and is a co-owner of the District of Columbia landscaping business District Green. She is a homeowner in the Brookland neighborhood of Ward 5.

44. As a student of conflict resolution, Ms. Francis is passionate about fairness and equal opportunities to be heard. Ms. Francis believes the District of Columbia's lack of voting representation in Congress is antithetical to those ideals. Ms. Francis is also disturbed by the District's disenfranchisement in light of its complicated racial history.

45. Plaintiff Abby Loeffler, a resident of Ward 6, was born in Harriman, Tennessee, and grew up in Rockwood, Tennessee. She moved to the District of Columbia in 2007 and began applying for graduate school. Ms. Loeffler graduated from Catholic University in 2011 with a dual Master of Architecture and City and Master of Regional Planning degree. Ms. Loeffler voted for voting representation in Congress as a resident of Tennessee, but is not now permitted to vote for voting representation in Congress because of her residence in the District.

46. Ms. Loeffler was raised in a small town by a single mother. This experience impressed upon her a belief that women can do more than what their traditional roles suggest. She also believes it is important for families to be able to use government assistance when needed.

47. Ms. Loeffler is now an associate architect at "//3877," a boutique design firm. She has taught at the Catholic University of America and the George Washington University Corcoran School of the Arts & Design. Ms. Loeffler has also volunteered with the National Building Museum Design Apprenticeship Program, the DC Rollergirls roller derby league, and

Batalá Washington, an all-female percussion band. She is a mentor to District of Columbia high school students who aspire to be architects and planners.

48. Ms. Loeffler believes it is unfair that District voters cannot elect voting representatives in the House of Representatives and Senate. District residents are subject to federal laws and pay federal taxes, but do not have the same ability as other citizens to elect a voting representative to help determine what laws are passed and how federal taxes are spent. She believes her voting rights should not depend on where she lives. Ms. Loeffler seeks to elect voting representatives in the House of Representatives and Senate because the District has a unique culture and needs to be represented based on the beliefs of its own residents. Ms. Loeffler believes this is especially true because Congress continues to have oversight of the District's local government activities.

49. Plaintiff Susannah Weaver, a resident of Ward 6, was born and raised in Pennsylvania. Ms. Weaver attended college in Massachusetts, and worked in Italy and Massachusetts before moving to the District for graduate school in 2001. After a semester of graduate school, she left for an opportunity to work for the House of Representatives Committee on Science from 2002 through 2006. In 2006, Ms. Weaver realized that she would be remaining in the District for the long term. She is not now permitted to vote for voting representation in Congress due to her status as a District resident.

50. Ms. Weaver has volunteered with College Bound, her local elementary school, and Hill Havurah, a Jewish community in Capitol Hill, in addition to serving as a member of the Board of Visitors of Georgetown University Law Center. She loves the Capitol Hill neighborhood, and her husband (whom she met while in law school in the District) also loves the neighborhood and volunteers regularly. Ms. Weaver has also had unique career opportunities in

Washington, D.C., not only in the House of Representatives, but also the U.S. Environmental Protection Agency, U.S. Department of Justice, the federal district court for the District of Columbia, and the Supreme Court of the United States. Despite this, she is sometimes tempted to move because she cannot vote for representation in Congress. Ms. Weaver volunteers in what elections she can, and tells her parents and in-laws how frustrating it is to be unable to vote for her own federal representatives, but that isn't enough.

51. Ms. Weaver thinks it is unfair that District residents are citizens and residents of the United States, and pay both federal and local taxes, but don't have voting representation in the federal government. When she has an opinion about something going on in Congress or thinks that Congress needs to take action, she doesn't have a representative to weigh in with who is charged with representing her. When there is a vote, there is no one she can seek to influence who is supposed to have her (and her neighbors') best interests in mind. In particular, as a lawyer, Ms. Weaver has strong views on who she thinks is qualified to be a federal judge or Justice and yet her opinion carries no weight when the Senate votes to confirm a judge or Justice. Ms. Weaver does not believe there is any principled basis on which she is denied voting representation in the federal government.

52. Plaintiff Manda Kelley, a resident of Ward 7, was born in Illinois, and moved to the District of Columbia as a young adult. Ms. Kelley loves the District because it is a big city with a small-town feel. Ms. Kelley voted for the first time as a resident of Illinois. Since then, she has not been permitted to elect voting representation in the House of Representatives or Senate because she is a resident of the District.

53. Ms. Kelley was an active member of Moms on the Hill, as well as an instrumental member of a parents' group that founded the highly rated Two Rivers Public Charter School in

the Ward 6 Capitol Hill neighborhood. She went back to school to earn a bachelor of arts in teaching, graduated *summa cum laude*, and is now a teacher at the school she helped found. Ms. Kelley made room for these community commitments in her life as a single mother to a busy student athlete who was enrolled in Advanced Placement International Baccalaureate classes and who graduated in the top of her high school class. She feels lucky to have had support from friends and family, particularly because she has rheumatoid arthritis and her daughter has Type I diabetes, which are both expensive to treat. For personal reasons like these, Ms. Kelley believes it is imperative that District voters have voting representation in the House of Representatives and Senate.

54. Plaintiff Absalom Jordan, a resident of Ward 8, is a native Washingtonian born in May, 1941. Mr. Jordan attended District of Columbia public schools and Federal City College (now known as the University of the District of Columbia). Because he has lived his entire life in the District, he has never been permitted to elect voting representatives in Congress.

55. Mr. Jordan is a veteran who served four years in the United States Air Force. He was a civil rights activist and was active in local District issues. He served with the Far Southeast Community Organization, the D.C. Statehood Assembly, the Bethlehem Baptist Church, the Anacostia Coordinating Council, Ward 8 Education Council, and his Advisory Neighborhood Commission.

56. Mr. Jordan worked for the International Business Machines Corporation ("IBM") after his service in the Air Force, and then became a legislative aide to a member of the Council of the District of Columbia. Later, he worked in the District of Columbia Department of Employment Services. He is currently retired, but continues his community involvement.

57. Mr. Jordan has never had the ability to elect voting representatives in Congress, even while serving in the Air Force. He believes that it is a violation of fundamental rights to disenfranchise the District of Columbia in this way. Mr. Jordan seeks to vote for voting members of the House of Representatives and Senate to exercise one of his fundamental rights as an American citizen.

58. All of the Plaintiffs are citizens of the United States and are registered to vote in the District of Columbia.

B. Defendants

59. Defendant Paul Ryan in his official capacity as Speaker of the United States House of Representatives is charged (among other responsibilities) with presiding over proceedings on the House floor. On information and belief, Defendant Ryan would not rule in favor of permitting a vote cast by an elected representative of the District of Columbia to count among the votes counted on that issue in the House of Representatives. Defendant Ryan maintains his office at, and conducts his official duties from, the United States Capitol Building in Washington, D.C.

60. Defendant Karen L. Haas, in her official capacity as Clerk of the United States House of Representatives, is charged with the duty (among other duties) of keeping a roll of all Representatives and Representatives-Elect, comprised of those persons, and those persons only, who are elected in accordance with the laws of the United States. Defendant Haas is also charged to call the Members-Elect to order at the commencement of each Congress and to call the roll of Members-Elect; to note all questions of order and decisions thereon; to oversee the recording of votes on legislation presented for a vote; and to certify the passage by the House of all bills and joint resolutions. Defendant Haas, as Clerk of the House of Representatives, has not

certified the Delegate of the District of Columbia as a voting member of the House of Representatives and has failed to include and record the vote of the District of Columbia Delegate on legislation, bills, and resolutions presented for a vote on the floor of the House, in violation of the fundamental right of District residents to full voting representation in the Congress of the United States. Defendant Haas maintains her office at, and conducts her official duties from, the United States Capitol Building in Washington, D.C.

61. Defendant Paul D. Irving, in his official capacity as Sergeant at Arms of the House of Representatives, is the chief law enforcement and protocol officer of the House. It is the Sergeant at Arms' duty (among other duties) to help maintain protocol and order in the House Chamber. Defendant Irving, as Sergeant at Arms of the House of Representatives, is charged to regulate admittance to the House Floor for Representatives (and certain other staff and assistants) and to bar all other persons from admission during the sessions of the House. Defendant Irving, as Sergeant at Arms of the House of Representatives, has not given effect to votes cast by citizens of the District of Columbia in determining the prevailing voting Member entitled to enter the floor of the House on behalf of the District. Defendant Irving maintains his office at, and conducts his official duties from, the United States Capitol Building in Washington, D.C.

62. Defendant Orrin G. Hatch in his official capacity as President Pro Tempore of the United States Senate is empowered (among other things), in the absence of the President of the Senate, to preside over proceedings on the Senate floor. On information and belief, Defendant Hatch would not favor permitting individuals elected by the citizens of the District of Columbia to be seated in the United States Senate. Defendant Hatch maintains his office at, and conducts his official duties from, the United States Senate Hart Office Building in Washington, D.C.

63. Defendant Julie Adams, in her official capacity as Secretary of the United States Senate, serves as an administrative and financial officer of the Senate and, in that role (among other duties), oversees the maintenance of all records of the Senate, and oversees the Senate Parliamentarian. Defendant Adams, as Secretary of the United States Senate, would not give effect to votes cast by citizens of the District in determining the prevailing candidate entitled to be sworn in as a Senator. Defendant Adams also has not sent a Recommended Form for Certificate of Election to an official of the District of Columbia certifying an upcoming election in the Senate, as she does to the secretary of state and the governor of each of the fifty States where there is an upcoming election for the Senate. Defendant Adams maintains her office at, and conducts her official duties from, the United States Senate Hart Office Building in Washington, D.C.

64. Defendant Michael Stenger, in his official capacity as Sergeant at Arms and Doorkeeper of the United States Senate, is the chief law enforcement officer of the Senate and is therefore responsible (among other things) for determining who can enter the Chamber of the United States Senate. In his official capacity as the executive officer of the Senate, the Sergeant at Arms enforces all rules of the Senate: its Standing Rules, Standing Orders, Rules for the Regulation of the Senate Wing, and Rules for Impeachment Trials. Defendant Stenger, as Sergeant at Arms and Doorkeeper of the United States Senate, would not give effect to votes cast by citizens of the District in determining the prevailing candidate entitled to enter the floor of the Senate as a Senator from the District of Columbia. Defendant Stenger maintains his office at, and conducts his official duties from, the United States Capitol Building in Washington, D.C.

65. Defendant Michael Pence, in his official capacity as Vice President of the United States, is empowered (among other things), as President of the Senate, to preside over

proceedings on the Senate floor. On information and belief, Defendant Pence would not favor permitting individuals elected by the citizens of the District of Columbia to be seated in the United States Senate. Defendant Pence maintains his office at, and conducts his official duties from, The White House in Washington, D.C.

66. Defendant Wilbur Ross in his official capacity as Secretary of the United States Department of Commerce is charged with responsibility (among other responsibilities) for conducting the decennial census required by Article I, Section 2 of the United States Constitution and for reporting census data to the President of the United States to enable fair apportionment of seats in the United States House of Representatives. On information and belief, Defendant Ross would not include a separate entry for the District of Columbia in his decennial census report to the President of the United States for purposes of apportioning voting representation in the United States House of Representatives to the District of Columbia. Defendant Ross maintains his office at, and conducts his official duties from, the Department of Commerce in Washington, D.C.

67. Defendant Donald Trump, in his official capacity as President of the United States, is charged with the responsibility, among other responsibilities, to transmit to Congress the results of each decennial census of the population of the United States, specifying the number of representatives in the United States House of Representatives to be apportioned to each State. Defendant Trump, as President of the United States, would not calculate, account for, and include the population of the District of Columbia for the purpose of apportioning representatives in the United States House of Representatives to the District of Columbia. Defendant Trump maintains his office at, and conducts his official duties from, The White House in Washington, D.C.

IV. HISTORY AND FACTS RELEVANT TO THE CLAIMS

A. Residents of the District of Columbia Are Full-Fledged American Citizens.

68. The individual Plaintiffs are representative of the more than 690,000 United States citizens who are also residents in the District of Columbia. *See QuickFacts District of Columbia*, U.S. Census Bureau (July 1, 2017), www.census.gov/quickfacts/DC. Of these, approximately 520,000 are of voting age, of which approximately 470,000 were registered to vote as of April 30, 2018. *See Monthly Report of Voter Registration Statistics*, D.C. Bd. of Elections (April 30, 2018), https://dcboe.org/CMSPages/GetFile.aspx?guid=faa2652c-b93c-4426-aacd-19460cf69adc.

69. Citizens in a representative democracy have rights and responsibilities that attach to their citizenship.

70. Among the key responsibilities of United States citizenship are paying taxes; serving, when called upon to do so, in the Nation's defense in time of conflict; serving on juries; supporting and defending the Constitution; and participating in the Nation's political processes through the exercise of the franchise. Another responsibility of United States citizenship is to obey the laws duly adopted by the legislative bodies elected by the body politic.

71. Like other citizens of the United States, Americans living in the District of Columbia have long fulfilled and continue to fulfill their responsibilities of citizenship, and they have supported and continue to support their national government.

72. District residents fully meet their obligation to pay taxes to the federal government. In FY 2017, individuals living in the District paid approximately $26 billion in federal taxes. *See* Internal Revenue Service Data Book, 2017, 11, *Table 5. Gross Collections, by Type and State, Fiscal Year 2017*, https://www.irs.gov/pub/irs-soi/17databk.pdf. This amount is

greater than the total federal income taxes paid by individuals in twenty-three States. *Id.* On a per capita basis, Americans living in the District pay more federal taxes than those living in all fifty States. *See id.* at 11–13; *Annual Estimates of Resident Population*, U.S. Census Bureau (July 1, 2017), https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk.

73. District residents have also discharged faithfully their obligations to serve the Nation in time of conflict, serving in every major armed conflict over the past century—from World War I, World War II, the Korean War, and the Vietnam War, to the Persian Gulf War and the wars in Afghanistan and Iraq. As of 2015, more than 28,000 veterans of the Country's Armed Services live within the District. *District of Columbia*, U.S. Dept. of Veterans Affairs, 1 (2016), https://www.va.gov/vetdata/docs/SpecialReports/State_Summaries_District_of_Columbia.pdf

74. Another obligation of citizenship is to participate in the election of government officials. Despite not being able to vote for Members with full voting rights in the United States Congress, District residents discharge this obligation in greater percentages than do the citizens of the Nation as a whole. In 2016, 82.1% of eligible District residents were registered to vote, a higher percentage than that in all fifty States of the Union. In that year, 74.3% of eligible District residents voted, a greater percentage than that in all fifty States. *See Voting and Registration in the Election of November 2016*, U.S. Census Bureau, Table 4a (rel. May 2017), https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-580.html.

75. Thus, while the right to vote is a fundamental right of citizenship, to the extent that achieving the right is related to fulfillment of the major responsibilities of United States

citizenship, District residents are as entitled as any group of Americans to voting representation in Congress, not least because of their impressive discharge of the obligations of United States citizenship.

B. The Right to Vote for Legislative Representation Is a Fundamental Right.

76. Since its birth, the United States has stood for a "self-evident" democratic ideal: governments "deriv[e] their just Powers from the consent of the Governed." The Declaration of Independence para. 2 (U.S. 1776). This fundamental tenet—American citizens' right to participate in the political franchise—is the cornerstone of the Nation's guarantee of a republican form of government.

77. Over the past 230 years, our country has acted time and again to expand rights of suffrage and thus has more fully embraced the concept of government by the consent of all of the governed. Historical recognition of the need to perfect the right of suffrage is reflected by action by every branch of the federal government—and especially Congress and the judiciary—to continue to extend and expand the exercise of suffrage rights.

78. When the Constitution was ratified in 1789, suffrage was narrowly constrained. The Constitution provided (and provides, subject to Amendments) that the "Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . ." U.S. Const. art. I Section 4, cl. 1. Most States in 1789 permitted only landholders to vote and further constrained the right to vote to free, white male citizens who paid taxes and satisfied durational residency requirements.

79. Yet even in those early days of the republic, the Framers recognized that "[t]he definition of the right of suffrage is very justly regarded as a fundamental article of republican

government." The Federalist No. 52 (Alexander Hamilton or James Madison). The Supreme Court in 1886 affirmed the political franchise as "a fundamental political right, because preservative of all rights." *Yick Wo,* 118 U.S. at 370.

80. While ownership of property as a requirement to vote was gradually eliminated in the late 1700s and early 1800s, the right to vote remained confined for the most part to free, taxpaying, white adult males. Those dynamics began to shift in the period following the Civil War, when the States ratified the Fourteenth and Fifteenth Amendments to the Constitution. The Fourteenth Amendment prohibited the States from depriving citizens—"[a]ll persons born or naturalized in the United States"—from the "privileges or immunities" of citizenship, U.S. Const. amend. XIV, Section 1, while the Fifteenth Amendment guaranteed that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude," U.S. Const. amend. XV, Section 1.

81. Race-based restrictions on the franchise nonetheless surfaced after ratification of the Civil Rights Amendments and survived in the guise of poll taxes, literacy tests, and sometimes, campaigns of rank intimidation or terror. Against this backdrop, in 1932 the Supreme Court recognized the "numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right" to vote. *Smiley v. Holm*, 285 U.S. 355, 366 (1932).

82. The Constitution originally provided for the election of Senators by State legislatures, not by direct election. U.S. Const. art. I, Section 3, cl. 1. Congress passed the Seventeenth Amendment to the Constitution to provide for direct election of Senators by citizens of each State, in the early 20th century. That amendment was ratified in 1913.

83. The women's suffrage movement gained momentum during the same period (notwithstanding an 1874 Supreme Court ruling that the Constitution did not grant women the right to vote. *See generally Minor v. Happersett*, 88 U.S. 162 (1874)). After decades of struggle, those efforts culminated in 1920 in the passage and ratification of the Nineteenth Amendment, guaranteeing that the right to vote shall not be denied or abridged on account of sex.

84. Four years later, the Indian Citizenship Act extended citizenship to all Native Americans born in the United States. Act of June 2, 1924, Pub. L. No. 68-175, 43 Stat. 253. While the privileges of citizenship technically included the right to suffrage, in practice States continued to deny Native Americans the right to vote from 1924 until at least 1957, when President Eisenhower signed the Civil Rights Act of 1957 into law, with the objective of ensuring all eligible voters' right to vote. Pub. L. No. 85-315, 71 Stat. 634.

85. Eliminating an injustice of more than 150 years, the Twenty-Third Amendment in 1961 restored the right of Americans living in the District, which "constitut[es] the seat of Government of the United States," to vote in presidential elections, another right lost when the federal Government took control of the District in 1801. U.S. Const. amend. XXIII Section 1.

86. The Supreme Court issued a series of decisions from 1964 to 1972 that maintained the trend of treating suffrage as a fundamental right that must be protected from infringement. As the Court affirmed in 1964:

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. *Other rights, even the most basic, are illusory if the right to vote is undermined*. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.

Wesberry, 376 U.S. at 17–18 (emphasis added). That same year, the Court declared:

> Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

Reynolds, 377 U.S. at 561–62.

87. Two years later, the Court struck down poll taxes as an unconstitutional barrier to the franchise, declaring that "wealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned." *Harper*, 383 U.S. at 670. The Court similarly struck down durational residency requirements in 1972. *Dunn v. Blumstein*, 405 U.S. 330, 332–33 (1972). In 1970, the Supreme Court ruled that, by virtue of Congressional action, residents of federal enclaves are entitled to vote in State elections. *Evans*, 398 U.S. at 419–20.

88. In 1971—during the Vietnam War—the Twenty-Sixth Amendment lowered the minimum voting age from 21 to 18, based in part on the rationale that citizens who serve our Nation in times of armed conflicts are entitled to participate in electing its leaders. U.S. Const. amend. XXVI, Section 1.

89. After years of legislative impasse in Congress, Congress passed the District of Columbia "Home Rule Act," and President Richard M. Nixon, a longtime proponent of greater rights for the District, signed the act into law on December 24, 1973. District of Columbia Home Rule Act, Pub. L. No. 93-198, 87 Stat. 777 (from 1973 to 1997 known as the District of Columbia Self-Government and Governmental Recognition Act). In the Home Rule Act, Congress restored the right of District residents to have a voice in their own local government through election of a local legislature (the District Council), a right that Congress, exercising its constitutional powers over the District, had eliminated in 1874 during Reconstruction.

90. In 1986, President Ronald Reagan signed the Uniformed and Overseas Citizens Absentee Voting Act into law. The law uniformly ensures that United States citizens living overseas, including citizens who have no intention of returning to the United States, can vote for representatives in Congress. The law does not, however, allow District of Columbia residents to vote. Uniformed and Overseas Citizens Absentee Voting Act of 1986, Pub. L. No. 99-410 (codified at 18 U.S.C. §§ 608–09, 39 U.S.C § 3406, 52 U.S.C. §§ 20301–10).

91. In 1993, in passing the National Voter Registration Act, Congress declared the following: "[t]he Congress finds that . . . (1) the right of citizens of the United States to vote is a fundamental right; [and] (2) it is the duty of the Federal, State, and local governments to promote the exercise of that right . . ." 52 U.S.C. § 20501(a)(1)-(2).

C. Congress Has the Power to Grant Voting Representation in Congress for Citizens Residing in the District.

92. Article I, Section 8, Clause 17 of the Constitution authorizes Congress "[t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States." This provision, referred to as the "District Clause," confers on Congress comprehensive power over the governance of the District (and likewise, as explained above, over other federal enclaves).

93. Nothing in the District Clause prohibits Congress from granting United States citizens who reside in the District the rights of national citizenship, including the right to voting representation in Congress. The Framers of the Constitution adopted the District Clause because they wanted our Nation's capital to be free from control by any one State. They did not intend thereby to deprive District residents of their fundamental voting rights, especially after fighting a

revolution to win just such a right. If they had intended a deprivation of so fundamental a right, they would have stated so explicitly. Nowhere in the District Clause nor the Constitution did the Framers require or contemplate such a fundamental deprivation. And as the Court stated in *Adams*, no District Clause interest is served by denying voting representation to residents of the District. 90 F. Supp. 2d at 66.

94. In 1788 and 1789, respectively, Maryland and Virginia ceded the territory now comprising the District to the United States. *See* Act of July 16, 1790, ch. 28, 1 Stat. 130. The second session of the First Congress passed the Residence Act of 1790, and President George Washington signed it into law on July 16, 1790. That Act provided that the national capital and permanent seat of our national government be established on a site on the Potomac River, and set a deadline of December 1800 for the capital to be ready. *Id.* § 6. The United States accepted the ceded land in 1790. Congress formally assumed full control and jurisdiction over the District on February 27, 1801, in the District of Columbia Organic Act of 1801. (In 1846, Congress retroceded the land given by Virginia. H.R. 259, 29th Cong. (1st Sess.)).

95. Between 1790 and 1800, before the federal government took control of the territory ceded by Maryland and Virginia, Americans who had been citizens of Maryland and Virginia prior to the cession continued to exercise their right to vote for representation in both houses of Congress. In 1793 and 1794, in fact, District resident Uriah Forrest served in Congress with full voting rights. When the United States assumed jurisdiction over the District, District residents lost voting representation in Congress as a result of Congress's failure to take action. It was *congressional* action (or inaction), in the Residence Act of 1790 and the Organic Act of 1801—not action by the Framers—that effectively deprived District residents of their right to vote for full voting representation in Congress. Although Congress has acknowledged its power

under the District Clause to grant back to the District residents the right to full voting representation, Congress has failed to act, and that power has lain dormant since 1800. In recent years, bipartisan majorities of both houses of Congress have separately confirmed, by wide margins, that Congress has such authority under the District Clause. Yet Congress has failed to guarantee this fundamental right to District residents.

96. In April 2007, in the 110th Congress, the House of Representatives passed the District of Columbia House Voting Rights Act (H.R. 1905), which would have created a Congressional district consisting of the District of Columbia, given an additional Representative to Utah, and thus increased the number of Members in the House of Representatives from 435 to 437. H.R. 1905 passed the House with bipartisan support by a vote of 241 to 177, including "yes" votes from then-Representative (now Vice President) Mike Pence of Indiana, and then-Representative (now Speaker of the House) Paul Ryan of Wisconsin. *See* H.R. 1905, Roll Call Vote No. 231 (April 19, 2007). The Senate, however, failed to pass the bill in that Congress.

97. In February 2009, the Senate passed Senate Bill 160, the District of Columbia House Voting Rights Act, also on a bipartisan basis and by a wide margin of 61 to 37. *See* S. 160, Roll Call Vote No. 73 (Feb. 26, 2009). Like H.R. 1905 in 2007, Senate Bill 160 would have created a congressional district consisting of the District of Columbia, given an additional Representative to Utah, and increased the number of Members in the House of Representatives from 435 to 437. S. 160, 111th Cong. § 3. The House failed to pass Senate Bill 160 in the 111th Congress.

98. During hearings on the House and Senate bills, bipartisan panels of lawmakers and constitutional experts testified in support of Congress's power to grant voting rights to

District residents in the national legislature, specifically concluding that Congress has the inherent power to grant District residents the right to vote in Congress.

99. The legal experts who testified included former D.C. Circuit Judge and Solicitor General Kenneth Starr, former Chief Judge of the D.C. Circuit Patricia Wald, and Senator Orrin Hatch. All concluded that Congress has the power to grant District residents Congressional representation under the District Clause. Senator Hatch, a staunch supporter of the proposed legislation, "believe[d] that [the] principle of popular sovereignty is so fundamental to our Constitution, the existence of the franchise so central, that it ought to govern absent actual evidence that America's founders intended that it be withheld from one group of citizens." Orrin G. Hatch, *'No Right is More Precious in a Free Country': Allowing Americans in the District of Columbia to Participate in National Self-Government,* 45 Harv. J. on Legis. 287, 298–99 (Summer 2008). In her testimony, Judge Wald agreed:

> There certainly is no evidence in the text or history of the Constitution signifying the Framers wanted to deny the District the franchise forever for any legitimate reason. . . . There are many other instances in which the courts have acceded to Congress' unique power to legislate for the District when it exercises that power to put the District on a par with States in critical constitutionally-related areas . . . . Congress is justified in concluding the balance tilts in favor of recognizing for D.C. residents the most basic right of all democratic societies, the right to vote for one's leaders.

Ending Taxation Without Representation: The Constitutionality of S. 1257: Hearing Before the S. Comm. on the Judiciary, 110th Cong. 255–60 (2007) (statement of Patricia M. Wald, former Chief Judge, U.S. Court of Appeals for the D.C. Circuit).

100. Article I, Section 2, Clause 1 of the Constitution provides that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States." The reference to the "people of the several States" was not intended to strip

otherwise qualified voters who reside in the District of their right to vote. As former United States Solicitor General and D.C. Circuit Judge Kenneth Starr testified, the broad language of the District Clause gives Congress the power to extend voting rights to District residents and residents of federal enclaves—places ceded to the federal government by a State. *See Common Sense Justice for the Nation's Capital: An Examination of Proposals to Give D.C. Residents Direct Representation: Hearing Before the H. Comm. on Government Reform*, 108th Cong. 2d Sess. 83–84 (2004) (statement of the Hon. Kenneth W. Starr, former Solicitor General of the United States; former Judge, U.S. Court of Appeals for the D.C. Circuit) ("Starr Statement").

101. As Judge Starr further explained, the Constitution's explicit grant of voting representation to "State" residents in Article I, Section 2, Clause 1 does not preclude Congress from extending the right to other citizens (as explained below) under the Uniformed and Overseas Citizens Absentee Voting Act of 1986, 18 U.S.C. §§ 608–09, 39 U.S.C. § 3406, 52 U.S.C. §§ 20301–10. Judge Starr also offered a common sense rebuttal to the argument to the contrary: "[a]bsent any persuasive evidence that the Framers' intent . . . was to deny the inhabitants of the District the right to vote for voting representation in the House of Representatives, a consideration of fundamental democratic principles further supports the conclusion that the use of [the] term ["State", in Article I, Section 2 of the Constitution] does not necessitate that result." Starr Statement at 83–84.

102. Similarly, although the Seventeenth Amendment speaks of "two Senators from each State, elected by the people thereof …," thus *requiring* the election of two senators from each State, the Amendment does not override Congress's authority under the District Clause to extend representation in the Senate to citizens who do not reside in a State. As explained below,

Congress has exercised its authority to permit citizens living overseas to vote for both Senators and Members of the House of Representatives.

103. Although both the House and Senate separately passed their respective versions of the District voting rights bill, both houses did not ultimately pass the same bill in the same Congress (in part as a result of failed negotiations over a proposed amendment repealing all firearm safety laws in the District in 2009). Thus, the voting rights bill supported in both Houses of Congress never became law. Since then, Congress has not acted to afford District residents voting representation in either House, even though bills establishing voting representation for the District have been introduced in Congress every year since the earlier bill failed in 2009. This is so even though majorities of both Houses made clear in passing the voting rights bill in 2007 and 2009 that Congress has authority under the District Clause to pass such legislation.

104. Congress's authority under the District Clause to pass such legislation is also voiced in House and Senate Committee Reports. The March 20, 2007 House Judiciary Committee Report states that "[w]hile there [was] no evidence that the Framers intended to deny voting representation for District residents, the Framers did provide the Congress with absolute authority over the District to rectify such a problem." H.R. Rep. No. 110-52, pt. 2, at 2 (2007). The March 19, 2007 House Oversight & Government Reform Committee Report notes that "[s]cholars spanning the political and legal spectrum have concluded that Congress has authority through this legislation to provide voting representation in Congress for local residents. . . . What was done by statute in 1790, and then undone by statute in 1800, can be redone by statute today." H.R. Rep. No. 110-52, pt. 1, at 29 (2007). The June 28, 2007 Senate Homeland Security and Government Affairs Committee Report affirmed that "[t]wo centuries of political and judicial precedent support Congress's authority to legislatively extend House representation to the

District under the District Clause" and that "[t]he Committee believe[d] this authority, which the Supreme Court described as 'plenary in every respect,' allows Congress to live up to the principles this nation was founded upon, and provide representation in the U.S. House of Representatives to the District of Columbia." S. Rep. No. 110-123, at 3 (2007) (quoting *Nat'l Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 592 (1949)).

D. Congress Has Exercised Its Authority to Grant This Right to Vote to Other Citizens Who Are Not Residents of States.

105. Although Congress continues to fail to extend to American citizens residing in the District the right to vote for representation in our national legislature, Congress has acted to allow Americans who are not residents of States to vote in other contexts for United States Senators and Representatives.

106. Pursuant to the District Clause, Congress possesses "like authority over all places purchased by the consent of the legislature of the State in which the same shall be" as it does over the District itself.

107. Exercising this same authority, and based on essentially the same constitutional authority, Congress has created numerous federal "enclaves." Indeed, the District *is* in substance a federal enclave, whose establishment, unlike that of many military bases and other properties purchased by the federal government, was foreseen when the Constitution was adopted.

108. In creating and exercising its jurisdiction over such enclaves, Congress has taken action to preserve the right of Americans living in such enclaves to continue to vote for representatives in Congress, just as District residents did between 1790 and 1800.

109. Congress has enacted legislation authorizing States to enforce certain State laws on federal enclaves. Americans who reside on federal enclave lands are consequently subject to

the laws of the State in which the enclave is contained. Congress has, for example, enacted legislation authorizing State authorities to enforce compliance with State workers' compensation laws on federal enclave land within the State to the same extent as if the land was under the exclusive jurisdiction of the State. *See* 40 U.S.C. § 3172(a).

110. In 1970, the Supreme Court held that the Equal Protection Clause requires that residents of federal enclaves, such as the National Institutes of Health ("NIH"), located in Maryland just outside of the District, be permitted to vote in federal and State elections, including for United States Senators and Representatives, in the State from which the enclave was created. *Evans*, 398 U.S. at 420. This was required, the Court held, because even though Congress could have precluded this result by refusing to permit the exercise of State power in the enclave given its own exclusive jurisdiction, Congress instead took action that "permitted the States to extend important aspects of State powers over federal areas." *Id.* at 423. That action included subjecting NIH residents to Maryland income taxes. *Id*.

111. Congress has also acted by legislation to ensure that Americans who reside entirely outside of the United States can exercise their right to vote for representation in Congress. In 1986, Congress passed the Uniformed and Overseas Citizens Absentee Voting Act, which allows otherwise disenfranchised American citizens residing in foreign countries to vote by absentee ballot for United States Senators and Representatives in "the last place in which the person was domiciled before leaving the United States." 52 U.S.C. § 20310 (5)(C). The Americans covered by the Act need not be residents of the State in which they vote, nor need they even return to that State.

E. Congress Has Failed to Exercise Its Authority to Grant Representation in Congress to District Residents.

112. Since it asserted control of the District pursuant to the Organic Act of 1801, Congress has consistently failed to exercise its authority under the District Clause to grant back Congressional representation to citizens residing in the District. This is so even though Congress has exercised its authority to protect voting rights for those living overseas and in a manner which results in voting rights for those living in federal enclaves. Thus, in the case of enclaves, as the Court pointed out in *Adams*, District residents are not entitled to claim the protection of the Supreme Court's decision in *Evans* "because of distinctions between the manner in which Congress has exercised its authority over the enclaves and the District." 90 F. Supp. 2d at 68.

113. In 1970, Congress authorized the election of a delegate (the "Delegate") for the District of Columbia to the House of Representatives. 2 U.S.C. § 25a. By statute, the Delegate is empowered with all privileges of Members of the House under the Constitution—except for the power to vote. *Id.* Some Congresses (e.g., the 103d Congress (1993–1995) and 110th and 111th Congresses (2007–2011) have allowed the District's Delegate to vote in the Committee of the Whole in the House. Other Congresses have stripped the District's Delegate of that right or failed to grant it, thus further demonstrating Congress's power to right this wrong.

114. Congress has not granted District residents the right to vote for representation, in any form, in the Senate. And even though, as was the case regarding residents of enclaves and those living overseas, Congress could have taken action to afford voting representation to District residents, it has not done so.

F. The First Amendment Prohibits Excessive Burdens on Voters' Rights to Association.

115. Recent judicial decisions have underscored that interference with a group of voters' right to vote necessarily interferes with their rights of association. *See supra* at ¶ 16. That principle has deep roots in First Amendment jurisprudence.

116. As Justice Harlan stated for a unanimous Court in *NAACP v. Alabama (ex rel. Patterson)*, 357 U.S. 449, 460 (1958), "[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."

117. A decade later, the Court explained the interwoven strands of "liberty" affected by restrictions on the right to vote, writing that such burdens implicate both "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). "Both of these rights, of course, rank among our most precious freedoms." *Id*.

118. Congress's failure to extend to American citizens residing in the District the right to elect voting representatives in our national legislature prevents District residents from casting their votes *effectively*, and guarantees that they will be unable to fully and fairly *advance* their political beliefs in Congress. Because their participation in elections does not include election of voting representatives in Congress, District residents are denied the right to address and effectively resolve their grievances through the political process. They are thus denied the right to associate for the advancement of their political beliefs. *See Common Cause*, 318 F. Supp. 3d

at 932 (finding impermissible burdens on speech and association from gerrymandering that caused increased "difficulty convincing voters to participate in the political process and vote, attracting strong candidates, raising money to support such candidates, and influencing elected officials").

119. District residents are also denied their closely-related right to representation. In *Benisek*, 2018 WL 5816831 at *8, the court held that voters' representational rights and associational rights were both violated by gerrymandering. The court explained that the gerrymandering reduced some citizens chances "to help elect a candidate of choice," while other citizens were placed in "overpopulated" districts, meaning that a candidate of the citizen's choice likely would have been elected in the absence of gerrymandering, thus contracting the value of their votes.

120. The law recognizes, of course, that the government must necessarily impose some restrictions on the right to vote: "[A]s 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 process." *Storer v. Brown*, 415 U.S. 724, 730 (1974).

121. As a result, the Supreme Court has developed a balancing test for claims of infringement of the right to association in the electoral process. Specifically, the Court first assesses the "character and magnitude of the asserted injury" to associational and voting rights, and then "identif[ies] and evaluate[s]the precise interests put forward" by the government. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). It then weighs the burdens imposed against the government's interests, recognizing that "important regulatory interests" can generally "justify reasonable, nondiscriminatory restrictions." *Id.* at 788.

122. This case does not involve a mere "restriction" on District residents' ability to participate in the process of electing voting congressional representatives—rather, they are barred from that foundational democratic process entirely. And Plaintiffs are not aware of *any* government interests—let alone "important" ones—served by this ban.

123. Therefore, District residents' representational and associational rights have been violated without respect to their political beliefs. Neither Democrats, Republicans, nor others may join together to elect candidates of their choice to represent them. Gerrymandering cases have required proof of intent to discriminate against members of a disfavored political party. *See*, *e.g.*, *Common Cause*, 318 F. Supp. 3d at 929–30 (finding intent to favor Democrats). Proof of intent to discriminate should not be required when every residents' First Amendment rights are violated. Nevertheless, if proof of intent to discriminate is required, Plaintiffs will show such intent.

G. Prior Judicial Decisions Do Not Preclude Plaintiffs' Challenges Here.

124. As noted above, a three-judge district court in 2000 rejected due process and equal protection challenges to the long-standing denial of the right to voting representation in Congress to District residents. *Adams*, 90 F. Supp. 2d at 37. That decision did not address and therefore does not preclude the challenges set out in this amended complaint for several reasons. First, the plaintiffs in that case did "not dispute that to succeed they must be able to characterize themselves as citizens of a 'State.'" *Id.* at 46. Plaintiffs here make no such concession and unlike the plaintiffs in *Adams,* the present plaintiffs do not rely on Article I, Section 2 for their claims. Rather, unlike the *Adams* plaintiffs, the plaintiffs here contend that they are constitutionally entitled to voting representation notwithstanding that they are not residents of a State and that legislative and legal developments after *Adams* entitle them to that representation.

125. With respect to the equal protection claim in *Adams*, the plaintiffs did not argue, and the Court did not address, whether Congress has authority under the District Clause to grant voting representation to District residents. It was not until 2007 and 2009 that Congress demonstrated that that it does have such authority. Because Congress has that authority and has exercised its authority to afford voting representation to those living overseas, and in a manner which results in voting representation for those who live in enclaves, its refusal to do so for District residents violates equal protection principles.

126. In addition, without the benefit of *Obergefell* the district court in *Adams* framed the due process issue as being whether "District residents have a right to vote in Congressional elections" and analyzed the issue in terms of whether there is a longstanding tradition of voting representation in Congress for District residents. *Id.* at 70. However, the Supreme Court's 2015 decision in *Obergefell* departs from this approach and established instead a two-step analysis: it first concluded that marriage is a fundamental right and then held that the reasons for that right apply to same-sex couples; accordingly, denial of that right violates the Due Process Clause. Under *Obergefell*'s two-step approach, the Court should first conclude that the right to voting representation in Congress is a fundamental right as shown above and then determine that because the reasons for that right extend to District residents, those residents can no longer be constitutionally denied that right.

127. The application of the First Amendment right of association to this case was demonstrated in the Supreme Court's 2004 decision in *Vieth* and its 2018 decision in *Gill*; through those decisions five Members of the Court identified a First Amendment right of association claim that is available to these plaintiffs. Thus, none of the claims advanced here are precluded by *Adams.*

V. HARM

A. District Residents Are Harmed by Their Lack of Voting Representation in Congress.

128. The Supreme Court has repeatedly held that the right to vote is the most fundamental right because it is "preservative of all rights." Denial of the right to vote "plainly constitutes an 'injury in fact.'" *Adams*, 90 F. Supp. 2d at 41.

129. Other American citizens who pay taxes—including Americans living overseas and in federal enclaves—have voting representation and they can band together to present grievances to a representative and two senators who represent them. District residents cannot. This denial is contrary to our Nation's most fundamental principles.

130. In addition, because Congress exercises plenary authority over the District under the District Clause, District residents are deprived of representation not only in legislation on national matters, but also in legislation on purely local issues as well, when Congress acts as the local legislature for District. Unlike American citizens living in States, Americans living in the District are subject to laws enacted by a Congress in which they have no voting representation—and in addition to national matters, these laws also concern local matters of critical importance that are traditionally committed to State governments in our constitutional framework.

131. As a result, on issues as wide-ranging as funding of infrastructure and the setting of educational standards and the minimum wage, Congress has overridden the will of Americans in the District, all without any accountability. To the voters affected by those decisions, these deprivations constitute concrete harm and constitutional injury.

132. The denial of District residents' voting representation in the political process has also led to District residents' exclusion from corresponding benefits.

133. For example, the District receives a smaller amount of federal funds than many States. Without voting representation in the House and the Senate, District residents are unable to rely on local champions in Congress arguing for a fairer distribution of federal funds. This denial constitutes a real and substantial injury.

B. Defendants' Actions Deprive Citizens Residing in the District of Their Right to Voting Representation in Congress.

134. The actions and omissions of Defendants have caused the individual Plaintiffs to suffer actual injury by depriving them of their fundamental right to voting representation in Congress. There is a substantial likelihood that these injuries will be redressed by the declaratory and injunctive relief that Plaintiffs seek in this action. *Adams*, 90 F. Supp. 2d at 41–42 (concluding that plaintiffs satisfied the injury-in-fact, causation, and redressability requirements of standing).

VI. CAUSES OF ACTION

A. Count I (Denial of Equal Protection)

135. Congress has the authority under the District Clause to extend the right to full voting representation in Congress to District residents, just as Congress has used its authority to extend that right to other American citizens not living in States, i.e., those living overseas and in federal enclaves. Continuing to deny that right to American citizens living in the District results in District citizens being treated unequally—both relative to other Americans required to abide by the same Congressional enactments, and also relative to Congress's treatment of citizens living overseas and in federal enclaves.

136. This unequal treatment inflicts grave harms on plaintiffs and other American citizens who live in the District, bars them from exercising their fundamental right to participate

in the political process, and abridges central precepts of equality, as set forth in the Fourteenth Amendment to the Constitution and as incorporated in the Fifth Amendment to the Constitution.

B. Count II (Denial of Due Process)

137. The right of citizens of the United States to voting representation in Congress is a fundamental right of United States citizenship, deeply rooted in our Nation's heritage and implicit in the concept of ordered liberty. As such, it is a fundamental right protected by the Due Process clauses of the Fifth and Fourteenth Amendments to the Constitution.

138. Each of the reasons showing that the right to vote for legislative representation is fundamental applies with equal force to American citizens residing in the District, just as each applies to American citizens living in the 50 States, in federal enclaves, and overseas.

139. The denial of the right to vote for members of the United States Congress deprives plaintiffs and other citizens of the District of Columbia of liberty and property without due process of law, in violation of the Fifth Amendment to the Constitution. This denial also constitutes an unjust limitation on the fundamental right to vote in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments.

C. Count III (Infringement of the Right to Association and Representation)

140. All citizens of the United States have the right, guaranteed by the First Amendment, to associate in the electoral process for the advancement of their political beliefs. That right is among the most fundamental of all freedoms guaranteed by the Constitution.

141. Congress's failure to extend to plaintiffs and other District residents the ability to elect voting representatives in our national legislature denies them the right to associate for the advancement of their political beliefs, and leaves them without voting representatives in Congress to whom they may effectively bring their grievances.

142. Those burdens on Plaintiffs' associational rights are not offset by any important regulatory interests, and accordingly violate the First Amendment.

VII. PRAYER FOR RELIEF

Based on the foregoing, Plaintiffs request that the Court grant the following relief:

1. Issue a DECLARATORY JUDGMENT declaring that individual Plaintiffs, in common with all adult citizens of the District of Columbia, possess a constitutional right to vote in elections for voting members of the United States House of Representatives and the United States Senate; that they have been deprived of this right without warrant or justification; that Defendants have violated this right; that the continuing deprivation of this right violates one of the most precious attributes of United States citizenship; and that 2 U.S.C. § 2a and 13 U.S.C. § 141 are unconstitutional insofar as they require or have been applied to effect the exclusion of citizens of the District of Columbia from the Congressional apportionment process.
2. Issue a DECLARATORY JUDGMENT declaring that the Delegate to the House of Representatives for the District of Columbia, as the duly elected representative of the United States citizens residing in the District of Columbia, has the full powers and privileges afforded to Members of the House of Representatives, including without limitation the power to vote on all legislation considered by the House.
3. Defer further relief for a reasonable period of time to provide Congress an opportunity, on the basis of the Court's declaratory judgment, to fashion a

constitutional remedy that will vindicate the constitutional rights of the citizens of the District of Columbia to vote for members of the United States Senate.

4. To comply with the declaratory judgment, Congress need not exercise its authority under Article IV, Section 3, Clause 1 to make the District a State. However, making the District a State would satisfy the judgment.

5. Failing appropriate action by the Congress, order INJUNCTIVE RELIEF as necessary to assure vindication of the constitutional rights of District citizens to vote for members of the United States Congress. Such relief could include:

   (a) ENJOINING Defendants Ryan, Haas, and Irving, and their successors in office, to give effect to votes cast by the Delegate to the House of Representatives for the District of Columbia;

   (b) ENJOINING Defendants Hatch, Stenger, and Pence, and their successors in office, to permit individuals elected by the citizens of the District of Columbia to be seated in the United States Senate.

   (c) ENJOINING Defendant Haas, and her successors in office, to account for citizens of the District of Columbia in transmitting the certificates apportioning the voting members of the House of Representatives;

   (d) ENJOINING Defendant Adams, and her successors in office, from transmitting to the States forms certifying upcoming elections for United States Senators, unless provision is made for participation by citizens of the District of Columbia in the election of members of the United States Senate;

(e) ENJOINING Defendants Irving and Stenger, and their successors in office, to give effect to votes cast by citizens of the District of Columbia in determining the prevailing candidates entitled to be seated, to participate in debates, to vote in roll calls, and to receive the salary of a voting member of the House of Representatives or of the Senate;

(f) ENJOINING Defendants Ross and Trump, and their successors in office, to include the District of Columbia in calculations for purposes of transmitting to Congress, on the basis of the decennial census, any number of representatives to be apportioned to the District of Columbia.

(g) ORDERING the Defendants to present plans setting forth their recommended best means for assuring the right of District of Columbia citizens to participate in the election of voting members of Congress;

(h) After full consideration of the parties' proposed plans, ORDERING Defendants to pursue the steps that will most appropriately assure the rights of District of Columbia citizens to participate in the election of voting members of Congress.

6. AWARD Plaintiffs their reasonable attorney fees and allowable costs of court; and

7. ORDER such further or different relief as the Court deems just and proper.

VIII. JURY DEMAND

143. Plaintiffs hereby demand a jury trial on all issues so triable.

November 26, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 26, 2018, I served a copy of the foregoing and accompanying materials on the acting United States Attorney General; the United States Attorney for the District of Columbia; Paul Ryan, in his official capacity as Speaker of the United States House of Representatives; Karen L. Haas in her official capacity as Clerk of the United States House of Representatives; Paul D. Irving, in his official capacity as Sergeant at Arms of the United States House of Representatives; Orrin G. Hatch, in his official capacity as President Pro Tempore of the United States Senate; Julie Adams, in her official capacity as Secretary of the United States Senate; Michael Stenger, in his official capacity as Sergeant at Arms and Doorkeeper of the United States Senate; Michael R. Pence, in his official capacity as Vice President of the United States; Wilbur Ross, in his official capacity as Secretary of the United States Department of Commerce; and Donald J. Trump, in his official capacity as President of the United States, by hand and U.S. Certified Mail.

/s/ Christopher J. Wright
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANGELICA CASTAÑON, *et al.*, *Plaintiffs*, v. UNITED STATES, *et al.*, *Defendants.*	Civil Action No. 18-2545 Three-Judge Court (RDM, RLW, TNM)

Before: WILKINS, *Circuit Judge*, and MOSS and MCFADDEN, *District Judges*.

Opinion for the Court filed by *Circuit Judge* WILKINS.

MEMORANDUM OPINION

WILKINS, *Circuit Judge*: This suit was brought by registered voters residing in the District of Columbia (the "District") in an effort to secure for themselves, and others similarly situated, the ability to elect voting representatives to the United States Congress. *See generally* Am. Compl., ECF No. 9. Suing Senate and Executive officials,[1] Plaintiffs challenged their lack of the congressional franchise as unconstitutional because violative of their rights to equal protection, due process, and association and representation. *Id.* This three-judge Court was convened under 28 U.S.C. § 2284(a), which provides that "[a] district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts[.]" *See* Mem. Op. 5-6, ECF No. 54 (finding three-judge Court to have jurisdiction over Plaintiffs' claims challenging the District's lack of representation in the House of Representatives). Upon consideration of Defendants' motion to dismiss, ECF No. 21, and Plaintiffs' motion for summary judgment, ECF No. 23, we declined to exercise jurisdiction over those of Plaintiffs' claims aimed at attaining the Senate franchise, Mem. Op. 7, dismissed those claims aimed at securing the House franchise, *id.* at 13, 25, and denied Plaintiffs' summary-judgment motion, *id.* at 26.

Plaintiffs now move the Court for reconsideration. Mot. Reconsid. ("Motion"), ECF No. 58. Because we find that justice does not require reconsideration, we deny the Motion.

I. Procedural History

In our Memorandum Opinion, we: (1) held that our consideration of Plaintiffs' House claims as a three-judge Court was proper under 28 U.S.C. § 2284(a), Mem. Op. 5-6; (2) declined

[1] Initially, Plaintiffs also sued House officials, Am. Compl. ¶¶ 59-61, but they voluntarily dismissed the House Defendants, ECF No. 20, who then filed an *amicus* brief in support of Plaintiffs, ECF No. 38.

to exercise jurisdiction over those of Plaintiffs' claims seeking representation in the Senate, *id.* at 6-7; (3) ruled that, insofar as Plaintiffs sought to compel affirmative congressional action, any such claims were nonjusticiable for want of Article III standing, *id.* at 13; and (4) held that those of Plaintiffs' House claims that challenged apportionment, though justiciable, *id.* at 14, were foreclosed by the Constitution, *id.* at 25; we therefore dismissed those claims, *id.* Plaintiffs' Senate claims have not yet been adjudicated, and judgment was never entered as to any of Plaintiffs' claims.

In the course of our analysis of Plaintiffs' claims, we made note of the following:

> We do not understand Plaintiffs to be challenging the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), Pub. L. No. 99-410, 100 Stat 924 (1986) (codified at 52 U.S.C. §§ 20301-11). UOCAVA requires States (as well as U.S. territories and the District of Columbia) to permit otherwise-qualified voters residing or stationed overseas to vote in the last place they were domiciled prior to leaving the United States. 52 U.S.C. §§ 20302, 20310. Although the Amended Complaint does make repeated mention of UOCAVA with respect to Plaintiffs' equal-protection claim, *see, e.g.*, Am. Compl. ¶¶ 4, 111, 112, 114, 125, 135, it has none of the hallmarks we would expect of a complaint challenging UOCAVA's constitutionality or contending that UOCAVA should be expanded to grant some District residents the congressional franchise. For instance, the Amended Complaint's focus is evidently on securing congressional representation for District residents *qua* District residents, not as (former) residents of States. *See, e.g.*, *id.* ¶¶ 6 (arguing for "the constitutional right of District residents to band together to further their political beliefs"), 133 ("Without voting representation in the House and the Senate, District residents are unable to rely on local champions in Congress arguing for a fairer distribution of federal funds."). None of Plaintiffs' allegations as to the Defendants sued pertains to UOCAVA. *See id.* ¶¶ 59-67. And none of the requested relief addresses UOCAVA – either striking the statute down wholesale or allowing those District residents who previously resided and voted in States to continue to vote there. *See id.* Prayer for Relief ¶¶ 1-7. Because we conclude that Plaintiffs' constitutional claims are otherwise foreclosed, we have no occasion for further discussion of UOCAVA.

Mem. Op. 13 n.5.

Following the issuance of our Memorandum Opinion, Plaintiffs filed the instant Motion, styled "Plaintiffs' Motion for Reconsideration or to Alter or Amend Judgment under Rule 59(e)." Framing their request for reconsideration as "narrowly focused" on "a specific equal protection argument that the Court's Memorandum Opinion largely failed to address," Mem. in Supp. of Mot. 3, ECF No. 58-1, Plaintiffs – while declaring repeatedly that they do not challenge the validity of UOCAVA, *id.* at 4, 6 – argue that UOCAVA's "differential treatment of similarly situated overseas citizens and District residents violates the Equal Protection Clause," *id.* at 1; *see also, e.g.*, *id.* at

1-2 ("[I]t violates the Equal Protection Clause for Congress to allow the 'people of the several States' who move abroad to continue to vote for senators and representatives, but *not* to allow citizens who move from the States to the District to do the same[.]"). The Motion asks the Court to issue declaratory and injunctive relief to the effect that those District residents who relocated to the District from States are entitled to be considered, for the purposes of apportionment and the congressional franchise, as residing in the States from which they moved. *Id.* at 2.

II. Standard of Review

Both Plaintiffs and Defendants invoke Federal Rule of Civil Procedure ("Rule") 59(e) as supplying the relevant rubric for our review of the Motion. *See* Mem. in Supp. of Mot. 2-3; Defendants' Opposition to Mot. ("Opp.") 2-4, ECF No. 60. But it is Rule 54(b) that governs. Rule 54(b) provides:

> When an action presents more than one claim for relief . . . or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any . . . other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties . . . may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

FED. R. CIV. P. 54(b). The "express determination" mandate of Rule 54(b) "is a bright-line requirement." *Bldg. Indus. Ass'n of Superior Cal. v. Babbitt*, 161 F.3d 740, 743 (D.C. Cir. 1998); *see also Blackman v. Dist. of Columbia*, 456 F.3d 167, 175 (D.C. Cir. 2006) ("The mandate of Rule 54(b) is plain and without exception."). But we made no express determination "that there [wa]s no just reason for delay," FED. R. CIV. P. 54(b), either in the Memorandum Opinion or in the accompanying Order, ECF No. 55, and judgment was not entered as to any of Plaintiffs' claims. Therefore, "[t]he decision was interlocutory," and we treat the Motion "as filed under Rule 54(b)." *Cobell v. Jewell*, 802 F.3d 12, 25 (D.C. Cir. 2015).

While "[t]he precise standard governing Rule 54(b) reconsideration is unsettled in our Circuit," *Cobell v. Norton*, 224 F.R.D. 266, 272 (D.D.C. 2004), our Court of Appeals has recognized that a district court ruling on a Rule 54(b) motion does not abuse its discretion in denying reconsideration on the basis of arguments it has "already rejected on the merits," *Capitol Sprinkler Inspection, Inc. v. Guest Servs., Inc.*, 630 F.3d 217, 227 (D.C. Cir. 2011). The Court of Appeals has also stated that a district court should not treat the Rule 54(b) standard as containing a "strict prohibition on raising new arguments." *Jewell*, 802 F.3d at 26. In the absence of more specific appellate authority, many district courts in this Circuit have employed the following standard:

> Justice may require revision when the Court has patently misunderstood a party, has made a decision outside the adversarial issues presented to the Court by the parties, has made an error not of reasoning but of apprehension, or where a controlling or significant change in the law or facts has occurred since the submission of the issue to the Court. Errors of apprehension may

> include a Court's failure to consider controlling decisions or data that might reasonably be expected to alter the conclusion reached by the court.

Singh v. George Wash. Univ., 383 F. Supp. 2d 99, 101 (D.D.C. 2005) (citations, alterations, and quotation marks omitted); *accord, e.g.*, *Shvartser v. Lekser*, 330 F. Supp. 3d 356, 360 (D.D.C. 2018); *United States v. Dynamic Visions, Inc.*, 321 F.R.D. 14, 17 (D.D.C. 2017); *Jones v. Castro*, 200 F. Supp. 3d 183 (D.D.C. 2016). Additionally, the party seeking reconsideration under Rule 54(b) must establish "that some harm or injustice would result if reconsideration were to be denied." *Pueschel v. Nat'l Air Traffic Controllers' Ass'n*, 606 F. Supp. 2d 82, 85 (D.D.C. 2009) (citation omitted); *accord, e.g.*, *Dynamic Visions, Inc.*, 321 F.R.D. at 17; *Cobell v. Norton*, 355 F. Supp. 2d 531, 540 (D.D.C. 2005).

III. Analysis

The Motion is not a picture of clarity, such that we are not entirely certain under what theory Plaintiffs are proceeding. There are, as we see it, two possibilities: Either Plaintiffs seek reconsideration in order to press an "equal protection claim based on [UOCAVA]," Mem. in Supp. of Mot. 6 – in other words, an equal-protection challenge to UOCAVA itself – or they seek reconsideration in order to reiterate equal-protection arguments along the lines of those necessarily rejected by our Memorandum Opinion, *see* Mem. Op. 25 ("Because Congress's District Clause power does not include the power to contravene the Constitution's express provisions, and because the Constitution by its terms limits House representation to 'the people of the several states,' we find that Plaintiffs' claim[] that their exclusion from apportionment is violative of their right[] to equal protection . . . fail[s] to state a claim upon which relief can be granted."); Mem. in Supp. of Mot. 3 ("Plaintiffs continue to believe that voting is a right of such fundamental importance that Congress may properly view that constitutional language as a floor rather than a ceiling on who may exercise it."). As we explain, neither theory lays a path to success.

The first path seems to be the one that Plaintiffs, in crafting the Motion, most likely intended to tread. Despite their declaration that they "do not challenge the constitutionality of [UOCAVA]," Mem. in Supp. of Mot. 4, Plaintiffs expend a fair bit of effort doing exactly that. Plaintiffs assert that "Congress's extension of voting rights to overseas residents but not to similarly situated residents of the District violates equal protection," *id.* (capitalization altered), and that "the Equal Protection Clause *requires* Congress" to provide the congressional franchise to voters who relocate from a State to the District just as it has to voters who instead relocate overseas, *id.* Moreover, in support of their preferred remedial outcome – the extension of the congressional franchise, via their State of origin, to individuals who have relocated to the District, *id.* at 2 – Plaintiffs rely on the discussion of equal-protection remedies in *Sessions v. Morales-Santana*, *see id.* at 8 n.7 (quoting 137 S. Ct. 1678, 1699 (2017)), a discussion quite evidently premised on the existence of an equal-protection challenge to a statute, *see* 137 S. Ct. at 1698 ("There are two remedial alternatives . . . when a statute benefits one class . . . and excludes another from the benefit . . . . A court may either declare the statute a nullity and order that its benefits not extend to the class the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion." (citations, alterations, and internal quotation marks omitted)).

While we are counseled by *Jewell* that the "as justice requires" rubric does not necessarily serve as a bar to a Rule 54(b) movant's raising new *arguments*, 802 F.3d at 26, the absence of such

a barrier does not assist Plaintiffs in their primary traverse, which is an attempt to assert a new *claim*. We set forth in our Memorandum Opinion some of the reasons we did not originally consider Plaintiffs to have been pressing an "equal protection claim based on [UOCAVA]," Mem. in Supp. of Mot. 6: The Amended Complaint's evident focus "on securing congressional representation for District residents *qua* District residents, not as (former) residents of States"; the absence of any UOCAVA-related allegations as to any of the Defendants; and the fact that "none of the requested relief addresse[d] UOCAVA[.]" Mem. Op. 13 n.5. Plaintiffs now charge the Court with having failed to "directly respond to Plaintiffs' equal protection claim based on [UOCAVA]," Mem. in Supp. of Mot. 6, but they surmise that "the Court declined to address the issue because it was unclear to the Court whether Plaintiffs sought relief modeled on the voting rights of citizens living overseas," *id.* at 1 ("Plaintiffs here clarify that they did and do seek such relief, as well as continuing to request whatever alternative relief the Court may deem just and proper." (citing Am. Compl. Prayer for Relief ¶ 7)).

In other words, Plaintiffs now contend that the Court "patently misunderstood" them, *Singh*, 383 F. Supp. 2d at 101 – but they entirely fail to contend with two of the three iterated bases for our conclusion that they were not challenging UOCAVA in the first instance, which again included the absence of any allegations connecting the Defendants to the statute Plaintiffs now purport to have challenged. Even accepting *arguendo* the soundness of Plaintiffs' premise that their catch-all, "boilerplate request[]" for relief, *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 618 n.19 (D.C. Cir. 2017), should be read to pray for relief fashioned on UOCAVA (which would run only to a subset of the named Plaintiffs[2]), Plaintiffs do not address the other aspects of the Amended Complaint that informed our conclusion that UOCAVA as such was not at issue. Because our prior reading of the Amended Complaint satisfied us that Plaintiffs were not in fact mounting an equal-protection challenge to UOCAVA, and because the Motion fails to call that conclusion into question, we cannot find that justice requires us to reconsider our prior rulings to account for the challenge to UOCAVA that Plaintiffs now seek to assert.

Returning now to the trailhead, we need only take a few steps along the second path before concluding that this way, too, is a dead end. If (despite all appearances) Plaintiffs are not attempting to assert a challenge to UOCAVA itself, *see, e.g.*, Mem. in Supp. of Mot. 6 ("Plaintiffs do not challenge [UOCAVA.]"), they must be relying on UOCAVA to reargue their original equal-protection claim. But we previously found the justiciable aspects of this claim, together with Plaintiffs' other constitutional challenges to the apportionment statutes (2 U.S.C. § 2a and 13 U.S.C. § 141), to be foreclosed by the Constitution itself. Mem. Op. 25; *see generally id.* at 21-25. Insofar as Plaintiffs seek to relitigate that issue, they seem to point to UOCAVA as evidence that Congress is in fact empowered to give the operative constitutional language – "the people of the several States"[3] – a sufficiently expansive reading as to encompass individuals who once lived in the "several States" but now live elsewhere. *See, e.g.*, Mem. in Supp. of Mot. 3 ("Harmonizing [UOCAVA] with this Court's ruling that House representation is limited [to] 'the people of the several States' requires understanding Congress to have construed that phrase to *include* individuals from the 'several States' who moved overseas."). But, as explained above, if anything,

[2] Of the eleven Plaintiffs named in the Amended Complaint, two do not purport to have ever lived in a State. Am. Compl. ¶¶ 26, 54.

[3] The Constitution provides that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States," U.S. CONST. art. I, § 2, cl. 1, and that "Representatives shall be apportioned among the several States according to their respective numbers," *id.* amend. XIV § 2.

UOCAVA merely supports the premise that Congress *might* treat residents of the District of Columbia as residents of the State in which they resided before moving to the District; UOCAVA provides no precedent for treating residents of the District of Columbia *qua* residents of the district as among "the people of the several States." It was that premise – that residents of the District *qua* residents of the District are not among "the people of the several States" – that informed our conclusion that Plaintiffs' equal-protection law claim was pretermitted by the Constitution's own dictates. *See* Mem. Op. 2. Plaintiffs' motion for reconsideration gives us no discernable reason to reexamine that fundamental premise. As such, we again cannot conclude that justice requires our reconsideration. *See Singh*, 383 F. Supp. 2d at 101.

IV. Conclusion

For the foregoing reasons, Plaintiffs' Motion for Reconsideration or to Alter or Amend Judgment under Rule 59(e), ECF No. 58, which we have construed as a Rule 54(b) motion, is **DENIED**.

An accompanying order will follow.

/s/
ROBERT L. WILKINS
United States Circuit Judge

/s/
RANDOLPH D. MOSS
United States District Judge

/s/
TREVOR N. McFADDEN
United States District Judge

Date: September 16, 2020

90 F.Supp.2d 35
United States District Court,
District of Columbia.

Lois E. ADAMS, et al., Plaintiffs,

v.

William Jefferson CLINTON, et al., Defendants.

Clifford Alexander, et al., Plaintiffs,

v.

William M. Daley, et al., Defendants.

Nos. CIV.98–1665LFOMBGCKK, CIV.98–2187LFOMBGCKK.
|
March 20, 2000.
|
As Amended April 20, 2000.

Synopsis
District of Columbia and various of its residents brought action challenging constitutionality of the exclusion of the District of Columbia from the apportionment of congressional districts. Upon motions to dismiss and cross-motions for summary judgment, a three-judge panel of District Court held that: (1) it would not exercise supplemental jurisdiction over claims that did not directly challenge apportionment of representatives; (2) political question doctrine did not bar court's consideration of case; (3) District and residents had standing; (4) District could not be treated as a "state" for purposes of the apportionment of congressional representatives; (5) residents could not be permitted to vote in congressional elections through Maryland, based on a theory of "residual" citizenship in that state; and (6) denial of District of Columbia residents' right to vote in congressional elections did not violate Equal Protection, Privileges or Immunities, Due Process, or Republican Guarantee Clauses.

Order in accordance with opinion.

Oberdorfer, J. filed opinion dissenting in part, and concurring in part .

West Headnotes (11)

[1] **Federal Courts** Elections and reapportionment

Complaints of District of Columbia and various of its residents, which challenged constitutionality of the exclusion of the District of Columbia from the apportionment of congressional districts, fell outside the jurisdictional mandate of three-judge court statute insofar as they demanded representation in the Senate and challenged Congress' continuing exercise of exclusive authority over matters of local concern; although those claims involved some issues akin to those found in the representation claims, they did not directly challenge congressional apportionment and therefore fell outside jurisdictional mandate. 28 U.S.C.A. § 2284(a).

7 Cases that cite this headnote

[2] **Federal Courts** Particular Claims or Causes of Action

Three-judge court considering District of Columbia residents' challenge to constitutionality of the exclusion of the District of Columbia from the apportionment of congressional districts would not exercise supplemental jurisdiction over claims that did not directly challenge apportionment of representatives. 28 U.S.C.A. § 2284(a).

11 Cases that cite this headnote

[3] **Constitutional Law** Apportionment, election, and discipline of members of legislature

Political question doctrine did not bar court's consideration of District of Columbia residents' constitutional challenge to the denial of their right to elect representatives to Congress; the purely legal issue was one the courts were perfectly capable of resolving.

1 Case that cites this headnote

[4] **Constitutional Law** Elections

District of Columbia and various of its residents had standing to raise claims challenging the constitutionality of the exclusion of the District of Columbia from the apportionment of congressional districts.

8 Cases that cite this headnote

[5] **District of Columbia** Status and governmental powers and functions in general

The measure of whether the District of Columbia constitutes a "State or Territory" within the meaning of any particular constitutional provision depends upon the character and aim of the specific provision involved.

[6] **District of Columbia** Status and governmental powers and functions in general

United States Apportionment of Representatives; Reapportionment and Redistricting

District of Columbia could not be treated as a "state" for purposes of the apportionment of congressional representatives. U.S.C.A. Const. Art. 1, § 2, cl. 1.

3 Cases that cite this headnote

[7] **United States** Regulation of Election of Members

Residents of District of Columbia could not be permitted to vote in congressional elections through Maryland, based on a theory of "residual" citizenship in that state. U.S.C.A. Const. Art. 1, § 2, cl. 1.

2 Cases that cite this headnote

[8] **Constitutional Law** Elections, Voting, and Political Rights

District of Columbia Status and governmental powers and functions in general

District of Columbia's lack of representation in the House did not deprive its residents of the equal protection of the laws; differing treatment was the consequence, not of legislative determinations, but of constitutional distinctions, and court was without authority to scrutinize those distinctions to determine whether they are irrational, compelling, or anything in between. U.S.C.A. Const. Art. 1, § 2, cl. 1; Amend. 5.

2 Cases that cite this headnote

[9] **Constitutional Law** Particular Issues and Applications

District of Columbia Status and governmental powers and functions in general

Denial of District of Columbia residents' right to vote in congressional elections did not abridge right of national citizenship in violation of Fourteenth Amendment's Privileges or Immunities Clause; denial of District residents' right to vote was not the consequence of the addition of any extra-constitutional qualification on voting, but rather, was the result of applying precisely those qualifications contained in the Constitution itself. U.S.C.A. Const. Art. 1, § 2, cl. 1; Amend. 14.

1 Case that cites this headnote

[10] **Constitutional Law** Voters, candidates, and elections

District of Columbia Status and governmental powers and functions in general

Denial of District of Columbia residents' right to vote in congressional elections did not violate Due Process Clause of the Fifth Amendment. U.S.C.A. Const. Art. 1, § 2, cl. 1; Amend. 5.

[11] **District of Columbia** Status and governmental powers and functions in general

States Guaranty by United States of republican form of government

Denial of District of Columbia residents' right to vote in congressional elections did not violate Republican Guarantee Clause of Constitution. U.S.C.A. Const. Art. 1, § 2, cl. 1; Art. 4, § 4.

3 Cases that cite this headnote

Attorneys and Law Firms

***37** George Simons LaRoche, Takoma Park, MD, Charles Alvin Miller, Thomas Samuel Williamson, Jr., Covington & Burling, Washington, DC, for Plaintiffs.

Hon. John M. Ferren, Paul Eric Strauss (Senator), Morgan John Frankel, U.S. Senate, Theodore C. Hirt, DOJ, Civil Div., John Russell Tyler, DOJ, Civil Div., Robert B. Ahdieh, DOJ, Civil Div., Kerry W. Kircher, OGC, House of Representatives, Daniel A. Reznick, D.C. Financial Resp. & Mgmt. Asst. Authority, Thomas B. Griffith, U.S. Senate, Jonathan Lynwood Abram, Hogan & Hartson, Washington, DC, John Marshall Smallwood, Gregory K. Wells & Associates, Lawrence Hillel Mirel, Mirel & Algei, Washington, DC, Ann Christine Wilcox, Statehood Party, Washington, DC, Walter A. Smith, Jr., Esq., Robert R. Rigsby, OCC, for Defendants/Movants/amicus.

Before: GARLAND, Circuit Judge, and OBERDORFER and KOLLAR–KOTELLY, District Judges.

MEMORANDUM OPINION

PER CURIAM.

In these consolidated lawsuits, seventy-five residents of the District of Columbia, along with the District of Columbia itself, challenge as unconstitutional the denial of their right to elect representatives to the Congress of the United States. Plaintiffs argue that their exclusion from representation is unjust. They note that the citizens of the District pay federal taxes and defend the United States in times of war, yet are denied any vote in the Congress that levies those taxes and declares those wars. This, they continue, contravenes a central tenet of our nation's ideals: that governments "deriv[e] their just powers from the consent of the governed." THE DECLARATION OF INDEPENDENCE para. 2.

None of the parties contests the justice of plaintiffs' cause. President Clinton and the other defendants, however, maintain that the dictates of the Constitution and the decisions of the Supreme Court bar us from providing the relief plaintiffs seek. Any such relief, they say, must come through the political process.

Plaintiffs' grievances are serious, and we have given them the most serious consideration. In the end, however, we are constrained to agree with defendants that the remedies plaintiffs request are beyond this court's authority to grant.

I

On June 30, 1998, D.C. resident Lois Adams and nineteen co-plaintiffs filed suit in *Adams v. Clinton.* Their complaint alleges that the failure to apportion congressional representatives to the District, and to permit District residents to vote in House and Senate elections, violates their constitutional rights to equal protection of the laws and to a republican form of government. ***38** They further contend that those same rights are violated by Congress's exercise of exclusive jurisdiction over the District, and by its denial to plaintiffs of "a state government, insulated from Congressional interference in matters of local concern." *Adams* Compl. ¶ 109. In connection with the latter claim, they seek an injunction directing the District of Columbia Financial Responsibility and Management Assistance Authority, commonly known as the "Control Board," [1] to "take no further action" and to "disband itself." *Id.* at 28. The *Adams* complaint names as defendants President William Jefferson Clinton, the Clerk and the Sergeant at Arms of the House of Representatives, and the Control Board.

1 The Control Board was established pursuant to the District of Columbia Financial Responsibility and Management Assistance Act, Pub. L. No. 104–8, 109 Stat. 97 (1995).

On September 14, 1998, District of Columbia resident Clifford Alexander, fifty-six other residents of the District, and the District itself filed suit in *Alexander v. Daley.* Like their counterparts in *Adams,* the *Alexander* plaintiffs allege that their inability to vote for representatives and senators violates their rights to equal protection and to a republican form of government. The *Alexander* plaintiffs also allege that the denial of congressional representation violates their right to due process and abridges their privileges and immunities as citizens of the United States. Finally, they contend that the denial of their right to vote violates Article I and the Seventeenth Amendment of the Constitution, which provide that the members of the House shall be chosen by "the People of the several States" and that senators shall come "from each State, elected by the people thereof." U.S. CONST. art. I, § 2,

cl. 1; *id.* amend. XVII, cl. 1. The *Alexander* complaint names as defendants Secretary of Commerce William M. Daley; the Clerk, the Sergeant at Arms, and the Chief Administrative Officer of the House of Representatives; the Secretary and the Doorkeeper/Sergeant at Arms of the Senate; and the United States.

On November 3, 1998, a single-judge district court consolidated the two lawsuits. *See Adams v. Clinton,* Civ. No. 98–1665 (D.D.C. Nov. 3, 1998) (Oberdorfer, J.). On November 6, that court granted motions by both sets of plaintiffs to appoint a three-judge district court pursuant to 28 U.S.C. § 2284(a), which provides that "[a] district court of three judges shall be convened ... when an action is filed challenging the constitutionality of the apportionment of congressional districts." *See Adams v. Clinton,* 26 F.Supp.2d 156, 160 (D.D.C.1998) (Oberdorfer, J.). This court subsequently convened, disposed of certain preliminary motions, *see Adams v. Clinton,* 40 F.Supp.2d 1, 5 (D.D.C.1999), and heard oral argument.

Currently pending are motions to dismiss or for summary judgment on behalf of each of the parties. All parties agree that the consolidated lawsuits contain no genuine issue as to any material fact and that decision on the pending motions is appropriate. We first address whether all of the claims disputed in these motions are properly before this three-judge panel. We then address the standing of plaintiffs to pursue those claims that are properly before us. Finally, we examine the merits of those claims.

II

[1] The parties have not asked us to revisit the original judge's determination that this case falls within the confines of the three-judge court statute, and we will not do so insofar as the complaints allege the failure to apportion members of the House of Representatives to the District. We have, however, determined that this court should relinquish jurisdiction over the other claims raised in the complaints and pending motions. These include both complaints' demands for representation in the Senate, which, because they do not "challeng[e] the constitutionality of the apportionment of congressional districts," ***39** plainly fall outside the jurisdictional mandate of section 2284(a). They also include the *Adams* plaintiffs' challenges to Congress' continuing exercise of exclusive authority over matters of local concern, particularly their challenge to the existence of the Control Board. Although these claims involve some issues akin to those found in the representation claims, they do not directly challenge congressional apportionment and therefore also fall outside the language of section 2284(a). *Cf. Public Serv. Comm'n v. Brashear Freight Lines,* 312 U.S. 621, 625, 61 S.Ct. 784, 85 L.Ed. 1083 (1941) (holding that three-judge court should not consider "questions not within the statutory purpose for which the two additional judges ha[ve] been called").

Not only do the aforementioned claims fall outside the scope of section 2284(a), but they are also not the type of claims over which three-judge courts commonly assert supplemental jurisdiction. *See generally Allee v. Medrano,* 416 U.S. 802, 812, 94 S.Ct. 2191, 40 L.Ed.2d 566 (1974) (indicating that three-judge courts may assert ancillary jurisdiction over certain non-three-judge claims); *Lake Carriers' Ass'n v. MacMullan,* 406 U.S. 498, 504 n. 5, 92 S.Ct. 1749, 32 L.Ed.2d 257 (1972) (same). For example, it is not necessary to resolve the Senate and Control Board claims in order to provide a "final and authoritative decision of the controversy" among the parties involved in the apportionment claims. *Public Serv. Comm'n,* 312 U.S. at 625 n. 5, 61 S.Ct. 784; *see also Allee,* 416 U.S. at 812 n. 8, 94 S.Ct. 2191. Nor is this a case in which resolution of the non-three-judge claims would allow us to dispose of the claims that provide the basis for our jurisdiction. *See Allee,* 416 U.S. at 812 n. 8, 94 S.Ct. 2191; *United States v. Georgia Pub. Serv. Comm'n,* 371 U.S. 285, 287–88, 83 S.Ct. 397, 9 L.Ed.2d 317 (1963) ("Once [a three-judge court has been] convened the case can be disposed of below or here on any ground, whether or not it would have justified the calling of a three-judge court."): *see also Rosado v. Wyman,* 397 U.S. 397, 402, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970) (stating that three-judge court must decide non-constitutional claims "in preference to deciding the original constitutional claim" for which court convened).

[2] Because the claims that do not directly challenge the apportionment of representatives do not implicate the concerns that have traditionally caused three-judge courts to exercise supplemental jurisdiction, it may be improper for us to exercise such jurisdiction over them. *Cf. Perez v. Ledesma,* 401 U.S. 82, 86–87, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971) (holding that three-judge court convened to hear challenges to certain state laws did not have jurisdiction over related attack on similar local ordinance). Even if our jurisdiction over those claims were proper, however, we would retain the discretion not to exercise it. *See Turner Broad, Sys., Inc. v. FCC,* 810 F.Supp. 1308, 1314 (D.D.C.1992) (three-judge court). As we noted at an earlier stage in these proceedings, the Supreme

Court has indicated that "even when [a] three-judge court has jurisdiction over [an] ancillary claim, 'the most appropriate course' may be to remand it to [a] single district judge." *Adams,* 40 F.Supp.2d at 5 (quoting *Hagans v. Lavine,* 415 U.S. 528, 544, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974)); *see also Diven v. Amalgamated Transit Union Int'l & Local 689,* 38 F.3d 598, 601 (D.C.Cir.1994).

Remand of the non-apportionment claims is the appropriate course here. There is no doubt that resolution of the Senate and Control Board claims would take us far afield from the core of the original jurisdictional grant, and at the same time deprive the Court of Appeals of the opportunity to review our work. *See* 28 U.S.C. § 1253 (providing that final judgment of three-judge district court is appealable directly to Supreme Court). To avoid reaching "constitutional questions we need not reach, asserting authority we may not have," *Adams,* 40 F.Supp.2d at 5, we will address here only those claims that challenge the constitutionality of an ***40** apportionment of congressional districts that fails to account for the District of Columbia and its residents. The balance of the claims are remanded for determination by the single district judge before whom they were originally filed.

III

Before reaching the merits of the claims for representation in the House, we must determine two further questions regarding our jurisdiction: whether plaintiffs' challenge represents a nonjusticiable political question, and whether plaintiffs have the requisite standing to bring it. *See Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 118 S.Ct. 1003, 1012, 140 L.Ed.2d 210 (1998) (holding that Article III courts must consider jurisdictional questions before deciding merits of causes of action).

A

[3] The defendant House officials contend that this case presents a nonjusticiable political question because there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker v. Carr,* 369 U.S. 186, 217, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). Specifically, they assert that because Article I of the Constitution limits voting to residents of the fifty states, only congressional legislation or constitutional amendment can remedy plaintiffs' exclusion from the franchise.

We do not agree that the political question doctrine bars our consideration of this case. The Supreme Court has repeatedly declared that "[c]onstitutional challenges to apportionment are justiciable." *Franklin v. Massachusetts,* 505 U.S. 788, 801 & n. 2, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992) (plurality opinion of O'Connor, J.) (citing U.S. *Department of Commerce v. Montana,* 503 U.S. 442, 112 S.Ct. 1415, 118 L.Ed.2d 87 (1992)); *accord Wesberry v. Sanders,* 376 U.S. 1, 6, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964). The resolution of this dispute is "textually committed" only if we assume before we begin that plaintiffs cannot prove what they allege: that District residents are among those qualified to vote for congressional representatives under Article I. That purely legal issue is one the courts are perfectly capable of resolving, and is similar to those the Supreme Court has repeatedly found appropriate for judicial resolution. *See, e.g., Montana,* 503 U.S. at 458–59, 112 S.Ct. 1415 ("[T]he interpretation of the apportionment provisions of the Constitution is well within the competence of the Judiciary. The political question doctrine presents no bar to our reaching the merits of this dispute ....") (citations omitted); *Baker,* 369 U.S. at 226, 82 S.Ct. 691.

B

[4] Next, we consider plaintiffs' standing to bring these consolidated actions. The Supreme Court has summarized the requirements for standing as follows:

> [T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of .... Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (footnote, citations, and internal quotations omitted). For the purposes of standing analysis, we "assume the validity of a plaintiff's substantive claim." *Catholic Soc. Serv. v. Shalala,* 12 F.3d 1123, 1126 (D.C.Cir.1994); *accord Warth v. Seldin,* 422 U.S. 490, 500, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) ("[S]tanding in no way depends on the merits of the plaintiff's contention that particular conduct is illegal ...."); *Claybrook v. Slater,* 111 F.3d 904, 907 (D.C.Cir.1997); *United States House* ***41** *of Representatives v. United States Dep't of Commerce,* 11 F.Supp.2d 76, 83 (D.D.C.1998) (three-judge court), *appeal dismissed,* 525 U.S. 316, 119 S.Ct. 765, 142 L.Ed.2d 797 (1999).

Defendants do not seriously dispute that plaintiffs' lack of representation in the House satisfies the "injury in fact" requirement. *See* Tr. of Mot. Hr'g at 70. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry,* 376 U.S. at 17, 84 S.Ct. 526 (invalidating malapportioned congressional districts). Hence, if the residents of the District are entitled to such a voice—which we must presume for purposes of standing analysis—its denial plainly constitutes an "injury in fact." *See Department of Commerce v. United States House of Representatives,* 525 U.S. 316, 119 S.Ct. 765, 774, 142 L.Ed.2d 797 (1999) (holding that resident's "expected loss of a Representative to the United States Congress" through reapportionment "undoubtedly satisfies the injury-in-fact requirement of Article III standing"); *Michel v. Anderson,* 14 F.3d 623, 626 (D.C.Cir.1994) (noting that "[i]t is obvious that Georgia voters would have suffered an injury" if "the House were to prevent all congressmen from the State of Georgia from voting in the House").

Defendants focus instead on the second and third prerequisites of standing: the requirements of causation and redressability. That analysis in turn, focuses on the statutory process for apportionment of congressional districts. The Secretary of Commerce is required, within nine months of completing the decennial census, to report to the President the total population of each state for purposes of congressional apportionment. *See* 13 U.S.C. § 141(b). [2] Upon receiving the report, the President must transmit to Congress "a statement showing the whole number of persons in each State ... and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives." 2 U.S.C. § 2a(a). "Each State shall be entitled ... to the number of Representatives shown" in the President's statement, and within fifteen days of receiving that statement, the Clerk of the House must "send to the executive of each State a certificate of the number of Representatives to which such State is entitled ...." *Id.* § 2a(b); *see Franklin,* 505 U.S. at 792, 112 S.Ct. 2767. The Secretary concedes that he has not included, and does not plan to include, a separate entry for the District of Columbia in his report to the President. Nor has he included, nor does he plan to include, the District's population within that of any state.

2 The statute provides:

> The tabulation of total population by States ... as required for the apportionment of Representatives in Congress among the several States shall be ... reported by the [Commerce] Secretary to the President of the United States.

13 U.S.C. § 141(b).

With respect to causation, the Secretary of Commerce and the Clerk of the House contend that they bear no individual responsibility for the exclusion of the District from the apportionment process because they are merely carrying out the constitutional requirement (repeated *in haec verba* in the statute) that representatives be apportioned "among the several States," [3] and because the District of Columbia is not a state. This argument once again assumes that plaintiffs will not prevail on the merits. We, however, must assume here that plaintiffs will prevail, and hence that the District *is* a "state" for apportionment purposes and that the Constitution is not the cause of their electoral disability.

3 U.S. CONST. art. I, § 2, cl. 3; 13 U.S.C. § 141(b); *see supra* note 2.

The more difficult standing question is that of redressability. Secretary Daley contends that even if we may order him to include the District's citizens within his ***42** report, [4] the President is not bound to accept that report. He further argues that we are without power to enjoin the President if he refuses to adhere to a declaration in plaintiffs' favor. Making an analogous argument, the Clerk of the House contends that the Speech or Debate Clause [5] likewise prevents us from enjoining her should she decide not to comply with our declaration of the law. Defendants argue that, because the chain of causation may be broken in these two places, plaintiffs cannot satisfy the requirement of redressability. [6]

4 *See Franklin,* 505 U.S. at 802, 112 S.Ct. 2767 (plurality opinion of O'Connor, J.) (noting that "injunctive relief against executive officials like the Secretary of Commerce is within the courts' power").

5 U.S. CONST. art. I, § 6, cl. 1 ("[F]or any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place.").

6 Defendants do not shrink from the implications of their position. As noted at oral argument, their contention would apply with equal force to a President's decision to deny representation to a state that voted against him in the last election (at least if that decision were supported by a majority in Congress). *See* Tr. of Mot. Hr'g at 54. Indeed, the Executive Branch defendants concede that, on their theory, no one would have standing to challenge a presidential decision to *grant* the District the vote simply by apportioning it representatives in his transmission to the Clerk. *See id.* at 54–55.

We are guided in our resolution of this issue by the Supreme Court's resolution of a similar dispute in *Franklin v. Massachusetts,* which arose out of a three-judge court proceeding pursuant to the same jurisdictional statute at issue here. *See* 505 U.S. at 788, 112 S.Ct. 2767. In that case, Massachusetts and two of its residents challenged the method used by the then-Secretary of Commerce for allocating overseas military personnel among the states for apportionment purposes—a method that resulted in Massachusetts losing a seat in the House. *See id.* at 790, 112 S.Ct. 2767. The plaintiffs sued the President, the Secretary of Commerce, the Clerk of the House, and Census Bureau officials for violating the Administrative Procedure Act (APA) and the Constitution. As in this case, the defendants contended that the court could not grant injunctive relief against the President, and that absent such relief, a judgment against the remaining defendants would fail to redress the plaintiffs' injury. *See id.* at 802–03, 112 S.Ct. 2767.

Although divisions among the Justices make the Court's opinion difficult to parse, it nonetheless appears that eight Justices rejected the contention that the *Franklin* plaintiffs lacked standing. Four Justices agreed with the defendants that, at a minimum, the prospect of an injunction against the President was "extraordinary, and should have raised judicial eyebrows." *Id.* at 802, 112 S.Ct. 2767 (plurality opinion of O'Connor, J.). Those four concluded, however, that they could avoid deciding the propriety of granting relief against the President (or the House officials) because the plaintiffs' injury was likely to be redressed by declaratory relief against the Secretary of Commerce alone. *See id.* at 803, 112 S.Ct. 2767. A judgment against the Secretary would be enough to cause her to send the correct numbers, the four Justices thought, and it was fair to assume that the President and the congressional officials would then follow the law as the Court articulated it:

> [A]s the Solicitor General has not contended to the contrary, we may assume it is substantially likely that the President and other executive and congressional officials would abide by an authoritative interpretation of the census statute and constitutional provision by the District Court, even though they would not be directly bound by such a determination.

Id. Accordingly, the four went on to consider the merits of plaintiffs' constitutional argument, ultimately holding against them. *See id.* at 806, 112 S.Ct. 2767.

***43** Four more Justices concurred in the judgment against plaintiffs without addressing standing. They did, however, conclude that the President's role in the apportionment process was strictly ministerial, and thus that the Secretary's report could be challenged as "final agency action" under the APA. *See id.* at 807, 808–17, 112 S.Ct. 2767 (Stevens, J., concurring in part). "[T]he statute," these four said, "does not contemplate the President's changing the Secretary's report." *Id.* at 814, 112 S.Ct. 2767. Because these four Justices went on to consider (and deny) the merits of the plaintiffs' claims, the sole Justice dissenting on the issue of standing concluded that they had necessarily found it to exist. *See id.* at 823–24 & n. 1, 112 S.Ct. 2767 (Scalia, J., concurring in part). Even if that was not necessarily so, [7] the view of these four regarding the President's lack of discretion supports plaintiffs' claim of redressability. Since, in the view of these four Justices, the President is without discretion to modify the Commerce Secretary's report, [8] the ability of the court to enjoin the Secretary establishes the necessary redressability.

7 *Franklin* preceded *Steel Co.,* in which the Court expressly held that Article III courts must consider jurisdictional questions before deciding whether a plaintiff has stated a cause of action. *See Steel Co.,* 118 S.Ct. at 1012.

8 *See Franklin,* 505 U.S. at 813, 112 S.Ct. 2767 (Stevens, J., concurring in part) ("[T]he President has consistently and faithfully performed the ministerial duty [of relaying the Secretary's figures to the Clerk without modification]. The Court's suggestion today that the statute gives him discretion to do otherwise is plainly incorrect.").

Deriving a governing principle from the opinions of a fragmented Court is always problematic. [9] Nonetheless, we are bound to try to discern such a principle. *Cf. Marks v. United States,* 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds ....") (internal quotation omitted). In *Franklin,* eight Justices reached one common conclusion: that a judgment directing the Secretary of Commerce to report the population of the states in a specified way would directly affect the apportionment of the House, either because the President would voluntarily abide by it or because the President had no choice but to abide by it.

9 In this case, for example, although the four Justices just cited found the President to have nothing more than a ministerial responsibility with respect to the Secretary's report, a majority of the Court (including the four Justices who found standing) held that the Secretary's decision did not constitute final agency action under the APA because "[the President] is not expressly required to adhere to the policy decisions reflected in the Secretary's report.... [I]t is the President's personal transmittal of the report to Congress that settles the apportionment ...." *Franklin,* 505 U.S. at 799, 112 S.Ct. 2767. The same majority noted that Congress had intended to make the reapportionment process "virtually self-executing, so that the number of Representatives per State would be determined by the Secretary of Commerce and the President without any action by Congress." *Id.* at 792, 112 S.Ct. 2767.

Although *Franklin* is not identical to the case before us, it is sufficiently analogous to govern our determination of plaintiffs' standing. This case involves the same apportionment statute as that at issue in *Franklin.* The Secretary of Commerce plays the same role here as the Secretary did there, and is equally amenable to suit. Here, as in *Franklin,* neither the President nor the House officials have suggested that they would refuse to follow a decision of this court (assuming, of course, that it were upheld on appeal) regarding the apportionment of congressional districts. [10] Hence, we can conclude that plaintiffs satisfy ***44** the redressability prong of the standing inquiry and, as in *Franklin,* can do so without deciding whether the President or the Clerk is subject to suit. [11]

10 *See* House Opp'n to Pls.' Mot. for Summ. J. at 5–6 ("Were District residents determined to have the right to elect congressional representatives, there is no doubt that the District would be included in the apportionment process.").

11 An alternative ground for finding redressability, again without resolving the question of the President's amenability to suit, is contained in the D.C. Circuit's opinion in *Swan v. Clinton,* 100 F.3d 973 (D.C.Cir.1996). There, the court held that even if "the President has the power, if he so chose, to undercut ... relief" in the form of an injunction against a subordinate official, the "partial relief [plaintiff] can obtain against subordinate executive officials is sufficient for redressability." *Id.* at 980–81. This, the court said, "simply recogniz [es] that such partial relief is sufficient for standing purposes when determining whether we can order more complete relief would require us to delve into complicated and exceptionally difficult questions regarding the constitutional relationship between the judiciary and the executive branch." *Id.* at 981.

The distinction the Executive Branch defendants draw between the two cases is not significant. They contend that unlike *Franklin,* which involved the Secretary's policy decision regarding how the census should count military personnel living abroad, here the Secretary is merely carrying out what he perceives the Constitution to require. As defendants point out, the plurality opinion in *Franklin* observed that "[t]he Secretary certainly has an interest in defending her policy determinations concerning the census" and therefore "has an interest in litigating" the accuracy

of reapportionment. *Franklin,* 505 U.S. at 803, 112 S.Ct. 2767 (plurality opinion of O'Connor, J.). Because in this case Secretary Daley is not defending one of his own policy decisions, defendants contend that we cannot find he has sufficient stake in the outcome of these suits.

Defendants' argument amounts to a claim that the parties lack the "concrete adverseness" necessary to assure that there is an actual "case" or "controversy" within the meaning of Article III of the Constitution. *See Gollust v. Mendell,* 501 U.S. 115, 125–26, 111 S.Ct. 2173, 115 L.Ed.2d 109 (1991) (quoting *Baker,* 369 U.S. at 204, 82 S.Ct. 691); *Diamond v. Charles,* 476 U.S. 54, 61–62, 106 S.Ct. 1697, 90 L.Ed.2d 48 (1986). That claim is not persuasive. Nothing in *Franklin* suggested that its standing analysis turned on the fact that the Secretary's decision was based on her view of policy rather than law. Although Secretary Daley's decision to exclude District residents is based on his interpretation of what the Constitution (and the statute that follows it verbatim) requires, his interest in and responsibility for defending that interpretation is at least as substantial as his interest in defending his policy judgments. *See* U.S. CONST. art. VI, cl. 3 ("[A]ll executive and judicial Officers, both of the United States and the several States, shall be bound by Oath or Affirmation, to support this Constitution ...."). And as we have already concluded that plaintiffs have suffered constitutional "injury in fact" from the denial of their right to vote, the fact that the injury arises out of a dispute of law rather than policy does not deprive them of standing to sue.

Before concluding our standing analysis, we must also consider the fact that the *Adams* plaintiffs, unlike their *Alexander* counterparts, did not name the Secretary of Commerce as a defendant. We do not regard this as fatal to applying *Franklin* to the *Adams* complaint. In *Swan v. Clinton,* this Circuit held that, when necessary to satisfy the redressability component of standing, a court may constructively amend a complaint to include prayers for relief against unnamed defendants in their official capacities who might otherwise be in a position to frustrate the implementation of a court order. *See* 100 F.3d 973, 979–80 & n. 3 (D.C.Cir.1996) (citing, *inter alia, United States v. New York Tel. Co.,* 434 U.S. 159, 174, 98 S.Ct. 364, 54 L.Ed.2d 376 (1977)). Here it is not even necessary to constructively amend the complaint to bring the additional defendant before the court, because the *Alexander* plaintiffs did sue the Secretary, and we have consolidated the two cases. The Secretary is therefore already before us, and his counsel has ***45** already raised all of the appropriate arguments on his behalf.

Finally, we must address the question of whether the failure of both complaints to include Maryland election officials as defendants poses an insuperable obstacle to redressability, given that one proposed remedy is to permit plaintiffs to vote for representatives as if they were citizens of Maryland. Although there is no guarantee that Maryland officials would permit District residents to vote there even if we directed the Secretary to count them as Maryland citizens for purposes of apportionment, the fact that officials who are not parties to these cases are in a position to thwart one of many potential remedies does not defeat our jurisdiction. *See id.* at 980–81. Moreover, plaintiffs point out that if we were to find them to be Maryland citizens for purposes of congressional voting, a remedy could be crafted that would not necessarily rely on Maryland's electoral machinery. *See Alexander* Pls.' Consolidated Mem. in Opp'n to Defs.' Mots. to Dismiss at 35 n. 18 [hereinafter *Alexander* Pls.' Opp'n] (suggesting that votes of District residents be counted separately and added to Maryland totals); Tr. of Mot. Hr'g at 114–15.

In sum, we conclude that the plaintiffs in these consolidated cases have standing to raise claims challenging the constitutionality of the exclusion of the District of Columbia from the apportionment of congressional districts. [12]

12 Because the individual plaintiffs in *Alexander* and *Adams,* all adult residents of voting age, have standing to sue, we need not consider whether plaintiff District of Columbia has standing as well. *See United States House of Representatives,* 119 S.Ct. at 773; *Animal Legal Defense Fund, Inc. v. Glickman,* 154 F.3d 426, 429 (D.C.Cir.1998) (en banc) (citing *Mountain States Legal Found. v. Glickman,* 92 F.3d 1228, 1232 (D.C.Cir.1996) ("For each claim, if constitutional and prudential standing can be shown for at least one plaintiff, we need not consider the standing of the other plaintiffs to raise that claim.")).

IV

We now turn to the merits of plaintiffs' claims. In this Part, we consider the *Alexander* plaintiffs' contention that their right to vote in congressional elections is guaranteed by Article I of the Constitution, as well as defendants' opposing argument that the same Article precludes such a right. In Part

V, we consider additional arguments, raised by both groups of plaintiffs, premised on other provisions of the Constitution.

Article I, section 2, clause 1 of the Constitution provides:

> The House of Representatives shall be composed of Members chosen every second Year *by the People of the several States,* and the Electors in each *State* shall have the Qualifications requisite for Electors of the most numerous Branch of the *State* Legislature.

U.S. CONST. art. I, § 2, cl. 1 (emphasis added). Although standing alone the phrase "people of the several States" could be read as meaning all the people of the "United States" and not simply those who are citizens of individual states, the Article's subsequent and repeated references to "state [s]"—beginning with the balance of the same clause quoted above—make clear that the former was not intended. *See, e.g., id.* (electors "in each State" shall have qualifications of electors of most numerous branch "of the State Legislature"); *id.* art. I, § 2, cl. 2 (each representative shall "be an Inhabitant of that State" in which he or she is chosen); *id.* art. I, § 2, cl. 3 (representatives shall be "apportioned among the several States which may be included within this Union"); *id.* ("each State shall have at Least one Representative"); *id.* art. I, § 2, cl. 4 (the Executive Authority of the "State" shall fill vacancies); *id.* art. I, § 4, cl. 1 (the legislature of "each State" shall prescribe times, places, and manner of holding elections for representatives). Indeed, for this reason—and as the *Alexander* plaintiffs concede—residents of United States territories are not entitled to vote in federal ***46** elections, notwithstanding that they are United States citizens. [13]

13 *See De La Rosa v. United States,* 32 F.3d 8 (1st Cir.1994) (holding that United States citizens in Puerto Rico are not entitled to vote in presidential elections); *Attorney Gen. of Territory of Guam v. United States,* 738 F.2d 1017 (9th Cir.1984) (holding that United States citizens in Guam are not entitled to vote in presidential and vice-presidential elections); Jon M. Van Dyke, *The Evolving Legal Relationships Between the United States and Its U.S.-Flag Islands,* U. HAW. L. REV. 445, 512 (1992); *Alexander* Pls.' Opp'n at 5–6.

Plaintiffs accordingly do not dispute that to succeed they must be able to characterize themselves as citizens of a "state." *See Alexander* Pls.' Opp'n at 15; *accord Adams* Pls.' Opp'n to the Federal Defs.' Mots. to Dismiss at 51 [hereinafter *Adams* Pls.' Opp'n]. Instead, they contend that District residents can fairly be characterized as citizens of a "state," as the term was intended in Article I, under either of two theories. First, they argue that the District of Columbia itself may be treated as a state through which its citizens may vote. Second, they contend that District citizens may vote in congressional elections through the State of Maryland, based on their "residual" citizenship in that state—the state from whose territory the current District was originally carved. In the following sections we consider the validity of each theory.

A

The *Alexander* plaintiffs' first theory is that "the District itself may be treated as the 'state' through which its citizens may vote" under Article I. Mem. in Supp. of Mot. of Pls. Alexander et al. for Summ. J. at 48 [hereinafter *Alexander* Pls.' Summ. J. Mem.]. As plaintiffs correctly note, the Supreme Court has on occasion interpreted the constitutional term "state" to include the District. *See Loughran v. Loughran,* 292 U.S. 216, 228, 54 S.Ct. 684, 78 L.Ed. 1219 (1934) (holding that Full Faith and Credit clause binds "courts of the District ... equally with courts of the States"); *cf. Callan v. Wilson,* 127 U.S. 540, 550, 8 S.Ct. 1301, 32 L.Ed. 223 (1888) (holding that right to trial by jury extends to residents of District). [14] As they concede, however, the Court also has interpreted the term "state" to exclude the District. *See, e.g., Hepburn & Dundas v. Ellzey,* 6 U.S. (2 Cranch) 445, 452, 2 L.Ed. 332 (1805) (holding that diversity jurisdiction provision of Article III, section 2 does not cover cases in which one party is resident of District, because "the members of the American confederacy only are the states contemplated in the constitution").

14 Plaintiffs also note that Congress has passed numerous statutes that treat the District as though it were a state for various purposes. *See Alexander* Pls.' Summ. J. Mem. at 48 n. 47 (citing, *inter alia,* 18 U.S.C. § 1961 (RICO Act); 50 U.S.C. § 466 (Military Selective Service Act)). But these expressions of congressional intent, most of which were passed more than a century after

the ratification of the Constitution, provide little insight into the intent of the Framers.

[5] The measure of "[w]hether the District of Columbia constitutes a 'State or Territory' within the meaning of any particular ... constitutional provision depends upon the character and aim of the specific provision involved." [15] *District of Columbia v. Carter,* 409 U.S. 418, 420, 93 S.Ct. 602, 34 L.Ed.2d 613 (1973). [16] The cases plaintiffs cite do not involve Article I, nor do they involve constitutional rights that textually appear to require citizenship ***47** (or residence) in a state. [17] Defendants argue that, by contrast, when dictating the composition of Congress, the Constitution leaves no doubt that only the residents of actual states are entitled to representation. An examination of the Constitution's language and history, and of the relevant judicial precedents, persuades us that defendants are correct and that the District-as-state theory is untenable.

15 We therefore reject the dissent's suggestion that if the District were not considered a state for purposes of Article I, District residents would also be deprived of the right to travel under Article IV.

16 In *Carter,* the Court held that the District of Columbia is not a "State or Territory" within the meaning of 42 U.S.C. § 1983, but rather "is truly *sui generis* in our governmental structure." *Carter,* 409 U.S. at 432, 93 S.Ct. 602: *accord Palmore v. United States,* 411 U.S. 389, 395, 93 S.Ct. 1670, 36 L.Ed.2d 342 (1973) ("The District of Columbia is constitutionally distinct from the States ...") (citing *Hepburn & Dundas,* 6 U.S. (2 Cranch) at 445).

17 *See, e.g., Callan,* 127 U.S. at 550, 8 S.Ct. 1301 (relying on language of Article III providing that jury trial, for "crimes ... *not committed within any State,* ... shall be at such place or places as the legislature may direct"; and noting that Article III was specifically amended " 'to provide for trial by jury of offenses committed *out of any state'* ") (quoting James Madison) (emphasis added). Although in *Loughran* Justice Brandeis found the Full Faith and Credit Clause, U.S. CONST. art. IV, § 2, to bind "*courts* of the District ... equally with courts of the States," 292 U.S. at 228, 54 S.Ct. 684 (emphasis added), in *Heald v. District of Columbia,* he made clear that "[*r*]*esidents* of the District lack the suffrage and have politically no voice," 259 U.S. 114, 124, 42 S.Ct. 434 (1922) (emphasis added).

[6] **1**. We begin with the language of Article I, which makes clear just how deeply Congressional representation is tied to the structure of statehood. Indeed, as we explore each relevant constitutional provision, it becomes apparent how far afield from the common understandings of the relevant terms we would have to go to sustain plaintiffs' theory.

As previously noted, besides stating that the House shall be composed of members chosen by the people of the several states, clause I of Article I, section 2 requires that voters ("Electors") in House elections "have the Qualifications requisite for the Electors of the most numerous branch of *the State Legislature.*" U.S. CONST. art. I, § 2, cl. 1 (emphasis added). [18] If the District were regarded as a state for purposes of this provision, what could the reference to "State Legislature[s]" mean? The thirteen original states all had such legislatures, as do each of the present fifty. But for most of its history, the District of Columbia has had nothing that could even roughly be characterized as a legislature for the entire District. [19] Although plaintiffs point to the existence of the current elected city council, *see Alexander* Pls.' Opp'n at 24, Congress did not pass the "home rule" statute creating that entity until 1973, and the Court of Appeals for this Circuit has indicated that such a body is not constitutionally required. [20] A right ***48** to vote that depends upon the existence of such an occasional institution can hardly have been what the Framers contemplated.

18 *See also* U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof ....").

19 For the first 70 years, there were separate local governmental structures for Washington, Georgetown, and—until the retrocession of the Virginia portion of the District in 1846—Alexandria. *See, e.g.,* An Act to Incorporate the Inhabitants of the City of Washington, in the District of Columbia, 2 Stat. 195, ch. 53, § 2 (1802). *See generally* WILLIAM TINDALL, ORIGIN AND GOVERNMENT OF THE DISTRICT OF COLUMBIA 14–29 (1909). In 1871, Congress established a territorial form of government for the District, *see* An Act To Provide a Government for the District of Columbia, 16 Stat. 419, ch.

62 (1871), which was replaced by a commission system in 1874, *see* An Act for the Government of the District of Columbia, and for Other Purposes, 18 Stat. 116, ch. 337 (1874). As modified in 1878, the District's governing body was a three-person commission appointed by the President. *See id.;* An Act Providing a Permanent Form of Government for the District of Columbia, 20 Stat. 102, ch. 180 (1878). The commission system was replaced in 1967 by a mayor-commissioner and council form of government, the members of which were appointed by the President. *See* Reorganization Plan No. 3 of 1967, Pub.L. No. 90–623, 81 Stat. 948 (1967). It was not until 1973 that the present "home rule" form of government was established, creating a mayor and council elected by the citizens of the District and granting them certain executive and legislative authority; the home rule statute reserved ultimate authority over District governance to Congress. *See* District of Columbia Self–Government and Governmental Reorganization Act, Pub.L. No. 93–198, 87 Stat. 774 (1973).

20 *See Breakefield v. District of Columbia,* 442 F.2d 1227, 1229 (D.C.Cir.1970) (noting that Circuit has rejected "the claim that ... the members of the [then non-elected] City Council were illegally appointed 'because the citizens of the District have not been given the opportunity by popular vote to elect persons to the positions held by' them") (quoting *Carliner v. Commissioner,* 412 F.2d 1090, 1091 (D.C.Cir.1969)); *see also D.C. Fed'n v. Volpe,* 434 F.2d 436, 443 n. 28 (D.C.Cir.1970); *Hobson v. Tobriner,* 255 F.Supp. 295 (D.D.C.1966).

Moreover, and more important, it is clear that the ultimate legislature the Constitution envisions for the District is not a city council, but rather Congress itself. The District Clause expressly grants Congress the power to "exercise exclusive Legislation in all Cases whatsoever" over the district that would become the seat of government. U.S. CONST. art. 1, § 8, cl. 17. Plaintiffs themselves argue that in the "absence" of a city council, Congress should be considered the state legislature for purposes of Article I. *See Alexander* Pls.' Opp'n at 24. But Congress cannot be characterized as a "state legislature" without doing violence to the meaning of that term. Indeed, to characterize it as such would turn the Qualifications Clause into a circle without beginning or end. Under section 2, clause 1, House voters must have the qualifications requisite for voters of the most numerous branch of the state legislature. If that legislature were Congress itself, with the House as its most numerous branch, then the clause would say no more than that voters for the House must have the qualifications requisite for voters for the House—a tautology without constitutional content.

Including the District within the definition of "state" is also inconsistent with the provisions of clause 3 of Article I, section 2, the clause that directly addresses the issue of congressional apportionment. That clause provides that "Representatives ... shall be apportioned among *the several States which may be included within this Union,* according to their respective numbers." U.S. CONST. art. I, § 2, cl. 3 (emphasis added).[21] That provision plainly contemplates true states and not the District, which neither was one of the original states nor has been "admitted by the Congress into this Union." *Id.* art. IV. § 3, cl. 1. Indeed, the "Seat of Government" contemplated by the Constitution is subsequently described in Article I as a "District," in contrast to the "particular States" whose cessions of territory were expected to create it.[22] And, as if to remove any doubt, clause 3 goes on to identify specifically those thirteen entities it regards as the immediate post-ratification states, and to assign each an initial apportionment of representatives until an "actual Enumeration" of "each State['s]" "respective Numbers" can be accomplished. *Id.* art. I, § 2, cl. 3.[23] The District is not included ***49** within that initial apportionment.[24]

21 Section 2 of the Fourteenth Amendment modified this provision by establishing that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons *in each State* ...." U.S. CONST. amend. XIV, § 2 (emphasis added); *see Montana,* 503 U.S. at 445, 112 S.Ct. 1415 n.1; *see also Carter,* 409 U.S. at 424, 93 S.Ct. 602 ("[T]he District of Columbia is not a 'State' within the meaning of the Fourteenth Amendment ....").

22 *See* U.S. CONST. art. I, § 8, cl. 17 (granting Congress power to exercise exclusive legislation in all cases whatsoever "over such District ... as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of Government of the United States").

23 The clause reads:

> The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight. Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

U.S. CONST. art. I, § 2, cl. 3.

24 Plaintiffs suggest that the District may not have been included because the site of the seat of government had not yet been chosen when the Constitution was drafted, and because no one knew what its population would be. While it is true that the District did not exist at the time the Constitution was drafted, provision had been made for its creation, *see* U.S. CONST. art. I, § 8, cl. 17, and it was possible that it would be established prior to the first enumeration (i.e., the first census). It is also true that the original population of the District was small. *Compare* TINDALL, *supra* note 19, at 15 (estimating 1800 population at 14,093), *with* 2 BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES 26 (bicentennial ed.1975) (listing 1800 census count at 8,000). The Framers, however, assumed that the population would grow substantially. L'Enfant's original plan provided for a city of 800,000, which at the time was the size of Paris. *See Home Rule: Hearings Before Subcomm No. 6 of the Comm. on the District of Columbia,* 88th Cong. 347 (1963) (statement of Robert F. Kennedy, Attorney General).

The effort to define the District as a state generates still further incongruities with respect to the next clause of Article I, section 2. Clause 4 provides: "When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies." *Id.* art. I, § 2, cl. 4. But who or what is "the Executive Authority" of the District? Plaintiffs offer the current home-rule mayor as that authority, *see Alexander* Pls.' Opp'n at 24, but we again are confronted by the relative recency of that position. *See supra note* 19. And we also again have the problem that it is Congress that is the ultimate executive authority for the District. *See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.,* 458 U.S. 50, 76, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982) ("Congress' power over the District of Columbia encompasses the full authority of government, and thus, necessarily, the Executive and Judicial powers as well as the Legislative."). The possibility that the Framers intended Congress to fill its own vacancies seems far too much of a stretch, even if the constitutional fabric were more flexible than it appears to be.

When we turn to the provisions of the Constitution that originally governed voting for the Senate, the complications of defining the District as a state become even more apparent. Although we are remanding the merits of plaintiffs' claims for Senate representation to a single-judge court, the relationship between the House and Senate provisions nonetheless requires us to examine the latter in order to determine the Framers' intentions with respect to the House.

As originally provided under Article I, section 3, the Senate was to be "composed of two Senators from each State," chosen not "by the People of the several States," as in the case of the House, but rather "*by the Legislature thereof.*" U.S. CONST. art. I, § 3, cl. 1 (emphasis added). The impossibility of treating Congress as the legislature under that clause is manifest, as doing so would mean that Congress would itself choose the District's senators. The scenario is further complicated by the fact that clause 2 of the same section provides that Senate vacancies will be filled not just by the state's "Executive," as with the House, but also by the state's "Legislature" when not in recess. *Id.* art. I, § 3, cl. 2. Since, as noted above, Congress is ultimately both the Legislature and Executive for the District, plaintiffs' theory would mean that Congress would fill vacancies in the District's Senate seats—except when Congress is in recess, in which event Congress would also fill the vacancies.

It is, of course, not surprising to conclude that the Framers did not contemplate allocating two senators to the District of Columbia. The Senate was expressly viewed as representing the states themselves, *see* THE FEDERALIST NOS. 10, 39, 58, 62 (James Madison) (Jacob E. Cooke ed., 1961), and the guarantee of two senators for each ***50** was an important element of the Great Compromise between the smaller and larger states that ensured ratification of the Constitution: the smaller states were guaranteed equal representation notwithstanding their smaller populations. *See Reynolds v. Sims,* 377 U.S. 533, 574, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964); *Wesberry,* 376 U.S. at 12–13, 84 S.Ct. 526; *see also*

INS v. Chadha, 462 U.S. 919, 950, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). But reaching this conclusion with respect to the Senate requires reaching a similar conclusion with respect to the House. The House provisions, after all, were "the other side of the compromise": to satisfy the larger states, the House was to be popularly elected, and "in allocating Congressmen the number assigned to *each State* should be determined solely by the number of the State's inhabitants." *Wesberry,* 376 U.S. at 13, 84 S.Ct. 526 (emphasis added). Treating the Senate and House differently with respect to the District would unhitch half that compromise from its historical and constitutional moorings.

In 1913, the Seventeenth Amendment granted the people of "each State," rather than their legislatures, the right to choose senators. U.S. CONST. amend. XVII, cl. 1. After that change, the provisions concerning qualifications and vacancies for the Senate essentially parallel those for the House. *See id.* (providing that "electors ... shall have the qualifications requisite for electors of the most numerous branch of the State legislatures"); *id.* cl. 2 ("When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments ...."). *But see id.* cl. 1 (providing that senators shall be elected by people of "each State," rather than "of the several states" as in provision for representatives in Article I, section 2, clause 1). Accordingly, no separate discussion of those provisions is necessary.

2. We conclude from our analysis of the text that the Constitution does not contemplate that the District may serve as a state for purposes of the apportionment of congressional representatives. That textual evidence is supported by historical evidence concerning the general understanding at the time of the District's creation.

It is true, as plaintiffs note, that the voting rights of District residents received little express attention at the time of the Constitution's drafting. *See generally* Peter Raven–Hansen, *Congressional Representation for the District of Columbia: A Constitutional Analysis,* 12 HARV. J. ON LEGIS, 167, 172 (1975). As plaintiffs suggest, this lack of attention may have been due to the fact that the District's geographic location had not yet been determined, and that even once selected, the territory had relatively few residents. *See supra* note 24. *But see id.* (noting that L'Enfant anticipated city of Washington growing to size of 800,000). It is also true, as our dissenting colleague argues, that the historical rationale for the District Clause—ensuring that Congress would not have to depend upon another sovereign for its protection—would not by itself require the exclusion of District residents from the congressional franchise. [25]

25 There is general agreement that the District Clause was adopted in response to an incident in Philadelphia in 1783, in which a crowd of disbanded Revolutionary War soldiers, angry at not having been paid, gathered to protest in front of the building in which the Continental Congress was meeting under the Articles of Confederation. *See, e.g.,* KENNETH R. BOWLING, THE CREATION OF WASHINGTON, D.C. 30–34 (1991); THE FEDERALIST NO. 43, *supra,* at 289; JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION §§ 1213 (1833). Despite requests from the Congress, the Pennsylvania state government declined to call out its militia to respond to the threat, and the Congress had to adjourn abruptly to New Jersey. The episode, viewed as an affront to the weak national government, led to the widespread belief that exclusive federal control over the national capital was necessary. "Without it," Madison wrote, "not only the public authority might be insulted and its proceedings be interrupted, with impunity; but a dependence of the members of the general Government, on the State comprehending the seat of the Government for protection in the exercise of their duty, might bring on the national councils an imputation of awe or influence, equally dishonorable to the Government, and dissatisfactory to the other members of the confederacy." THE FEDERALIST NO. 43, *supra,* at 289; *see also* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 220 (Jonathan Elliot ed., 2d ed. 1888), *reprinted in* 3 THE FOUNDERS' CONSTITUTION 225 (Philip B. Kurland & Ralph Lerner eds., 1987) ("Do we not all remember that, in the year 1783, a band of soldiers went and insulted Congress? .... It is to be hoped that such a disgraceful scene will never happen again; but that, for the future, the

national government will be able to protect itself.") (North Carolina ratifying convention, remarks of Mr. Iredell).

Although this self-protection rationale has little relevance for the question of congressional representation, other statements by Madison concerning the rationale for the District Clause suggest he did not view the District as the constitutional equivalent of a state. *See, e.g.,* THE FEDERALIST NO. 43, *supra,* at 289 (arguing that "the gradual accumulation of public improvements at the stationary residence of the Government, would be ... too great a public pledge to be left in the hands of a single State"); *see also* JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787, WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 332 (Gaillard Hunt & James Brown Scott eds., 1970) (noting George Mason's objection that having national capital and a state capital at the same place would give "a provincial tincture to your national deliberations").

***51** Such evidence as does exist, however, indicates a contemporary understanding that residents of the District would not have a vote in the national Congress. At the New York ratifying convention,[26] for example, Thomas Tredwell argued that "[t]he plan of the *federal city,* sir, departs from every principle of freedom ... subjecting the inhabitants of that district to the exclusive legislation of Congress, in whose appointment they have no share or vote." 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 402 (Jonathan Elliot ed., 2d ed. 1888), *reprinted in* 3 THE FOUNDERS' CONSTITUTION 225 (Philip B. Kurland & Ralph Lerner eds., 1987).[27] On the same day at that convention, Alexander Hamilton proposed that the Constitution be amended to provide: "When the Number of Persons in the District or Territory to be laid out for the Seat of the Government of the United States ... amount to ____ [an unspecified number] ... Provision shall be made by Congress for having a District representation in that Body." 5 THE PAPERS OF ALEXANDER HAMILTON 189–90 (Harold C. Syrett & Jacob E. Cooke eds., 1962). The proposed amendment failed. *See id.*

26 *Cf. U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779, 791–92, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995) (noting that Court has used ratification debates to confirm Framers' understanding of Article I) (citing *Powell v. McCormack,* 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969)).

27 *See also* BOWLING, *supra* note 25, at 82 (noting that opponents of Constitution charged that District residents "would be subject to a government with absolute authority over them but in which they were unrepresented").

In FEDERALIST NO. 43, Madison expressed the view that inhabitants of the District will have acquiesced in cession, "as they will have had their voice in the election of the Government which is to exercise authority over them ...." THE FEDERALIST NO. 43, *supra,* at 289. As plaintiffs concede, this is generally understood as a reference to the fact that before cession the residents would "have had" a voice in that decision, not a suggestion that they would have a voice in Congress thereafter. *See* Mem. Amici Curiae for Professors James D.A. Boyle et al. at 21 n. 13; Raven–Hansen, *supra,* at 172 n. 24.

Considerably more evidence of the contemporary understanding emerges from ***52** examination of the period immediately surrounding Congress' assumption of exclusive jurisdiction over the land ceded for the District by Maryland and Virginia.[28] During that period, some residents of the District sought to dissuade Congress from passing the Organic Act of 1801, 2 Stat. 103 (1801), through which jurisdiction was to be assumed. They believed that, under the Constitution, once Congress assumed jurisdiction they would necessarily lose their vote and be "reduced to the mortifying situation, of being subject to laws made, or to be made, by we know not whom; by agents, not of our choice, in no degree responsible to us." ENQUIRIES INTO THE NECESSITY OR EXPEDIENCY OF ASSUMING EXCLUSIVE LEGISLATION OVER THE DISTRICT OF COLUMBIA 15 (1800) [hereinafter ENQUIRIES INTO THE NECESSITY] (available in Rare Book/Special Collections Reading Room, Library of Congress).[29] Members of Congress opposed to the Organic Act made the same argument. *See, e.g.,* 10 ANNALS OF CONG. 992 (1801) (remarks of Rep. Smilie) (arguing that upon assumption of congressional jurisdiction, "the people of the District would be reduced to the state of subjects, and deprived of their

political rights"). Even those who supported the Act appeared to agree that, under the Constitution, once Congress assumed jurisdiction the residents would automatically lose their right to vote. *See, e.g., id.* at 996 (remarks of Rep. Bird) (noting that although "the people [of the District] could not be represented in the General Government," the "blame" was not "to the men who made the act of cession; not to those who accepted it," but "to the men who framed the Constitutional provision, who peculiarly set apart this as a District under the national safeguard and Government"). [30]

28 *Cf. U.S. Term Limits, Inc.,* 514 U.S. at 816, 115 S.Ct. 1842 (examining 1807 congressional debates as "further evidence of the general consensus" regarding meaning of Article I, section 2, clause 2).

29 Paralleling our analysis in the previous section, the author of this letter to Congress wrote that "we cannot hope to have our situation ameliorated" by the Constitution for two reasons. ENQUIRIES INTO THE NECESSITY, *supra,* at 16. First, he noted:

> In the 2d Section of the 1st article, the rule of representation is settled. "The House of Representatives shall be composed of members, chosen every second year, by the people of the several states," but if we cease to be of any state, we can derive no benefit from that clause.

Id. Second, he noted that the same section also "excludes us from the privilege of voting for members of congress" because

> [T]he provision is, that 'the electors in each state shall have the qualification requisite for electors of the most numerous branch of the state legislature,' and if we are not qualified to vote for the state legislature, we are not qualified to vote for members of congress.

Id. at 18–19.

30 Other debates concerning the District also reflected the understanding that District residents would lack a vote in the national Congress. *See* FEDERAL GAZETTE & BALTIMORE DAILY ADVERTISER, Feb. 21, 1801, at 2 (remarks of Rep. Gallatin) ("[T]his was not the fault of the present congress: if any fault, it laid with the [constitutional] convention, who expressly provided that exclusive jurisdiction should be assumed, and therefore the people [of the District] could not be represented in the general government."); FEDERAL GAZETTE & BALTIMORE DAILY ADVERTISER, Feb. 26, 1801, at 2 (reporting that "Mr. Nicholson, as a representative of the state of Maryland could not avoid expressing his opinion, upon a subject so highly interesting to a part of the people of that state, who were divested, by the assumption of jurisdiction, ... of the right of voting for ... the house of representatives to the general government. There ought to be, in his opinion, some weighty reasons urged why they should not be possessed with other rights as great, in the election of their local legislature."); WASHINGTON FEDERALIST, Mar. 3, 1801, at 2 (reporting same statement by Rep. Nicholson) [all sources available in Newspaper and Current Periodical Reading Room, Library of Congress].

Others saw a constitutional amendment—rather than blocking Congress' assumption of jurisdiction—as the best way to preserve the franchise for the District's residents. *See, e.g.,* 10 ANNALS OF CONG. 998–99 (1801) (remarks of Rep. ***53** Dennis) ("[I]f it should be necessary, the Constitution might be so altered as to give them a delegate to the General Legislature, when their numbers should become sufficient."). In 1801, Augustus Woodward, a prominent lawyer who practiced in the District of Columbia, published a pamphlet decrying the area's lack of congressional representation, calling it a violation of "an original principle of republicanism, to deny that all who are governed by the laws ought to participate in the formation of them." AUGUSTUS WOODWARD, CONSIDERATIONS ON THE TERRITORY OF COLUMBIA 5–6 (1801) (available in Rare Book/Special Collections Reading Room, Library of Congress). [31] Woodward called for representation of the District in the Senate and the House, but recognized that "[i]t will require an amendment to the Constitution of the United States." *Id.* at 6. Accordingly, he proposed one. *See id.* at 15. [32]

31 Woodward was a friend and protege of Thomas Jefferson, who appointed him judge of the Supreme Court of the Michigan Territory in 1805. *See* Richard P. Cole, *Law and Community in the New Nation: Three Visions for Michigan, 1788–1831,* 4 S. CAL. INTERDISC, L.J. 161, 196–98 (1995).

32 In another pamphlet, written under the pseudonym Epaminondas, Woodward opposed the suggestion that "it is better for Congress never to assume the jurisdiction." 5 EPAMINONDAS ON THE GOVERNMENT OF THE TERRITORY OF COLUMBIA 9 (1801) (available in Rare Book/ Special Collections Reading Room, Library of Congress). Constitutional amendment was to be preferred, he said, and was "the *exclusive* and *only* remedy." *Id.* (emphasis in original).

Within a few years of the assumption of congressional jurisdiction, still others saw retrocession of the District to Maryland and Virginia as the only remedy for the "political slave[ry]" of nonrepresentation. 12 ANNALS OF CONG. 487 (1803) (remarks of Rep. Smilie); *see id.* ("Under our exercise of exclusive jurisdiction the citizens here are deprived of all political rights, nor can we confer them.... Why not then restore the people to their former condition?"). In 1803, a bill calling for retrocession was introduced in Congress. *See id.* at 487–506. Although the bill was defeated, *see id.* at 506, the residents of the former Virginia territory eventually succeeded in obtaining retrocession in 1846, *see* An Act to Retrocede the County of Alexandria, in the District of Columbia, to the State of Virginia, 9 Stat. 35 (1846). [33]

33 In 1818, President Monroe, who had been a delegate to the Virginia ratifying convention, noted that the people of the District of Columbia "have no participation" in Congress' exercise of power over them, and asked Congress to consider "whether an arrangement better adapted to the principles of our Government" might be possible. 33 ANNALS OF CONG. 18 (1818). No specific arrangement was proposed. *See generally* 3 STORY, *supra* note 25, § 1218 (1833) (noting that inhabitants of the District "are not indeed citizens of any state, entitled to the privileges of such, but are citizens of the United States" and that "[t]hey have no immediate representatives in congress").

Although the foregoing represents positive evidence of a contemporary understanding that District residents would not (and did not) have the right to vote in Congress, perhaps more important is the absence of evidence to the contrary. No political leaders, for example, assured the residents that they would have representation even without constitutional amendment or defeat of the Organic Act. Nor is there any indication that the residents of the new District were surprised when they found themselves without the vote after Congress assumed exclusive jurisdiction in 1801. Indeed, had it been understood that the former citizens of Maryland and Virginia had a right to continue voting for Congress, one would have expected a flood of newspaper articles and lawsuits decrying their unlawful disenfranchisement. Such a reaction, however, is not visible in the historical record. [34]

34 *See e.g.,* COLUMBIAN MIRROR & ALEXANDRIA GAZETTE (Alexandria, Va.), Apr. 13, 1799 through Dec. 6, 1800 (further dates unavailable); FEDERAL GAZETTE & BALTIMORE DAILY ADVERTISER (Baltimore, Md.), July 1, 1800 through Dec. 31, 1801 (further dates unavailable); WASHINGTON FEDERALIST (Georgetown, D.C.), Sept. 25, 1800 through Dec. 29, 1802 [all sources available in Newspaper and Current Periodical Reading Room, Library of Congress]. To the contrary, the newspapers extensively reported the congressional debates on the Organic Act, which frequently expressed the understanding that District residents would not have a vote in Congress. *See, e.g.,* FEDERAL GAZETTE, Feb. 19, 1801, at 2 (remarks of Rep. Smilie); WASHINGTON FEDERALIST, Feb. 24, 1801, at 2 (same); *see also* FEDERAL GAZETTE, Feb. 19, 1801, at 2 (remarks of Rep. Dennis); FEDERAL GAZETTE, Feb. 21, 1801, at 2 (remarks of Rep. Gallatin); FEDERAL GAZETTE, Feb. 26, 1801, at 2 (remarks of Rep. Nicholson).

A resident of the former Virginia territory did sue for the right to vote in Virginia state elections. *See Custis v. Lane,* 17 Va. (3 Munf.) 579 (1813). The Virginia Supreme Court, however, rejected the claim on the ground that plaintiff was no longer a citizen of that state. Reflecting the same understanding as that in the congressional debates, the court held: "That he is no longer within the jurisdiction of the commonwealth of Virginia, is manifest from this consideration, that congress are vested, by the constitution, with exclusive power of legislation over the territory in question ...." *Id.* at 591.

***54 3.** Finally, we note that every other court to have considered the question—whether in dictum or in holding—has concluded that residents of the District do not have the right to vote for members of Congress. The early Supreme Court decisions are particularly relevant here, not only

because they are binding upon us, but because they reflect the historical understanding of Chief Justice Marshall, who "wrote from close personal knowledge of the Founders and the foundation of our constitutional structure." *National Mut. Ins. Co. v. Tidewater Transfer Co.,* 337 U.S. 582, 587, 69 S.Ct. 1173, 93 L.Ed. 1556 (1949) [hereinafter *Tidewater*] (plurality opinion of Jackson, J.).

In 1805, the Chief Justice considered whether the District of Columbia was a "state" within the meaning of the Judiciary Act of 1789, which effectuated Article III's grant of diversity jurisdiction by giving circuit courts authority over cases "between a citizen of the state in which the suit is brought, and a citizen of another state." *Hepburn & Dundas,* 6 U.S. (2 Cranch) at 452 (citing, without citation, 1 Stat. 73, 78 (1789)). Plaintiffs contended there, as they do here, that the word "state" can mean more than simply one of the members of the union. Although Marshall agreed that was true, in his view "the act of congress obviously uses the word 'state' in reference to the term used in the constitution." *Id.* Expressly relying on his understanding of the meaning of that term in the clauses that prescribe the composition of the House and the Senate, Marshall concluded that "state" could not encompass the District for purposes of Article III. "These clauses," he said, referring to the clauses of Article I, "show that the word state is used in the constitution as designating a member of the union." *Id.* at 452–53, 2 Cranch 445. Because the word "has been used plainly in this limited sense in the articles respecting the legislative and executive departments," he concluded, "it must be understood as retaining th[at] sense" in the article concerning the judicial branch. *Id.* at 453, 2 Cranch 445.

Marshall was not unaware of the unfairness his conclusion would engender. He felt constrained to reach it, however, notwithstanding that it was "extraordinary that the courts of the United States, which are open to aliens, and to the citizens of every state in the union," should be closed to citizens of the United States who reside in the District. *Id.* at 453, 2 Cranch 445. Sixteen years later, Marshall reaffirmed *Hepburn & Dundas's* conclusion in *Corporation of New Orleans v. Winter,* 14 U.S. (1 Wheat.) 91, 4 L.Ed. 44 (1816).

The dissent contends that Chief Justice Marshall's position has since been undermined by *Tidewater,* in which the Supreme Court held it constitutional for Congress to open the federal courts to an action by a citizen of the District of Columbia against a citizen of one of the states. But in so doing, a plurality of the Court reconfirmed Marshall's conclusion that the District was ***55** not a state within the meaning of Article III's grant of jurisdiction to the federal courts, holding instead that Congress had lawfully expanded federal jurisdiction beyond the bounds of Article III by using its Article I power to legislate for the District. *See Tidewater,* 337 U.S. at 600, 69 S.Ct. 1173 (plurality opinion of Jackson, J.). Although two other Justices opined that Marshall's holding in *Hepburn & Dundas* should be reversed, even they limited their disagreement to Article III's Diversity Clause, taking pains to distinguish between constitutional clauses "affecting civil rights of citizens," such as that clause, and "the purely political clauses," among which they counted "the requirements that members of the House of Representatives be chosen by the people of the several states." *Id.* at 619–623, 69 S.Ct. 1173 (Rutledge, J., concurring).

In 1820, Marshall reviewed a claim that, because District residents were unrepresented in Congress, the national legislature lacked the power to impose a direct tax upon the District. *See Loughborough v. Blake,* 18 U.S. (5 Wheat.) 317, 5 L.Ed. 98 (1820). If there were a Justice who would have been particularly sensitive to this reprise of the Revolutionary War battle cry of "no taxation without representation," surely it would have been Marshall—who served as a company commander at Valley Forge. *See* JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 62–65 (1996). Nonetheless, speaking for a unanimous Court, Marshall held that Congress had the power to tax residents of the District of Columbia despite their lack of representation. *See Loughborough,* 18 U.S. (5 Wheat.) at 317. The District, he said, "relinquished the right of representation, and has adopted the whole body of Congress for its legitimate government." *Id.* at 324, 5 Wheat. 317. "Although in theory it might be more congenial to the spirit of our institutions to admit a representative from the district," he declared, "certainly the Constitution does not consider their want of a representative in Congress as exempting it from equal taxation." *Id.* at 324–25, 5 Wheat. 317.

The opinions do not end with those of Chief Justice Marshall. In *Heald v. District of Columbia,* Justice Brandeis also faced a claim that a congressional tax on the District was unconstitutional "because it subjects the residents of the District to taxation without representation." 259 U.S. 114, 124, 42 S.Ct. 434, 66 L.Ed. 852 (1922). Like Marshall, Brandeis recognized that "[r]esidents of the district lack the suffrage and have politically no voice in the expenditure of the money raised by taxation." *Id.* Nonetheless, he concluded that "[t]here is no constitutional provision which so limits the

power of Congress that taxes can be imposed only upon those who have political representation." *Id.: see also Palmore v. United States,* 411 U.S. 389, 395, 93 S.Ct. 1670, 36 L.Ed.2d 342 (1973) (citing, with approval, *Hepburn & Dundas,* 6 U.S. (2 Cranch) at 445).

The cry of "no taxation without representation" has reached the courts of this circuit as well. In *Breakefield v. District of Columbia,* the Court of Appeals considered a challenge to Congress' imposition of an income tax upon District residents "notwithstanding that they then had and now have no elected representative in the Congress." 442 F.2d 1227, 1228 (D.C.Cir.1970). Petitioner acknowledged the existence of contrary precedent, namely the Supreme Court's decisions in *Loughborough* and *Heald,* but "question[ed] both the original soundness" of those decisions "and their continuing vitality in the light of later Supreme Court pronouncements." *Id.* at 1229. "[Petitioner] presents those contentions in the wrong forum," the court said. "[I]t is for the Supreme Court, not us, to proclaim error in its past rulings, or their erosion by its adjudications since." *Id.* at 1229–30. We are of the same view.

4. In sum, we conclude that constitutional text, history, and judicial precedent bar us from accepting plaintiffs' contention ***56** that the District of Columbia may be considered a state for purposes of congressional representation under Article I.

Before proceeding to plaintiffs' alternative argument, we pause over another advanced by the dissent. As noted at the outset of this Part, plaintiffs do not dispute that to succeed under Article I they must be able to characterize themselves as citizens of a state. Our dissenting colleague, however, does dispute that assumption, contending that the Article's repeated use of the word "state" does not necessarily mean the Framers intended to apportion representatives *only* among states. As the dissent correctly points out, "the legal maxim *expressio unius est exclusio alterius* ('the mention of one thing implies the exclusion of another') is not always correct." *In re Sealed Case,* 181 F.3d 128, 132 (D.C.Cir.1999) (en banc). And we certainly should not resolve as important a question as that now before us by rote application of such a canon of construction.

This, however, is not a case where "[t]he 'exclusio' is ... the result of inadvertence or accident." *Ford v. United States,* 273 U.S. 593, 612, 47 S.Ct. 531, 71 L.Ed. 793 (1927) (internal quotation omitted). As we have discussed above, the overlapping and interconnected use of the term "state" in the relevant provisions of Article I, the historical evidence of contemporary understandings, and the opinions of our judicial forebears all reinforce how deeply Congressional representation is tied to the structure of statehood.[35] The Constitution's repeated references to states cannot be understood, as the dissent urges, as merely the most practical method then available for holding elections. Rather, they are reflections of the Great Compromise forged to ensure the Constitution's ratification. There is simply no evidence that the Framers intended that not only citizens of states, but unspecified others as well, would share in the congressional franchise.

35 As we discuss below, this conclusion is not inconsistent with the fact that the right to vote for federal officers is a right of national citizenship. *See infra* Part V.B and note 69.

B

[7] As an alternative to the argument that the District may be considered a state under Article I, the *Alexander* plaintiffs contend that residents of the District should be permitted to vote in congressional elections through Maryland, based on a theory of "residual" citizenship in that state. This theory depends heavily on the fact that residents of the land ceded by Maryland apparently continued to vote in Maryland elections during the period between the Act of 1790, by which Congress accepted the cession, and the Organic Act of 1801, by which Congress assumed jurisdiction and provided for the government of the District. We discuss that history and its implications below.

Although in the end we find that we cannot draw the same conclusion plaintiffs do from the historical record, we must begin by noting that there is a much greater obstacle to plaintiffs' success on this theory: it has already been rejected in a decision binding upon this court. In *Albaugh v. Tawes,* a three-judge district court considered a suit seeking a declaratory judgment "that the District of Columbia is a part of the State of Maryland for purposes of United States Senator elections." 233 F.Supp. 576, 576 (D.Md.1964). Plaintiff's arguments were "based upon the fact that ... during the period between 1790 and the 'Organic Act of 1801,' residents of the territory ceded by the State of Maryland may have been allowed to vote as residents" of that state. *Id.* at 578. The court rejected plaintiffs' claims, noting the Supreme Court's decision in *Reily v. Lamar* that former residents of Maryland

lost their state citizenship upon "the separation of the District of Columbia from the State of Maryland." *Id.* (quoting *Reily v. Lamar,* 6 U.S. (2 Cranch) 344, 356–57, 2 L.Ed. 300 (1805)). *Albaugh* concluded that "residents of the District of Columbia have no right to vote in Maryland elections ***57** generally, and specifically, in the selection of United States Senators." *Id.* at 577.

The Supreme Court affirmed the decision of the three-judge court. *See Albaugh v. Tawes,* 379 U.S. 27, 85 S.Ct. 194, 13 L.Ed.2d 173 (1964) (per curiam). Although the Supreme Court's affirmance was summary, the Court has reminded the lower courts that we are bound by such affirmances "until such time as the Court informs [us] that [we] are not." *Hicks v. Miranda,* 422 U.S. 332, 344–45, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975) (quoting *Doe v. Hodgson,* 478 F.2d 537, 539 (2d Cir.1973)). The jurisdictional statement submitted to the Supreme Court in *Albaugh* raised the principal theories we consider in this Part, and also raised the "privileges or immunities" claim considered in Part V.[36] *Cf.* ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 219–20 (7th ed.1993) (noting importance of evaluating issues raised in appeal papers); *see also Illinois State Bd. v. Socialist Workers Party,* 440 U.S. 173, 182–83, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979); *Mandel v. Bradley,* 432 U.S. 173, 176, 97 S.Ct. 2238, 53 L.Ed.2d 199 (1977). Accordingly, the decision in *Albaugh* forecloses the conclusion that District residents may be allowed to vote in congressional elections through the State of Maryland. The Fourth Circuit has recently reached the same determination, in a case raising the same basic claim.[37]

36 The jurisdictional statement attacked the lower court opinion for failing to accept the significance of the fact that, through the effective date of the 1801 Organic Act, Maryland continued to designate its District lands as part of the state's federal congressional districts. *See* Jurisdictional Statement at 4–5, *Albaugh v. Tawes,* 379 U.S. 27, 85 S.Ct. 194, 13 L.Ed.2d 173 (1964) (No. 481) [hereinafter *Albaugh* Jurisdictional Statement]; *cf. infra* Part IV.B.2. It further argued that since "[t]he District of Columbia territory, like the rest of the State of Maryland, was a charter member of the United States," its citizens "have always been citizens of the State of Maryland and under the perpetual protection of the ... 'equal privileges' clause." *Albaugh* Jurisdictional Statement at 7 (citing U.S. CONST. art. IV, § 2, cl. 1). This meant, plaintiff said, that the right of District citizens to vote could not constitutionally be denied. *See id.; cf. infra* Part IV.B.3; *infra* Part V.B. The jurisdictional statement also raised the claim, made by amicus here, that the Organic Act was not intended to "repeal[ ] the existing Maryland Congressional election regulations which defined the District of Columbia as a part of the State of Maryland," since it provided "that the laws of the State of Maryland, as they now exist, shall be and continue in force." *Albaugh* Jurisdictional Statement at 6 (quoting 2 Stat. 103, § 1); *cf. infra* note 46.

37 *See Howard v. State Admin. Bd.,* 122 F.3d 1061, 1997 WL 561200 (4th Cir.1997) (unpublished opinion), *aff'g* 976 F.Supp. 350 (D.Md.1996) (holding that plaintiff's argument, that as "a resident of the District of Columbia ... he has the right to participate in congressional elections in the State of Maryland," is "foreclosed by" *Albaugh*). The Committee for the Capital City, amicus curiae here, was also amicus in *Howard.*

Even if *Albaugh* were not an impediment, however, we would still be unable to accept the "residual" citizenship theory advanced by plaintiffs. That theory fails because the Maryland citizenship of the District's inhabitants was extinguished upon the completion of the transfer of the seat of the national government to the territory of the District. We set forth our analysis in the following subsections.

1. The District Clause gave Congress the power to exercise exclusive legislation "over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of Government of the United States." U.S. CONST. art. I, § 8, cl. 17. In 1788, the General Assembly of Maryland had authorized and required its representatives to cede any district in the state for the national capital; Virginia did the same.[38] After protracted ***58** debate over sites offered by several states, Congress agreed upon a tract along the Potomac River; Maryland agreed to cede land along the eastern bank while Virginia agreed to cede land along the western.[39] Congress accepted the cessions by the Act of July 16, 1790, and established the first Monday of December 1800 as the date for the removal of the government to the District.[40] In 1791, Maryland ratified the cession, stating that "all that part of the said territory

called Columbia which lies within the limits of this State shall be ... forever ceded and relinquished to the Congress and Government of the United States, and full and absolute right and exclusive jurisdiction, as well of soil as of persons residing or to reside thereon."[41]

[38] *See* An Act to Cede to Congress a District of Ten Miles Square in This State for the Seat of Government of the United States, 2 Kilty Laws of Md., ch. 46 (1788); *see also* An Act for the Cession of Ten Miles Square, or Any Lesser Quantity of Territory Within This State, to the United States, in Congress Assembled, for the Permanent Seat of the General Government, 13 Va. Stat. at Large, ch. 32, at 43 (Hening 1823) (enacted 1789).

[39] *See generally* BOWLING, *supra* note 25, at 127–207.

[40] *See* An Act for Establishing the Temporary and Permanent Seat of the Government of the United States, 1 Stat. 130 (1790). The Act stated:

> SECTION 1.... That a district of territory, not exceeding ten miles square, to be located as hereafter directed on the river Potomac, at some place between the mouths of the Eastern Branch and Connogochegue, be, and the same is hereby accepted for the permanent seat of the government of the United States. *Provided nevertheless.* That the operation of the laws of the state within such district shall not be affected by this acceptance, until the time fixed for the removal of the government thereto, and until Congress shall otherwise by law provide.
>
> . . . . .
>
> SEC. 6.... That on the said first Monday in December, in the year one thousand eight hundred, the seat of the government of the United States shall, by virtue of this act, be transferred to the district and place aforesaid.

Id.

[41] An Act Concerning the Territory of Columbia and the City of Washington, 1791 Md. Acts ch. 45, § 2. As noted above, Congress retroceded the Virginia portion of the District in 1846.

Congress' acceptance of the cessions specified that the "seat of the government of the United States" would "be transferred to the district" on the "first Monday in December" of 1800. 1 Stat. 130, § 6. Until that time, Philadelphia was to serve as the seat of government. *See id.* § 5. During that interim, the acceptance statute provided that "the operation of the laws of the state [Maryland or Virginia, respectively] within such district shall not be affected by this acceptance, until the time fixed for the removal of the government thereto, and until Congress shall otherwise by law provide." *Id.* § 1. Similarly, in making their cessions, both Maryland and Virginia stipulated that their jurisdiction "over the persons and property of individuals residing within the limits of the cession" would "not cease until" Congress did "by law provide for the government thereof, under their jurisdiction, in the manner provided by the [District Clause] of the Constitution." 1791 Md. Acts ch. 45, § 2; 13 Va. Stat. at Large, ch. 32. at 43. On February 27, 1801, Congress passed the so-called "Organic Act," providing for the government and the administration of justice in the District of Columbia. *See* 2 Stat. 103.

There is evidence that during the period prior to the transfer of the seat of government to the District, the residents of the area continued to vote for Congress in Maryland and Virginia. *See* WILLIAM TINDALL, ORIGIN AND GOVERNMENT OF THE DISTRICT OF COLUMBIA 17 (1909); Raven–Hansen, *supra,* at 173–74. When the laws of those states ceased having force in the District, however, the states ceased treating District citizens as state citizens eligible to vote in their elections—an event that occurred no later than February of 1801. *See Alexander* Am. Compl. ¶ 97; TINDALL, *supra,* at 17; Raven–Hansen, *supra,* at 174. Since that date, District residents have been unable to vote in either Maryland or Virginia.

2. The *Alexander* plaintiffs and several amici contend that the above-described history, and particularly the fact that residents of the area continued to vote ***59** in congressional elections into the year 1800, demonstrates that the Framers did not intend the cession of the states' lands to deprive their residents of the right to vote. As citizens of Maryland and Virginia, plaintiffs argue, the residents of the District were originally part of the "People of the several States," continued to vote even after the land was ceded to the national government, and hence "retain a residual citizenship in the state[s] from which the District was created." *Alexander* Pls.' Opp'n at 16. This "historical experience," they contend, "confirms that otherwise stateless citizens may retain prior state affiliation for purposes of exercising their constitutional right to vote." *Alexander* Pls.' Summ. J. Mem. at 51–52.

We are unable to draw this conclusion from the history recounted above. Contrary to plaintiffs' suggestion, the fact that residents of the Virginia and Maryland lands voted in those states into 1800 did not reflect an understanding that they would continue to do so after the District became the seat of government. Rather, it reflected the fact that during this period those lands were not yet the seat of government (Philadelphia was), but instead remained part of the ceding states. As the Circuit Court for the District of Columbia held in 1801, "Virginia did not part with her jurisdiction until congress could exercise it, which, by the [District Clause of the] constitution, could not be until the district became the seat of government." *United States v. Hammond,* 26 F. Cas. 96, 96 (C.C.D.C.1801). That, the court held, occurred on "the first Monday of December, 1800" by virtue of the Act of 1790. *Id.* [42] In *Reily v. Lamar,* Chief Justice Marshall reached a similar conclusion with respect to Maryland, although for the purposes of that case he found it "not material to inquire, whether the inhabitants of the city of Washington ceased to be citizens of Maryland on the 27th day of February 1801," when the Organic Act took effect, "or on the first Monday of December 1800." 6 U.S. (2 Cranch) 344, 357, 2 L.Ed. 300 (1805); *see also Young v. Bank of Alexandria,* 8 U.S. (4 Cranch) 384, 396, 2 L.Ed. 655 (1808) (Marshall, C.J.) ("[U]nder the terms of the cession and acceptance of the district,.... the power of legislation remained in Virginia until it was exercised by congress."). The precise date is likewise immaterial for our purposes. [43]

42 In addition to the District Clause and the Act of 1790, the court relied on the proviso in the Virginia cession act, which stated that "the jurisdiction of the laws of this commonwealth over the persons and property of individuals residing within the limits of the cession aforesaid, shall not cease or determine, until congress, having accepted the said cession, shall by law provide for the government thereof, under their jurisdiction, in manner provided by the [District Clause]." *Hammond,* 26 F. Cas. at 97 (quoting 13 Va. Stat. at Large, ch. 32, at 43); *see also* 1791 Md. Acts ch. 45, § 2 (parallel proviso in Maryland's ratification of its cession).

43 The three-judge court in *Albaugh* held that "[s]ince the 'Organic Act of 1801,' it has been uniformly recognized ... that residents of the District of Columbia are no longer citizens of the State of Maryland." 233 F.Supp. at 578.

In sum, during the interim period, the territory's residents continued to vote not as "residual" citizens of Maryland, but as actual citizens of that state. [44] Only thereafter did they lose their state citizenship, and with it their right to vote. *See* Raven–Hansen, *supra,* at 174 ("District residents ***60** did not lose state citizenship until December, 1800"). [45] We thus conclude, in accord with the academic authority upon whom plaintiffs otherwise heavily rely, that this "decade of voting and representation provided no precedent for the representation of District citizens." *Id.* [46]

44 In *Hammond,* 26 F.Cas. at 99, the court held that "[b]y the constitution, congress could not exercise exclusive legislation over the district until it had become the seat of government." Even if we were to assume to the contrary that Congress acquired the authority to exercise exclusive control over the District in 1790, that would not change the analysis. Whatever Congress' *authority* may have been during the interim period, it left control of the area to Maryland and Virginia. Since 1801, however, Congress has continuously exercised exclusive authority over the District. It is thus unnecessary for us to consider whether District residents would be able to vote had Congress never exercised its authority, or had it subsequently ceded partial authority back to the state. *See* discussion of *Evans v. Cornman,* 398 U.S. 419, 90 S.Ct. 1752, 26 L.Ed.2d 370 (1970), *infra* Part IV.B.4.

45 In 1801, Maryland law provided that "[t]he election of representatives for the state to serve in congress, shall be made by the citizens of this state, qualified to vote for members of the house of delegates." A DIGEST OF THE LAWS OF MARYLAND 227 (Herty 1799). Maryland's Constitution, in turn, imposed, *inter alia,* a 12–month residency requirement on voting for members of the House of Delegates. *See* MD. CONST. of 1776, art. II, *reproduced in* 4 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 376 (William F. Swindler ed., 1975). The current Maryland Constitution provides that only those "resident of the State as of the time for the closing of registration next preceding the election, shall be entitled to vote." MD. CONST. art. 1, § 1.

46 The Committee for the Capital City, appearing as amicus curiae, contends that District residents retain their right to vote in Maryland because Maryland's laws were never effectively terminated in the District. *See* Br. of the Committee for the Capital City at 1–2. It notes that in accepting the ceded territory in 1790, Congress stated that "the laws of the state within such district shall not be affected ... until Congress shall otherwise by law provide." *Id.* at 11 (quoting 1 Stat. 130, § 1). Congress never did "otherwise provide," the Committee argues, because the Organic Act of 1801 merely stated that "the laws of the state of Maryland, as they now exist, shall be and continue in force." *Id.* at 10 (quoting 2 Stat. 195, § 1). Hence, it contends, "Congress has never enacted legislation that repealed or superseded those Maryland laws, and therefore they still apply—by the express terms of the Act of 1801 establishing the District's local governance—to those persons living in that portion of the State of Maryland that was ceded to the federal government." *Id.* at 11–12.
This is simply a misinterpretation of the 1801 statute. By continuing the authority of Maryland's laws "as they now exist," Congress did nothing more than fix them (as they stood as of that date) as a part of the common law *of the District;* without such a provision the new District would have had no laws upon which to build. It did not, however, provide any continuing governmental or regulatory authority to Maryland. *See generally Brooks v. Laws,* 208 F.2d 18, 25 (D.C.Cir.1953); *Hammond,* 26 F. Cas. at 98; *see also Reily,* 6 U.S. (2 Cranch) at 356–57. Indeed, Maryland had renounced any such authority. *See* 1791 Md. Acts ch. 45, § 2. In any event, in 1901 Congress expressly repealed the applicability to the District of acts of the Maryland Assembly, retaining only the common law and the British statutes in force in Maryland on February 27, 1801 (where consistent with provisions of the D.C.Code). *See* Act of March 3, 1901, ch. 854, 31 Stat. 1189, 1434. *See generally Brooks,* 208 F.2d at 25; *Williams v. United States,* 569 A.2d 97, 99 (D.C.1989).

Nor is there any other evidence of an intent, or an understanding, that former residents of Maryland and Virginia would continue to vote in those states after the District was established.[47] To the contrary, both the Maryland and Virginia statutes ratifying the cession made clear that their former territory was "forever ceded and relinquished to the Congress and Government of the United States, and full and absolute right and exclusive jurisdiction, as well of soil as of persons residing or to reside thereon." 1791 Md. Acts ch. 45, § 2; *accord* 13 Va. Stat. at Large, ch. 32, at 43. The early judicial cases also made clear that "[b]y the separation of the district of Columbia from the state of Maryland, the complainant ceased to be a citizen of that state." *Reily,* 6 U.S. (2 Cranch) at 357; *accord Hammond,* 26 F. Cas. at 98; *see also Custis v. Lane,* 17 Va. (3 Munf.) 579 (1813) (holding that District resident could no longer vote in Virginia ***61** because he was no longer "a citizen of Virginia, abiding, or inhabiting therein, but passed, with that territory, from the jurisdiction of this commonwealth, by the act of cession"). Once again, such evidence as there is indicates that the contemporary understanding was that the territory's residents would lose their vote in their former states as soon as Congress assumed exclusive jurisdiction.[48] And, after that occurred and the residents did lose their vote, altogether missing from the public record is any outpouring of complaints that the franchise was being unlawfully withheld. *See supra* note 34 and accompanying text.

47 One important piece of evidence of an understanding that District residents would not continue to vote in those states is contained in Article I, section 2, clause 2, which provides that no person may be a representative unless "an Inhabitant of that State in which he shall be chosen." U.S. CONST. art. I, § 2. cl. 2; *see also id.* art. I, § 3, cl. 3 (imposing same restriction on senators). Even if the residents of the District could be characterized as "residual citizens" of their former states, they surely are not "inhabitants" thereof. Plaintiffs' theory would make the District the only area where all of the voters are constitutionally unqualified to serve as their own representatives.

48 *See supra* Part IV.A.2; *see also* ENQUIRIES INTO THE NECESSITY, *supra,* at 15–16 (warning that effect of assumption of jurisdiction by Congress would be that "the Territory of Columbia [would] cease[ ] to be component parts of the states respectively, to which it formerly belonged," and

that residents would thereby lose their "share in electing the members of congress").

3. Intertwined with plaintiffs' above argument, that the creation of the District *was not* constitutionally intended to withdraw the right to vote in Maryland, is another argument: namely, that it *could not* have had that effect. The original residents of the District were among the people of the states by virtue of their citizenship in Maryland, plaintiffs argue, and they therefore had an inalienable right to vote that could not be withdrawn. Moreover, plaintiffs contend that right continues to inhere in those who currently are residents of the District. Our dissenting colleague offers a variation on this theme. Although he concludes that District residents should be permitted to vote in the District rather than Maryland, his rationale is the same: residents of the District had the right to vote prior to 1801; this was a right they were entitled to bequeath to their "political posterity"; and this right could not be removed by Maryland's act of cession or Congress' assumption of jurisdiction.

We cannot accept the argument that current residents of the District retain residual rights because other people, living 200 years earlier in the same place, had such rights. In the United States, personal rights generally do not "run with the land." Even if it could be argued that the right to vote was a privilege that irrevocably vested from "the moment the United States Constitution was ratified" in "every citizen living in what were then the thirteen states of the union," including the portions of Maryland and Virginia that would later become the District, Br. of the Committee for the Capital City at 1, the argument would not extend to the present plaintiffs. By virtue of the passage of 200 years, all of the plaintiffs—whether by birth or a combination of birth and their ancestors' migration—arrived on the scene after the land already had become a district whose residents, by constitutional contemplation, lacked a vote in the national Congress. Whatever rights the original residents of the area may have had, none of them are alive to press them before this court.

Moreover, upon close examination, this argument is not independent of the constitutional intent argument rejected above. At bottom, plaintiffs do not argue that notwithstanding the intent of the Constitution, the right to vote could not have been taken from District residents. They do not make that argument because their ultimate appeal is to the Constitution itself: they cannot argue both that the denial of their right to vote is unconstitutional, and that it is irrelevant whether the Constitution recognizes such a right. Instead, plaintiffs argue that the Constitution gave them the right to vote upon its ratification in 1789, and that it was the Organic Act of 1801—not the Constitution—that purportedly took it away. As one group of amici put it, "It was ... the exercise of federal jurisdiction over the District—and not the text or intent of the Constitution itself—that denied D.C. residents their right to popular representation in the federal legislature." ***62** Mem. Amici Curiae for Professors James D.A. Boyle et al. at 16.

This, however, merely returns us to ground previously plowed. We have already concluded that it *is* the Constitution itself that is the source of plaintiffs' voting disability. Under Article I, voters for the House of Representatives must "have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. CONST. art. I, § 2, cl. 1. Because those who live in the District lack state residency, they cannot qualify to vote in Maryland's (or any other state's) elections, and hence cannot vote for its representatives in the House. *See* MD. CONST. art. I, § 1.[49] Thus, it was not the Organic Act or any other cession-related legislation that excluded District residents from the franchise, something we agree could not have been done by legislation alone. *Cf. Lucas v. Colorado,* 377 U.S. 713, 736, 84 S.Ct. 1459, 12 L.Ed.2d 632 (1964) (holding that "an individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a State's electorate").[50] Rather, exclusion was the consequence of the completion of the cession transaction—which transformed the territory from being part of a state, whose residents were entitled to vote under Article I, to being part of the seat of government, whose residents were not. Although Congress' exercise of jurisdiction over the District through passage of the Organic Act was the last step in that process, it was a step expressly contemplated by the Constitution. *See* U.S. CONST. art. I, § 8, cl. 17.[51]

49 Although the Equal Protection Clause "restrains the States from fixing voter qualifications which invidiously discriminate." *Harper v. Virginia Bd. of Elections,* 383 U.S. 663, 665, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966) (declaring Virginia poll tax unconstitutional), the Court has not questioned "the power of a State to impose reasonable residence restrictions on the availability of the ballot," *id.* at 666, 86 S.Ct. 1079. *See Carrington v. Rash,* 380 U.S. 89, 96, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965) (emphasizing that states are "free to take reasonable and adequate steps ... to see that all applicants for the vote actually fulfill the requirements of

bona fide residence"); *see also Saenz v. Roe,* 526 U.S. 489, 119 S.Ct. 1518, 1528 (1999) (noting that "Citizenship Clause of the Fourteenth Amendment expressly equates citizenship with residence").

50 Nor did any of those statutes purport to disenfranchise District residents: none addressed the issue of voting rights at all.

51 Plaintiffs also contend that the Overseas Citizens Voting Rights Act (OCVRA) of 1975, 42 U.S.C. § 1973ff–1, by which Congress required the states to permit overseas Americans to vote absentee in the last state in which they were domiciled, shows that Americans retain a residual citizenship in their former states where necessary to vindicate the right to vote in congressional elections. *See Alexander* Pls.' Summ. J. Mem. at 51–53. Congress premised the OCVRA on a "reasonable extension of the bona fide residence concept." *Attorney Gen. of Guam,* 738 F.2d at 1019 (quoting H.R. REP. NO. 94–649, at 7 (1975)). There is a significant distinction between extending the right to vote to individuals who themselves once lived in a specific state, and extending it to other individuals who never have, based on the fact that still others were residents of Maryland 200 years ago.

4. We next consider an additional argument advanced in support of a right to vote in Maryland elections, this one based not only on the historical relationship between the District and Maryland, but also on the Supreme Court's ruling that residents of a federal enclave must be permitted to vote in the state from which the enclave was created. In *Evans v. Cornman,* the Supreme Court struck down under the Fourteenth Amendment's Equal Protection Clause a Maryland residency requirement that prevented persons living on the grounds of the National Institute of Health (NIH) from voting in state and federal elections. 398 U.S. 419, 90 S.Ct. 1752, 26 L.Ed.2d 370 (1970). NIH had become a federal reservation in 1953, when Maryland ceded jurisdiction over the property to the United States. *See id.* at 420–21, 90 S.Ct. 1752. Fifteen years later, the state denied NIH residents the right to vote.

***63** The Court began its analysis by noting that:

> Appellees clearly live within the geographical boundaries of the State of Maryland, and they are treated as state residents in the census and in determining congressional apportionment. They are not residents of Maryland only if the NIH ceased to be a part of Maryland when the enclave was created. However, that "fiction of a state within a state" was specifically rejected by this Court in *Howard v. Commissioners of sinking Fund of Louisville,* 344 U.S. 624, 627, 73 S.Ct. 465, 97 L.Ed. 617 (1953), and it cannot be resurrected here to deny appellees the right to vote.

Id. at 421–22, 90 S.Ct. 1752. It then proceeded to consider whether the state could deny plaintiffs the vote on the ground that they were neither substantially interested in nor affected by state electoral decisions. *See id.* at 422, 90 S.Ct. 1752. Maryland alleged that the plaintiffs were substantially less interested in state affairs than other Maryland residents because, under the Enclaves Clause, U.S. CONST. art. I, § 8, cl. 17, Congress had the power to exercise exclusive jurisdiction over the NIH.

The Supreme Court rejected the state's argument, noting that "the relationship between federal enclaves and the States in which they are located" had "changed considerably" over the years. *Evans,* 398 U.S. at 423, 90 S.Ct. 1752. In particular, it noted that Congress had passed a series of statutes expressly permitting states to extend many of their laws to cover enclave residents, including their criminal, tax, unemployment, and workers' compensation laws. *See id.* at 424, 90 S.Ct. 1752 (citing 18 U.S.C. § 13; 4 U.S.C. §§ 104–110; 26 U.S.C. § 3305(d); and 40 U.S.C. § 490). Moreover, it noted that plaintiffs were "required to register their automobiles in Maryland and obtain drivers' permits and license plates from the State; they are subject to the process and jurisdiction of State courts; they themselves can resort to those courts in divorce and child adoption proceedings; and they send their children to Maryland public schools." *Id.* All of this led the Court to conclude that

> In their day-to-day affairs, residents of the NIH grounds are just as interested in and connected with electoral decisions as they were prior to 1953 when the area came under federal jurisdiction and as are their neighbors who live off the enclave. In nearly every election, federal, state, and local, for offices from the Presidency to the school board, and on the entire variety of other ballot propositions, appellees have a

> stake equal to that of other Maryland residents.

Id. at 426, 90 S.Ct. 1752. Accordingly, *Evans* held that NIH residents were "entitled under the Fourteenth Amendment to protect that stake by exercising the equal right to vote." *Id.*

Plaintiffs here argue that since the residents of federal enclaves are entitled to vote under *Evans,* the residents of the District should be so entitled as well. There is some appeal to that argument, as Congress's authority to govern enclaves is identical to its authority over the District, and is conferred by the same clause of the Constitution. *See* U.S. CONST. art. I, § 8 ("The Congress shall have Power .... [t]o exercise exclusive Legislation in all Cases whatsoever, over such District ... as may, by Cession of particular States ... become the Seat of the Government .... and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings ...."). [52]

52 Although the constitutional text indicates that Congress has "like Authority" over both the District and the enclaves, the text does refer to them differently. The District is described as being created by "Cession" of particular states, a word which indicates that thereafter the District would no longer be part of those states. Enclaves, on the other hand, are areas purchased with the consent of the legislature of the state "in which the Same shall be," which may explain why *Evans* viewed enclaves as remaining parts of the states from which they were created. We need not resolve the significance of this difference in constitutional language, however, because the difference in the way in which Congress has exercised its authority over enclaves and the District distinguishes this case from *Evans* in any event. *See* discussion *infra* pp. 63–64.

***64** But the fact that Congress may have identical *authority* over both the District and the enclaves is not dispositive, because the ultimate result in *Evans* rested on the fact that Congress had not *exercised* that authority over NIH. [53] As noted above, Congress had passed statutes permitting Maryland to exercise its own authority in the enclave, and Maryland had done so extensively. It was Maryland's exercise of authority over the plaintiffs in that case—in areas as disparate as motor vehicle regulation, state court jurisdiction, and public education—that gave them "a stake equal to that of other Maryland residents." *Evans,* 398 U.S. at 426, 90 S.Ct. 1752. The case before us is plainly not analogous in this respect. Congress has ceded none of its authority over the District back to Maryland, and Maryland has not purported to exercise any of its authority in the District. [54]

53 Indeed, the three-judge district court whose decision the Supreme Court affirmed expressly distinguished that case from a hypothetical in which the federal government did assert exclusive jurisdiction over an enclave. *See Cornman v. Dawson,* 295 F.Supp. 654, 656 (D.Md.1969). For the same reason, the fact that Maryland's initial statute ceding NIH, like the statute ceding the District, gave the federal government the ability to exercise exclusive authority over NIH is not decisive, since Congress plainly did not do so.

54 We disagree with the dissent's suggestion that Congress' delegation of authority to the District government puts the District's situation on a par with that of the NIH enclave in *Evans.* In the latter circumstances, Congress delegated authority to another sovereign (Maryland), and the Court held that sovereign could not treat two classes of residents (those within and without the enclave) differently. Here, by contrast, Congress has merely delegated some of its power to its own creature, the District government. The governmental structure through which Congress chooses to exercise its authority over the District—provided it does not delegate that authority to another sovereign—cannot be determinative of the voting rights of District residents.

Plaintiffs do not dispute this distinction, and as a consequence do not contend that they have a right to vote in elections for the Maryland state legislature. Instead, they argue that while the absence of the exercise of Maryland authority over District residents might mean they have an insufficient interest in elections to Maryland's own legislature, "District citizens have an equally vital stake in elections to Congress" as other Maryland residents. *Alexander* Pls.,' Summ. J. Mem. at 27. Finding District residents qualified to vote for Congress but not for the Maryland legislature, however, would turn Article I on its head. As we have noted, Article I, section 2 states that "the [congressional] Electors in each State shall have the Qualifications requisite for Electors of the most numerous

Branch of the State Legislature." U.S. CONST. art. I, § 2, cl. 1. Plaintiffs' enclave theory, by contrast, would permit residents of the District to vote in Maryland's congressional elections notwithstanding that they lack—even under an *Evans* theory—precisely those qualifications.

Finally, and most important, adopting plaintiffs' argument would require us to ignore the result in *Albaugh,* which barred District residents from voting in Maryland's elections for the United States Senate. *See* discussion *supra* pp. 56–57. We do not have the authority to do so. Although there may be tension between *Evans* and *Albaugh,* [55] it is a tension that ***65** arises only if *Evans* is extended beyond its own holding in two ways: to a situation in which the ceding state no longer asserts any jurisdiction, and to a remedy limited to the right to vote in federal elections. *Albaugh,* on the other hand, is directly on point here without any extensions: it directly and expressly denies District residents a right to vote in Maryland's federal elections.

55 There appear to have been two steps to the *Evans* analysis. First, in rejecting the "fiction of a state within a state," the court rejected the suggestion that the NIH grounds ceased to be part of Maryland when the enclave was created. *See Evans,* 398 U.S. at 421, 90 S.Ct. 1752. The rationale for this declaration was unstated, other than by reference to the Court's prior similar statement in *Howard.* Standing alone, this declaration would appear to be in tension with the affirmance in *Albaugh,* although a difference in the constitutional language describing the District and the enclaves could explain it. *See supra* note 52. As discussed above, however, the Court did not rest its decision on this first step, but instead went on to consider whether enclave residents had a stake in the elections equal to that of other Maryland residents. *See Evans,* 398 U.S. at 426, 90 S.Ct. 1752.

Plaintiffs contend that it is *Evans,* rather than *Albaugh,* that is the harbinger of the Supreme Court's future course. Whether that is true, however, is not for us to judge. As the Supreme Court has repeatedly admonished the lower courts, "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Agostini v. Felton,* 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989)). We must apply the law as it now stands and, until the Supreme Court instructs otherwise, that law is set forth in *Albaugh.*

5. Plaintiffs rightly note that the cession of the lands of Virginia and Maryland "did not take away any of the individual constitutional rights guaranteed to District citizens." *Alexander* Pls.' Summ. J. Mem. at 46. As the Supreme Court declared in *O'Donoghue v. United States,* "[t]he mere cession of the District of Columbia to the Federal government relinquished the authority of the states, but it did not take it out of the United States or from under the aegis of the Constitution." 289 U.S. 516, 541, 53 S.Ct. 740, 77 L.Ed. 1356 (1933) (quoting *Downes v. Bidwell,* 182 U.S. 244, 260–61, 21 S.Ct. 770, 45 L.Ed. 1088 (1901)). [56] Yet, as the same opinion also noted, "when a provision of the Constitution is invoked, the question which arises is, not whether the Constitution is operative" in the District or territories, "but whether the provision relied on is applicable." *Id.* at 542, 53 S.Ct. 740 (quoting *Downes,* 182 U.S. at 292, 21 S.Ct. 770). For the reasons set forth above, we conclude that the constitutional provisions plaintiffs rely upon here—the clauses of Article I that provide for congressional voting—are not applicable to residents of the District of Columbia.

56 *See O'Donoghue,* 289 U.S. at 541, 53 S.Ct. 740 (holding that judges of District of Columbia are Article III judges whose salaries cannot be decreased). *But see id.* at 539–40, 53 S.Ct. 740 ("The object of the grant of exclusive legislation over the district was, therefore, national in the highest sense, and the city organized under the grant became the city, *not of a state,* not of a district, but of a nation.") (internal quotation omitted) (emphasis added).

V

In this Part, we consider plaintiffs' arguments based on provisions of the Constitution other than Article I. These include the Equal Protection, Privileges or Immunities, Due Process, and Republican Guarantee Clauses.

A

[8] We first address the contention of the plaintiffs (and of our dissenting colleague) that the District's lack of representation in the House deprives its residents of the equal protection of the laws. *See Bolling v. Sharpe,* 347 U.S. 497, 500, 74 S.Ct. 693, 98 L.Ed. 884 (1954) (applying equal protection analysis to federal government under Fifth Amendment's Due Process Clause); *see also* ***66** *Buckley v. Valeo,* 424 U.S. 1, 93, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) ("Equal protection analysis in the Fifth Amendment is the same as that under the Fourteenth Amendment."). The plaintiffs allege that the lack of representation renders them unequal to the residents of the fifty states and of the federal enclaves.[57] And they further contend that because the right to vote is fundamental, such unequal treatment cannot be upheld unless it satisfies strict scrutiny—that is, unless it is "narrowly tailored to serve a compelling" government interest. *Alexander* Pls.' Summ. J. Mem. at 56 (quoting *Washington v. Glucksberg,* 521 U.S. 702, 117 S.Ct. 2258, 2268, 138 L.Ed.2d 772 (1997)). Because there is no compelling interest in denying District residents the vote, plaintiffs contend that the denial cannot satisfy strict scrutiny and hence must fall.[58]

57 The *Adams* plaintiffs, but not the *Alexander* plaintiffs, also allege that their lack of representation renders them unequal to the residents of Alexandria County, Virginia (formerly a part of the District) as well as to the residents of the states "which started their organized political lives as territories of the United States." *Adams* Mot. for Summ. J. at 51.

58 Plaintiffs do not, however, contend that the Equal Protection Clause bars states from imposing state residency as a qualification for voting. *See supra* note 49.

We do not disagree that defendants have failed to offer a compelling justification for denying District residents the right to vote in Congress. As the dissent argues, denial of the franchise is not necessary for the effective functioning of the seat of government.[59] The problem, however, is that strict scrutiny does not apply in this case. Although equal protection analysis scrutinizes the validity of classifications drawn by executive and legislative authorities, *see, e.g., Parham v. Hughes,* 441 U.S. 347, 358, 99 S.Ct. 1742, 60 L.Ed.2d 269 (1979), the classification complained of here is not the product of presidential, congressional, or state action. Instead, as we have just concluded, the voting qualification of which plaintiffs complain is one drawn by the Constitution itself. The Equal Protection Clause does not protect the right of all citizens to vote, but rather the right "of all *qualified* citizens to vote." *Reynolds v. Sims,* 377 U.S. 533, 554, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) (emphasis added). "[T]he right to vote in federal elections is conferred by Art. I, § 2, of the Constitution," *Harper v. Virginia Bd. of Elections,* 383 U.S. 663, 665, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966), and the right to equal protection cannot overcome the line explicitly drawn by that Article. For that reason, even the absence of a compelling ground for denying District citizens the right to vote cannot result in the judicial grant thereof.

59 As noted above, the principal rationale noted by Madison for exclusive congressional control over the District—ensuring that Congress would not have to depend upon another sovereign for its protection—does not appear to be relevant to the issue of voting rights. *See supra* note 25.

This point is expressly made by the very cases plaintiffs cite in support of their equal protection argument: those establishing the doctrine of "one person, one vote." In those cases, the Supreme Court held that doctrine to require that, "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Wesberry v. Sanders,* 376 U.S. 1, 7–8, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964); *see also Gray v. Sanders,* 372 U.S. 368, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963) (applying same principle to state elections). Plaintiffs assert that, even if Article I were intended to deprive District residents of congressional representation—a result inconsistent with the one person, one vote principle—that deprivation cannot continue in light of the expansive application of the principle in modern equal protection analysis.

But the one person, one vote cases themselves make clear that the structural provisions of the Constitution necessarily limit the principle's application in federal ***67** elections. In *Reynolds v. Sims,* for example, the Court recognized that the allocation "to each of the 50 States, regardless of population" of two senators and at least one representative was inconsistent with one person, one vote. 377 U.S. at 571–72, 84 S.Ct. 1362. Nonetheless, the Court said, "The system of representation in the two Houses of the Federal Congress is one ingrained in our Constitution, as part of the law of the land." *Id.* at 574, 84 S.Ct. 1362. Moreover, and particularly relevant here, the Court declared that "[t]he developing history and growth of our republic cannot cloud the fact that, at the time of the inception of the system

of representation in the Federal Congress, a compromise between the larger and smaller states on this matter averted a deadlock in the Constitutional Convention which had threatened to abort the birth of our Nation." *Id.* This, the Court said, rendered the composition of the House and Senate constitutionally compelled, and thus "inapposite and irrelevant to state legislative districting schemes." *Id.* at 573, 84 S.Ct. 1362.

In *Gray v. Sanders,* the Court had previously reached the same conclusion regarding the electoral college system used in presidential elections, which does not allocate voting strength in strict proportion to population, but which is nonetheless mandated by Article II, section 1 and the Twelfth Amendment. *See* 372 U.S. at 378, 83 S.Ct. 801. [60] And subsequently, in *Department of Commerce v. Montana,* 503 U.S. 442, 112 S.Ct. 1415, 118 L.Ed.2d 87 (1992), the Court noted two additional (and one of the same) limitations upon the one person, one vote principle. That "general admonition," the Court said, "is constrained by three requirements. The number of Representatives shall not exceed one for every 30,000 persons: each State shall have at least one Representative; and the district boundaries may not cross state lines." *Id.* at 447–48, 112 S.Ct. 1415 [61] ; *see also Wisconsin v. City of New York,* 517 U.S. 1, 14–15, 116 S.Ct. 1091, 134 L.Ed.2d 167 (1996) ("[T]he Constitution itself, by guaranteeing a minimum of one representative for each State, made it virtually impossible in interstate apportionment to achieve the [one person, one vote] standard imposed by *Wesberry.*").

60 "The inclusion of the electoral college in the Constitution, as the result of specific historical concerns," the Court said, "validated the collegiate principle despite its inherent numerical inequality ...." *Gray,* 372 U.S. at 378, 83 S.Ct. 801.

61 The Court noted that "[t]he first and second requirements are set forth explicitly in Article I, § 2, of the Constitution," and that "[t]he requirement that districts not cross state borders appears to be implicit in the text and has been recognized by continuous historical practice." *Montana,* 503 U.S. at 448 n. 14, 112 S.Ct. 1415.

In sum, notwithstanding the force of the one person, one vote principle in our constitutional jurisprudence, that doctrine cannot serve as a vehicle for challenging the structure the Constitution itself imposes upon the Congress. *See Breakefield v. District of Columbia,* 442 F.2d 1227, 1228 & n. 4 (D.C.Cir.1970) (rejecting contention that lack of representation rendered congressional tax on District unlawful under "one-man one-vote" decision in *Wesberry*). This analysis also forecloses plaintiffs' contention that the disparity between their treatment and that of enclave residents violates equal protection. [62] As we held in ***68** Part IV.A, the inability of District residents to vote is a consequence of Article I. Similarly, as we discussed in Part IV.B.4, the contrasting ability of enclave residents to vote is not the consequence of legislative line drawing, but rather of the Supreme Court's decision in *Evans* that enclave residents have a constitutional right to vote—a holding we are unable to extend to District residents both because of distinctions between the manner in which Congress has exercised its authority over the enclaves and the District, and because of the Supreme Court's decision in *Albaugh. See* discussion *supra* Part IV.B.4. Hence, the differing treatment is the consequence not of legislative determinations but of constitutional distinctions. This court is without authority to scrutinize those distinctions to determine whether they are irrational, compelling, or anything in between. [63]

62 The dissent contends that the Equal Protection Clause is also violated by the disparity in treatment between District residents and overseas voters. As discussed *supra* note 51, in the Overseas Citizens Voting Rights Act (OCVRA), 42 U.S.C. § 1973ff–1. Congress required the states to permit Americans living overseas to vote absentee in the last state in which they were domiciled. Although the constitutionality of the OCVRA has not been tested, it depends upon the validity of Congress' premise that the Act is a "reasonable extension of the bona fide residence concept" for individuals who once lived in a specific state. *Attorney Gen. of Guam,* 738 F.2d at 1019 (quoting H.R. REP. NO. 94–649, at 7 (1975)). The instant lawsuits, brought on behalf of all District residents regardless whether they have ever lived in a state, cannot rely on such a premise.

63 One of the claims in the *Adams* complaint does challenge a species of legislative action: Congress' continued exercise of exclusive federal authority over the District—or at least over the private residential portions of the District outside of the National Capital Service Area (the part of the District containing the principal federal buildings

and offices). The *Adams* plaintiffs contend that Congress' decision to exercise exclusive authority over the District in local matters, yet to cede similar authority to the states in the federal enclaves, violates equal protection. This claim, however, challenges Congress' continuing authority over the District *regardless* of whether District residents may vote for Congress. *See Adams* Pls.' Opp'n at 72 n. 41 (stating that even if District residents had representatives in Congress, Congress' exercise of authority over local District matters would be unconstitutional as long as representatives from places other than District are members of that body). It thus does not come within our jurisdictional mandate to decide apportionment challenges, and we therefore remand it to the single-judge district court. *See* discussion *supra* Part II.

B

[9] Plaintiffs also contend that the right to vote for members of Congress is a privilege of national citizenship. Although the Fourteenth Amendment's Privileges or Immunities Clause [64] is phrased as a protection of such privileges against abridgement by the states, [65] plaintiffs further contend that its protections "are incorporated against the federal government by the fifth amendment in the same fashion as are the principles of equal protection." *Alexander* Pls.' Opp'n at 11 (citing *Bolling,* 347 U.S. at 500, 74 S.Ct. 693). [66] The denial of District residents' right to vote, plaintiffs conclude, abridges this right of national citizenship in violation of the Constitution.

64 "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States ...." U.S. CONST. amend. XIV, § 1.

65 Plaintiffs do not rely on the "Privileges and Immunities" Clause of Article IV. *See* U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

66 Although the House defendants dispute this proposition, *see* House Opp'n to Pls.' Mot. for Summ. J. at 34, our disposition of plaintiffs' claim makes it unnecessary to decide the issue.

We do not disagree that the "right to vote for national officers" is a "right[ ] and privilege[ ] of national citizenship." *Twining v. New Jersey,* 211 U.S. 78, 97, 29 S.Ct. 14, 53 L.Ed. 97 (1908) (citing *Ex parte Yarbrough,* 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274 (1884)); *accord In re Quarles,* 158 U.S. 532, 535, 15 S.Ct. 959, 39 L.Ed. 1080 (1895). Nor do we dispute Justice Kennedy's statements, in a concurrence repeatedly cited by plaintiffs, that this right arises out of the "relationship between the people of the Nation and their National Government, with which the States may not interfere." *U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779, 845, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995) (Kennedy, J., concurring); *see id.* at 844, 115 S.Ct. 1842 ("[T]he federal right to vote ... do[es] not derive from the state power in the first instance but ... belong[s] to the voter in his or her capacity as a citizen ***69** of the United States."). [67] Indeed, as we noted above, it is Article I, section 2 that confers "the right to vote in federal elections." *Harper,* 383 U.S. at 665, 86 S.Ct. 1079; *accord U.S. v. Classic,* 313 U.S. 299, 314–15, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941). That, however, can hardly be the end of the inquiry, as even plaintiffs concede that residents of the territories do not have the right to vote in congressional elections, notwithstanding that they, too, are national (American) citizens. *Cf. De La Rosa v. United States,* 32 F.3d 8 (1st Cir.1994); *Attorney Gen. of Territory of Guam v. United States,* 738 F.2d 1017 (9th Cir.1984). [68]

67 *See also U.S. Term Limits, Inc.,* 514 U.S. at 805, 115 S.Ct. 1842 (noting that " '[w]hile, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states,' " in fact it "was a new right, arising from the Constitution itself") (quoting *United States v. Classic,* 313 U.S. 299, 314–15, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941)); *id.* at 820–21, 115 S.Ct. 1842 (noting "that the right to choose representatives belongs not to the States, but to the people").

68 While our dissenting colleague does not dispute the national citizenship of territorial residents, he does distinguish them from District residents on two grounds. First, he argues that the territories were never part of the "several States," and hence that their current residents are not the political posterity of individuals who at one time were "people of the several States." Whether or not this distinction is constitutionally significant, a point addressed

supra Part IV.B, it proceeds from the premise that it is Article I (from which the quoted phrases are taken) that gives content to the "national" right to vote. But Article I, as we explain below, is precisely what withholds that right from District residents. The dissent also contends that the territories may be distinguished from the District on the ground that they were expected eventually to become states, thus rendering their condition temporary. Although it may be possible to distinguish the territories in this way, the Supreme Court relied on just that distinction to hold that although territorial residents came within the protection of (the then-existing version of) 42 U.S.C. § 1983, District residents did not. *See District of Columbia v. Carter,* 409 U.S. 418, 431–32, 93 S.Ct. 602, 34 L.Ed.2d 613 (1973) ("[I]n light of the transitory nature of the territorial condition, Congress could reasonably treat the Territories as inchoate States, quite similar in many respects to the States themselves, to whose status they would inevitably ascend. The District of Columbia, on the other hand, is an exceptional community ... established under the Constitution as the seat of the National Government.") (internal quotation omitted).

Rather, it is precisely because it is Article I that confers the federal right to vote that we must look to that Article to provide its content and define its boundaries. Article I grants that right only to those who "have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. CONST. art. I, § 2, cl. 1.[69] Furthermore, it apportions representatives only "among the several States which may be included within this Union." *Id.* art. I, § 2, cl. 3. Thus, in Justice Kennedy's own words, the "Constitution uses state boundaries to fix the size of congressional delegations." *U.S. Term Limits, Inc.,* 514 U.S. at 841, 115 S.Ct. 1842 (Kennedy, J., concurring).[70] Because we have previously concluded that the District cannot be characterized as a state for these purposes, and because therefore the ***70** constitutional provision that creates the federal right to vote does not include District residents within its terms, denial of the vote to those residents does not abridge their national privileges or immunities.

69 This does not, as both Justice Kennedy's concurrence and prior opinions of the Court make clear, mean that "electors for members of Congress owe their right to vote to the State law." *U.S. Term Limits, Inc.,* 514 U.S. at 842, 115 S.Ct. 1842 (Kennedy, J., concurring) (quoting *Ex parte Yarbrough,* 110 U.S. at 663–64, 4 S.Ct. 152). Rather, "even though the Constitution uses the qualifications for voters of the most numerous branch of the States' own legislatures to set the qualifications of federal electors, Art. I, § 2, cl. 1, when these electors vote, we have recognized that they act in a federal capacity and exercise a federal right." *Id.* at 842, 115 S.Ct. 1842. In short, the Constitution incorporates, or "adopts the qualification thus furnished as the qualification of its own electors for members of Congress." *Ex parte Yarbrough,* 110 U.S. at 663, 4 S.Ct. 152.

70 *See also U.S. Term Limits, Inc.,* 514 U.S. at 840, 115 S.Ct. 1842 (Kennedy, J., concurring) ("[T]he Constitution takes care both to preserve the States and to make use of their identities and structures at various points in organizing the federal union.").

In further support of the privileges or immunities argument, plaintiffs reason by analogy to the arguments that prevailed in *U.S. Term Limits, Inc.* In that case, the Supreme Court struck down an Arkansas law that limited the state's congressional representatives to a fixed number of terms. In so doing, the Court relied not on the Privileges or Immunities Clause, but on the two Qualifications Clauses that set forth the qualifications for members of Congress. *See* U.S. CONST. art. I, § 2, cl. 2; *id.* art. I, § 3, cl. 3.[71] Just as Arkansas "violated its citizens' privileges of national citizenship when it attempted to restrict their right to vote for the congressional representatives of their choice," plaintiffs argue, "[t]he defendants here violate the same constitutional privilege by denying the right of District residents to vote in Congressional elections." *Alexander* Pls.' Summ. J. Mem. at 41.

71 The Qualifications Clause for the House of Representatives reads: "No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen." U.S. CONST. art. I, § 2, cl. 2. The analogous clause for the Senate reads: "No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall

> not, when elected, be an Inhabitant of that State for which he shall be chosen." *Id.* art. I, § 3. cl. 3.

For two reasons, *U.S. Term Limits* has no application to the instant controversy. First, the congressional Qualifications Clauses at issue in that case are the structural opposites of the voter Qualifications Clause at issue here. The former set forth specific lists of qualifications that members of Congress must satisfy. *See supra* note 71. The Court held those lists to be exclusive, striking down Arkansas' term limits on the ground that the state was without authority to add to them. *See U.S. Term Limits, Inc.,* 514 U.S. at 806, 115 S.Ct. 1842. By contrast, the voter Qualifications Clause, U.S. CONST. art. I, § 2, cl. 1, contains no such list, but rather merely incorporates the relevant state's own set of voter qualifications. *See U.S. Term Limits, Inc.,* 514 U.S. at 806, 115 S.Ct. 1842 (noting "explicit [ ] contrast [ ]" between "state control over the qualifications of electors [and] the lack of state control over the qualifications of the elected").

Second, and more fundamentally, the denial of District residents' right to vote is not the consequence of the addition of any extra-constitutional qualification on voting, as in *U.S. Term Limits*. Rather, it is the result of applying precisely those qualifications contained in the Constitution itself. *See supra* Part IV. Accordingly, plaintiff's exclusion from the franchise violates neither the principles of *U.S. Term Limits,* nor the dictates of the Privileges or Immunities Clause.

C

[10] Plaintiffs contend that the right to vote in congressional elections is also protected by the Due Process Clause of the Fifth Amendment, which provides that no person shall be "deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. Because the right to vote for one's own legislators is one of those protected liberties, plaintiffs argue, its denial violates their right to both procedural and substantive due process. *See Alexander* Pls.' Summ. J. Mem. at 27.

Like the privileges or immunities argument, this contention founders upon its underlying assumption: that District residents have a right to vote in congressional elections. As we have repeatedly stated above, the Constitution does not grant that right except to individuals who qualify under Article I —which District residents do not. Nor can the Due Process Clause, any ***71** more than the Equal Protection Clause, be used to change elements of the composition of Congress that are dictated by the Constitution itself. *Cf. Carliner v. Commissioner,* 412 F.2d 1090, 1090 (D.C.Cir.1969) (rejecting argument that Due Process Clause rendered District's mayor-commissioner and city council unlawful "because the citizens of the District have not been given the opportunity by popular vote to elect" them). [72]

72 The Supreme Court has also held that the "procedural component of the Due Process Clause does not 'impose a constitutional limitation on the [legislative] power of Congress ....' " *Atkins v. Parker,* 472 U.S. 115, 129, 105 S.Ct. 2520, 86 L.Ed.2d 81 (1985) (quoting *Richardson v. Belcher,* 404 U.S. 78, 81, 92 S.Ct. 254, 30 L.Ed.2d 231 (1971)).

D

[11] Plaintiffs' final claim is based on the Republican Guarantee Clause of Article IV, which states: "The United States shall guarantee to every State in this Union a Republican Form of Government ...." U.S. CONST. art. IV, § 4. Although recognizing that the Clause is phrased as a guarantee to the states, plaintiffs once again contend that the "Framers cannot have intended anything less for the citizens of the federal government." *Alexander* Pls.' Summ. J. Mem. at 43. Plaintiffs argue that the guarantee of a republican form of government is incompatible with their exclusion from representation in Congress.

As the Supreme Court has noted, "[i]n most of the cases in which the Court has been asked to apply the [Guarantee] Clause, the Court has found the claims presented to be nonjusticiable under the 'political question' doctrine." *New York v. United States,* 505 U.S. 144, 184, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992); *accord Baker v. Carr,* 369 U.S. 186, 218–27, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). But even if plaintiffs' claim is justiciable, [73] it does not present a substantial federal question. [74] While we cannot be certain precisely what the Framers thought constituted a "Republican Form of Government," we do know that they intended the District to be subject to the exclusive control of Congress, *see* U.S. CONST. art. I, § 8, cl. 17; that they reserved the power to elect congressional representatives exclusively to those qualified to vote in state elections, *see id.* art. I, § 2, cl. 1; and that District residents are not so qualified, *see* discussion *supra* Part IV. Accordingly, we cannot adopt plaintiffs' Republican Guarantee argument without concluding that Article IV of the

Constitution was intended to repeal the provisions of Article I. That, of course, we cannot do.

73 *Cf. New York,* 505 U.S. at 185, 112 S.Ct. 2408 (suggesting, without deciding, that "perhaps not all claims under the Guarantee Clause present nonjusticiable political questions").

74 *Cf. Carliner,* 412 F.2d at 1091 (holding insubstantial the claim that then-existing city council was unlawful because not elected by District residents); *Breakefield,* 442 F.2d at 1229. *See generally Shook v. District of Columbia Fin. Responsibility & Management Assistance Auth.,* 132 F.3d 775, 781 (D.C.Cir.1998) (holding that "Congress' authorization to the Control Board to reduce, even drastically, the powers of the [elected] Board of Education does not raise an independent constitutional issue").

E

Plaintiffs argue that, even if we cannot find that Article I guarantees their right to vote in congressional elections, we should harmonize that Article with the other provisions discussed in this Part, which, they contend, do protect such a right. We do not disagree that we should strive to read the Constitution in a way that harmonizes its various provisions. We believe, however, that we have done so in the only way the words and historical interpretation of that document permit. Although the provisions considered in this Part protect rights guaranteed by the Constitution, our reading of Article I precludes the conclusion that the right plaintiffs seek to vindicate is one of those. Because the provisions ***72** of the Constitution that set forth the composition of Congress do not contemplate representation for District residents, we conclude that the denial of representation does not deny them equal protection, abridge their privileges or immunities, deprive them of liberty without due process, or violate the guarantee of a republican form of government.

VI

As we have noted, many courts have found a contradiction between the democratic ideals upon which this country was founded and the exclusion of District residents from congressional representation. All, however, have concluded that it is the Constitution and judicial precedent that create the contradiction. [75] Moreover, that precedent is of particularly strong pedigree. As Justice Jackson said in following Chief Justice Marshall's opinion that the District was not a state within the meaning of Article III:

75 *See* cases cited *supra* Part IV.A.3; *see also United States v. Thompson,* 452 F.2d 1333, 1341 (D.C.Cir.1971) ("[F]or residents of the District, the right to vote in congressional elections is ... totally denied. This regrettable situation is a product of historical and legal forces over which this court has no control."); *cf. Representation for the District of Columbia: Hearings Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary,* 95th Cong. 131 (1978) (statement of Patricia M. Wald, Assistant Attorney General) (explaining that "constitutional amendment is necessary" to provide District with voting representation because "we do not believe that the word 'state' as used in Article I can fairly be construed to include the District").

> Among his contemporaries at least, Chief Justice Marshall was not generally censured for undue literalness in interpreting the language of the Constitution to deny federal power and he wrote from close personal knowledge of the Founders and the foundation of our constitutional structure. Nor did he underestimate the equitable claims which his decision denied to residents of the District .... *Tidewater,* 337 U.S. at 586–87, 69 S.Ct. 1173 (plurality opinion of Jackson, J.) (citing *Hepburn & Dundas,* 6 U.S. (2 Cranch) at 453).

Like our predecessors, we are not blind to the inequity of the situation plaintiffs seek to change. But longstanding judicial precedent, as well as the Constitution's text and history, persuade us that this court lacks authority to grant plaintiffs the relief they seek. If they are to obtain it, they must plead their cause in other venues. Accordingly, plaintiffs' motions for summary judgment are denied, and defendants' motions to dismiss are granted with respect to those claims that challenge the constitutionality of the apportionment of the House of Representatives. The remaining claims are remanded to the single district judge before whom they were originally filed.

An order accompanies this memorandum.

PER CURIAM opinion for the Court filed by Judges GARLAND and KOLLAR–KOTELLY, in which Judge OBERDORFER joins as to Parts I, II, and III.

OBERDORFER, District Judge, filed an opinion dissenting in part.

OBERDORFER, District Judge, dissenting in part, and concurring in part [1].

1 I agree with the majority that the plaintiffs have standing to pursue their claims for representation in the House of Representatives. *See* Maj. Op. Part III. I also agree that the claims against the Senate defendants and the District of Columbia Financial Responsibility and Management Assistance Authority (the Control Board) do not involve apportionment, the sole business of this three-judge court. *See* Maj. Op. Part II. Accordingly, those claims are addressed in a separate memorandum and order, also filed today. *See Adams v. Clinton,* Nos. 98–1665, 98–2187 (D.D.C. Mar. 20, 2000).

> *We the People of the United States, in Order to ... secure the Blessings of Liberty to ourselves and our Posterity,* ***73** *do ordain and establish this Constitution for the United States of America.*
>
> U.S. Const. preamble.

In 1964, the Supreme Court first recognized that Article I of the Constitution requires States to honor a "one person, one vote" rule in their conduct of elections for the House of Representatives, saying that:

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people *in a way* that *unnecessarily* abridges this right.

Wesberry v. Sanders, 376 U.S. 1, 17–18, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964) (emphasis added). More than 30 years after *Wesberry,* and more than 200 years after ratification of the Constitution, plaintiffs charge, inter alia, that the Secretary of Commerce is obstructing several hundred thousand American citizens—the inhabitants of the District of Columbia—from their exercise of this "precious" right, and seek vindication of that right. An examination of the relevant facts and law yields, to me, the following conclusions:

(1) Article I, section 2, of the Constitution states, in relevant part: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States ...." U.S. Const. art. I, § 2. Section 2 of the Fourteenth Amendment, which replaced but did not materially alter part of Article I, section 2, provides, in relevant part: "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." *Id.* amend. XIV.

(2) During the years between when the Constitution took effect in 1789 and the federal government's assumption of exclusive jurisdiction over the area that became the District of Columbia in 1801, inhabitants of that area were "People of the several States," who, among other things, were apportioned as mandated, U.S. Const. art. I, § 2, and were entitled to, and enjoyed, the right to vote for voting representation in the House of Representatives, either through Maryland or Virginia, *see infra* Part I.B.3.

(3) The "People of the several States" who voted between 1789 and 1801 in the part of Maryland which became the District [2] thereby secured for themselves and their political posterity a constitutionally-protected right to be included in a cohort to which a Representative in Congress is apportioned and, if otherwise eligible, to vote for voting representation in the House of Representatives.

2 In 1846, those portions of Virginia which had been ceded to the United States to form the District were retroceded to Virginia. *See infra* note 23.

(4) In 1791, Maryland had ratified its cession to the United States of the portion of its territory which is now the District of Columbia, specifically including "persons residing or to reside thereon," but provided that it would continue to exercise jurisdiction until "Congress shall, by law, provide for the government thereof." An Act Concerning the Territory of

Columbia and the City of Washington, 1791 Md. Acts ch. 45, § 2, *reprinted in* 1 D.C.Code Ann. 34, 35 (1991).

(5) The District became the permanent Seat of Government in December 1800, *see* An Act for Establishing the Temporary and Permanent Seat of Government of the United States, 1 Stat. 130, ch. 28, § 6 (1790), and the cession was finally consummated by the Organic Act of 1801, 2 Stat. 103, ch. 15 (1801). At no time did either Maryland or the United States make any provision for either termination or continuation of the apportionment, or of the voting rights, of the "persons" ceded by Maryland to the United States. No provision in any cession instrument purported to ***74** take away the pre-existing right of those "persons" to be apportioned and to vote for voting representation in the House of Representatives. In any event, the decisions of the Supreme Court in *O'Donoghue v. United States,* 289 U.S. 516, 540, 53 S.Ct. 740, 77 L.Ed. 1356 (1933) (constitutional rights not lost at cession) and *Lucas v. Forty–Fourth Gen. Assembly of Colorado,* 377 U.S. 713, 736, 84 S.Ct. 1459, 12 L.Ed.2d 632 (1964) (constitutional voting rights of minority not waivable by majority), establish that neither the United States, nor any of its officers, could constitutionally interfere with that right of "persons" ceded to the United States or their political posterity.

(6) Nevertheless, ever since 1801, it has been assumed by some, but never authoritatively decided, that District inhabitants have no right to apportionment and to vote for voting representation in the House of Representatives.[3] On that assumption, the Secretary of Commerce intends to follow the practice of previous Secretaries to exclude inhabitants of the District of Columbia from his report to the President by which he performs his statutory duty to apportion the population of the several States and the membership of the House of Representatives, *see* 13 U.S.C. § 141(b), thereby obstructing voting representation of District inhabitants in the House.

3 *See Heald v. District of Columbia,* 259 U.S. 114, 124, 42 S.Ct. 434, 66 L.Ed. 852 (1922) (dictum stating that "[r]esidents of the District lack the [right of] suffrage"); *see also Loughborough v. Blake,* 18 U.S. 317, 324, 5 Wheat. 317, 5 L.Ed. 98 (1820) (dictum stating that inhabitants of the District are "a part of the society ... which has voluntarily relinquished the right of representation, and has adopted the whole body of Congress for its legitimate government ....") (Marshall, C.J.); infra Part II.B, II.C.2.c.vi; Maj. Op. at notes 29, 30, 32, 34 and accompanying text (summarizing statements of various Congressmen and commentators around time of adoption of Organic Act of 1801).

(7) *Wesberry* teaches that in such circumstances it behooves the judiciary to test thoroughly any purported necessity for such a practice and the assumptions underlying it. *Wesberry,* 376 U.S. at 17–18, 84 S.Ct. 526. As the Supreme Court subsequently declared: "that an unconstitutional action has been taken before does not render the action any less unconstitutional at a later date." *See Powell v. McCormack,* 395 U.S. 486, 546–47, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969). After thoroughly considering the various arguments, I have found nothing that necessitates federal officials continuing the practice of obstructing the "precious" constitutional right of the inhabitants of the District of Columbia to vote for voting representation in the House of Representatives. *See Wesberry,* 376 U.S. at 17–18, 84 S.Ct. 526.

(8) In addition, the Equal Protection Clause of the Fourteenth Amendment, incorporated into the Bill of Rights' Fifth Amendment and thereby made applicable to the national government,[4] requires a declaration that inhabitants of the District of Columbia have and should henceforth enjoy the same right to apportioned representation in the House of Representatives as that enjoyed by residents of other federal enclaves,[5] former residents of States who live abroad,[6] as well as residents of States.

4 *See Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 217–18, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995); *Weinberger v. Wiesenfeld,* 420 U.S. 636, 638 n. 2, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975); *Bolling v. Sharpe,* 347 U.S. 497, 500, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

5 *Evans v. Cornman,* 398 U.S. 419, 426, 90 S.Ct. 1752, 26 L.Ed.2d 370 (1970).

6 Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. § 1973ff.

Accordingly, I would hold that both Article I and principles of equal protection require this Court to declare that qualified residents of the District have a constitutional right to vote for voting representation in the House of Representatives, and declare that 13 U.S.C. § 141(b), as construed ***75** and

applied by the Secretary of Commerce, unconstitutionally obstructs their enjoyment of that right.

I

Although the facts have been well stated by my colleagues, some repetition and addition are necessary to bring the issues into focus for purposes of this dissent.

A

Article I of the original Constitution specifies that "Representatives ... shall be apportioned among the several States" according to an "actual Enumeration" of persons made every ten years. U.S. Const. art. I, § 2, cl. 3. The Fourteenth Amendment has superceded in part, but not substantively altered, this requirement. *Id.* amend. XIV, § 2. Section 141(b) of Title 13 of the United States Code makes the Secretary of Commerce responsible for conducting the enumeration and providing the President with a "tabulation of total population by States ... as required for the apportionment of Representatives in Congress among the several States." 13 U.S.C. § 141(b). The statute directs the President to transmit to the Congress "a statement showing the whole number of persons in each State ... as ascertained under ... each ... decennial census, and the number of Representatives to which each State would be entitled." 2 U.S.C. § 2a(a). Finally, the Clerk of the House is responsible for sending the "executive of each State a certificate of the number of Representatives to which each such State is entitled." 2 U.S.C. § 2a(b).

On December 26, 1990, a predecessor of the incumbent Secretary sent to President George Bush "a statement showing the apportionment population for each State as of April 1, 1990, tabulated from the 1990 Decennial Census." Statement of Undisputed Facts of Plaintiffs *Alexander et al.* with Supporting Declarations and Exhibits, Tab. 3. The statement included a determination of "the number of Representatives to which each State is entitled." *Id.* The statement allocated to every State at least one Representative. *Id.* The statement did not report the population of the District of Columbia, [7] include the District's population in the population of any State, or include its population in the total population used for apportionment purposes. *Id.* Nor did it allocate Representatives to the District. *Id.* The incumbent Secretary, a defendant here, intends to follow his predecessor's practice, as evidenced by his opposition to plaintiffs' motions. There being no allocation of Representatives, no transmittal by the President to the Clerk of the House, and no certificate by the Clerk to the District, the present practice of the Secretary obstructs inhabitants of the District from exercising their constitutional right to vote for voting representation in the House of Representatives. Meanwhile, the Secretary includes in his apportionment of persons and allocates representatives to residents of federal enclaves and Congress permits voting, even where there may be no apportionment, by persons residing overseas who formerly resided in a State.

[7] According to the 1990 Decennial Census, the population of the District of Columbia as of April 1, 1990, was approximately 607,000. U.S. Census Bureau, The Official Statistics, Statistical Abstract of the United States (1998). As of 1990, there were three States with populations less than the District, each of which were each allocated one Representative: Alaska, population: 551,947; Vermont, population: 564,964; Wyoming, population: 455,975. *Alexander* Plaintiffs' Statement of Undisputed Facts, Tab 3. There were three States with populations under 700,000 which were also each allocated one Representative: Delaware, population: 668,696; North Dakota, population: 641,364; South Dakota, population: 699,999. *Id.*

B

Plaintiffs' claims present constitutional questions, the resolution of which requires examination of a broad sweep of political and legal history, including particularly the ***76** circumstances preceding and surrounding the adoption of the Seat of Government clause in the Constitution, the Maryland cession of territory and "persons" to the United States to form the District, the exercise by District residents of their right to vote for voting representation in Congress between 1790 and 1800, the evolution of the District of Columbia as a political entity from 1790 through the present, the favorable judicial and legislative treatment accorded similar claims by residents of federal enclaves (other than the District of Columbia) and to United States citizens residing outside the United States—all viewed in the light of the evolving applications of the post-Civil War Amendments and Acts of Congress in the latter half of the Twentieth Century with respect to voting rights.

1. The Seat of Government Clause

Before the adoption of the Constitution, there was no fixed national seat of government. Congress met in a number of locations.[8] In 1783, while Congress was meeting in Philadelphia, hundreds of angry Revolutionary War veterans surrounded the State House and demanded compensation for their services.[9] Neither the city of Philadelphia nor the State of Pennsylvania acted to protect Congress from the disturbances.[10] At the Constitutional Convention in 1787,[11] mindful of this so-called Philadelphia Mutiny, the Framers sought to ensure that the national government would be free from interference by any State government and from dependence upon any State for protection.[12] As explained by James Iredell, at North Carolina's 1789 ratifying convention:

> What would be the consequence if the seat of government of the United States, with all the archives of America, was in the power of any one particular state? Would not this be most unsafe and humiliating? Do we not all remember that, in the year 1783, a band of soldiers went and insulted the Congress? The sovereignty of the United States was treated with indignity. They applied for protection to the state they resided in, but could obtain none. It is to be hoped such a disgraceful scene will never happen again; but that, for the future, the national government will be able to protect itself.
>
> Elliot's Debates at 219–20, *reprinted in* 3 Philip B. Kurland & Ralph Lerner, The Founders' Constitution 225 (1987).

Similarly, James Madison, in The Federalist, published while New York was deciding on ratification, defended "[t]he indispensable ***77** necessity of complete authority at the seat of government" on the grounds that

> [w]ithout it not only the public authority might be insulted and its proceedings interrupted with impunity, but a dependence of the members of the general government on the State ... for protection in the exercise of their duty might bring on the national councils an imputation of awe or influence, equally dishonorable to the government and dissatisfactory to the other members of the Confederacy.
>
> The Federalist, No. 43, at 272 (James Madison) (Clinton Rossiter ed.1961).

These considerations, particularly the pre-Convention experience with the shifting location of the Continental

8 From 1774 through the end of the Revolutionary War in 1783, Congress met in Philadelphia, Baltimore, and York, Pennsylvania. From 1783 through 1789, it met primarily in Philadelphia, but also in Princeton, New Jersey, Annapolis, Maryland, Trenton, New Jersey, and New York City. *See* Kenneth R. Bowling, The Creation of Washington, D.C. 15–19, 43–73 (1991); Walter Fairleigh Dodd, The Government of the District of Columbia 11–13 (1909); William Tindall, Origin and Government of the District of Columbia 13, 30–57 (1909).

9 *See* Dodd, *supra* note 8, at 12–13; 2 Joseph Story, Commentaries on the Constitution § 1219 (Melville M. Bigelow, 5th ed.1905); Bowling, *supra* note 8, at 29–34.

10 *See* 2 Story, *supra* note 9, § 1219; Bowling, *supra* note 8, at 29–34; Dodd, *supra* note 8, at 13; Roy P. Franchino, *The Constitutionality of Home Rule and National Representation for the District of Columbia,* 46 Georgetown L.J. 207, 209 (1957–58).

11 On February 21, 1787, Congress had called for "a convention of delegates ... appointed by the several states" to meet in Philadelphia to propose revisions to the 1781 Articles of Confederation. Documents Illustrative of the Formation of the Union of American States (Charles C. Tansill ed.1927).

12 2 Story, *supra* note 9, § 1219; Dodd, *supra* note 8, at 19; Bowling, *supra* note 8, at 84. Some delegates also objected to the impermanency of the site of Congress' meetings. As Rufus King of Massachusetts stated, "[t]he mutability of the place had dishonored the federal [Government] and would require as strong a cure as we could devise." 3 Philip B. Kurland & Ralph Lerner, The Founders' Constitution 218 (1987); *see* Bowling, *supra* note 8, at 75–76; Dodd, *supra* note 8, at 19.

Congress and exigencies such as the Philadelphia Mutiny which provoked Congress to move from time to time, prompted the inclusion of the Seat of Government clause in Article I of the Constitution. [13] The clause provides:

13 *See* 2 Story, *supra* note 9, § 1219; Franchino, *supra* note 10, at 209.

> The Congress shall have the Power ... To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the acceptance of Congress, become the Seat of Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Arsenals, dock-Yards and other needful buildings;

U.S. Const. art. I, § 8, cl. 17. The Framers did not select a location for the Seat of Government, nor place any constraints on where that location should be, primarily to avoid offending either Philadelphia or New York, both of which might expect to be selected. [14] Instead, they left that potentially contentious decision to Congress. [15]

14 Indeed, George Mason withdrew his proposal that would have prohibited the Seat of Government from occupying the same location as any State's seat of government, which he made because he thought that joint capitals would lead to jurisdictional disputes and lower the tone of the national legislature's deliberations, in the face of concerns that such prohibition "might make enemies of [Philadelphia and New York] which had expectations of becoming the Seat of the [General Government]." 3 Kurland & Lerner, *supra* note 12, at 218; Bowling, *supra* note 8, at 75; Dodd, *supra* note 8, at 19–20

15 *See* Dodd, *supra* note 8, at 20.

Neither the Seat of Government clause, nor any other provision of the Constitution, expressly mentions voting by, or representation of, inhabitants of the yet-to-be-selected Seat of Government. Indeed, the delegates to the Convention discussed and adopted the Seat of Government clause, and the remainder of the Constitution, without any recorded debate on its implications for the voting, representation or any other rights of the inhabitants of federal enclaves, including the yet-to-be-selected Seat of Government. [16]

16 *See* Bowling, *supra* note 8, at 75. The only references to voting by the inhabitants by the yet-to-be-selected Seat of Government occurred during the ratification process. These references, by James Madison, Alexander Hamilton and Thomas Tredwell, are discussed in detail *infra* § Part II.C.2.b.

2. Cession

Between 1788 and 1801, Maryland and Virginia ceded, and the United States accepted, the area which became the Seat of Government. It is undisputed that none of the pertinent documents contain a word about the voting rights of the persons to be ceded.

On December 23, 1788, Maryland offered Congress "any district in this state, not exceeding ten miles square, which the congress may fix upon and accept for the seat of government of the United States." An Act to Cede to Congress a District of Ten Miles Square in This State for the Seat of the Government of the United ***78** States, 1788 Md. Acts ch. 46, *reprinted in* 1 D.C.Code Ann. 33–34 (1991). On December 3, 1789, Virginia similarly offered "a tract of country not exceeding ten miles square, or any lesser quantity, to be located within the limits of the State ... as Congress may by law direct, shall be, and the same is hereby forever ceded and relinquished to the Congress and Government of the United States." 13 Va. Stat. at Large, ch. 32, *reprinted in* 1 D.C.Code Ann. 32–33 (1991). Virginia's offer contained the proviso that "the jurisdiction of the laws of this commonwealth over the persons and property of individuals residing with the limits of the cession aforesaid, shall not cease or determine until Congress, having accepted the said cession, shall, by law, provide for the government thereof, under their jurisdiction." *Id.* Meanwhile, a number of other sites made strong bids for selection as the permanent Seat of Government. [17]

17 *See* Bowling, *supra* note 8, at 129.

In July 1790, the first Congress of the United States, greatly influenced by President Washington, "accepted for the permanent seat of government of the United States" "a district of territory, not exceeding ten miles square," to be located within the territories offered by Maryland and Virginia. 1 Stat. 130, ch. 28, § 6. This Act also provided that Philadelphia would serve as the temporary seat of government until December 1, 1800, at which time the seat of government

would transfer to its permanent location within the "district" accepted by the Act. *Id.* §§ 5, 6. By the terms of this Act, the laws of Virginia and Maryland continued to operate within the District of Columbia "until the time fixed for the removal of the government thereto, *and* until Congress shall otherwise by law provide." *Id.* § 1 (emphasis added).

The boundaries of the permanent seat of government were fixed by Presidential proclamation of March 30, 1791. *See Morris v. United States,* 174 U.S. 196, 200, 19 S.Ct. 649, 43 L.Ed. 946 (1899). Later that year, commissioners appointed by President Washington chose the names "Washington" for the federal city and "Columbia" for the federal district. [18] There was no District of Columbia political entity created at that time, although the municipal corporations of Alexandria and Georgetown continued to exist.

18 *See* Tindall, *supra* note 8, at 94.

On December 19, 1791, Maryland passed an act ratifying the cession. It provided that the portion of the Seat of Government "which lies within the limits of this State shall be ... forever ceded and relinquished to the Congress and the Government of the United States, and full and absolute right and exclusive jurisdiction, *as well of soil as of persons residing or to reside thereon,*" while retaining jurisdiction over "persons and property of individuals residing within the limits" of the territory it ceded until Congress assumed jurisdiction. An Act Concerning the Territory of Columbia and the City of Washington, 1791 Md. Acts ch. 45, § 2, *reprinted in* 1 D.C.Code Ann. 34, 35 (1991).

On the first Monday in December 1800, as provided by the 1790 Act, the District became the permanent Seat of Government of the United States. 1 Stat. 130, ch. 28, § 6. On February 27, 1801, Congress enacted the "Organic Act of 1801," thereby assuming exclusive jurisdiction over the District. 2 Stat. 103, ch. 15. That Act divided the District into two counties—Washington and Alexandria; it also, *inter alia,* provided that the laws of the Maryland and Virginia would continue to apply to the respective parts of the District of Columbia which had been ceded by each state; established a federal court for the District of Columbia; established a marshal for the District; and provided that an attorney for the United States should be appointed for the District. *Id.* In 1800, the population of the ten-mile square area constituting the original Seat of Government ***79** totaled approximately 8,000, of whom approximately 6,000 were white, and approximately 2,000 were black. [19]

19 U.S. Department of Commerce, Bureau of the Census, Historical Statistics of the United States: Colonial Times to 1970, Bicentennial Edition, Part 2, at 26 (1975).

3. Voting in the District Between 1790 and 1800

There is undisputed historical evidence, and I would find, that from 1790 through 1800, qualified residents in what was proclaimed in 1791 to be the District continued to vote in the elections of federal officers conducted in Maryland and Virginia, including Representatives in Congress, even though Maryland and Virginia had ceded the land to the federal government and the boundaries of the District had been drawn. [20]

20 *See* Memorandum Amici Curiae at 17 (filed Feb. 26, 1999); Tindall, *supra* note 8, at 17; Peter Raven–Hansen, Congresssional Representation for the District of Columbia: A Constitutional Analysis, 12 Harv. J. on Legis. 167, 174 (1975). In addition, there is direct evidence that residents of the District between 1790 and 1800 were eligible to vote for Congressional representatives through the ceding state. For example, Thomas Beall, a resident of Georgetown during those years, an area encompassed by the newly-drawn District boundaries, was a representative in the Maryland House of Delegates in 1800. Archive of Maryland, new series I, An Historical List of Public Officials of Maryland, Vol. 1, at 229 (Maryland State Archives, 1990). The Maryland Constitution then in effect required that representatives to its house of delegates be eligible to vote in the county which they represented. Maryland Constitution (1776). The United States Constitution provides that those persons eligible to vote for representatives to the "most numerous branch of the State Legislature" are also eligible to vote for the House of Representatives. U.S. Const. art. I, § 2. Accordingly, Thomas Beall, a resident of the District, was eligible to vote in Maryland's state and federal elections in 1800 (and almost surely voted for himself!). A Biographical Dictionary of the Maryland Legislature, 1635–1789, Vol. 1: A–H, at 124 (Edward C. Papnefuse, Alan F. Day, David W. Jordan, Gregory A. Stiverson eds.).

Following Congress' enactment of the Organic Act in 1801, and the assumption of exclusive jurisdiction by the United States, Maryland and Virginia no longer permitted inhabitants of the District to vote in their local, state and federal elections. [21] At that time, there was no District government or voting apparatus and Congress made no provision for voting by inhabitants of the District. It was generally assumed that inhabitants of the District would no longer enjoy the right to vote for voting representation in the House of Representatives. [22] And, in fact, since then no inhabitant of the portion of the District ceded by Maryland has voted for voting representation in the House of Representatives. [23]

21 Tindall, *supra* note 8, at 17; Raven–Hansen, *supra* note 20, at 174–76.

22 *See* Maj. Op. at notes 29, 30, 32, 34 and accompanying text.

23 On July 9, 1846, Congress authorized the retrocession to Virginia of the County of Alexandria, contingent on the assent of its residents. An Act to Retrocede the County of Alexandria, in the District of Columbia, to the State of Virginia, 9 Stat. 35 (1846). In a submission to Congress, a "committee appointed by the common council of Alexandria" described some of the motives for seeking retrocession:

> We are deprived of the elective franchise, a privilege so dear and sacred that we would present its deprivation in the strongest light before your honorable body. Side by side with trial by jury and the writ of habeas corpus may be placed the rights of the ballot box. It is not unworthy to remark that while the principles of free government are yearly extending with the rapid march of civilization, and thrones and dynasties are yielding to their influence, here alone in the 10 miles square in and about the capital of this great country is there no improvement, no advance in popular rights.

Tindall, *supra* note 8, at 110. The committee also mentioned the failure of Congress to regularly update the laws of Virginia, which, absent congressional revision, had remained in effect throughout Alexandria County in their 1801 form. *Id.* at 109–110. After the retrocession took effect, the District of Columbia consisted entirely of only the territory ceded by Maryland.

***80 4. Evolution of a District of Columbia Voting Apparatus**

In 1802, the District included five jurisdictions: the counties of Alexandria and Washington, the towns of Alexandria and Georgetown, and the City of Washington. [24] For the period from 1800 through 1871, however, there was no elected government for the District of Columbia as a whole. [25]

24 *See* Dodd, *supra* note 8, at 30.

25 As distinguished from the municipalities of Washington, Georgetown and (from 1790 to 1846) Alexandria. Congress incorporated the City of Washington in 1802, providing for a council elected annually "by the free white male inhabitants of full age, who have resided twelve months in the city, and paid taxes therein the year preceding the election's being held." An Act to Incorporate the Inhabitants of the City of Washington, in the District of Columbia, 2 Stat. 195, ch. 53, § 2 (1802). The County of Washington was governed by a "levy court" the members of which were appointed by the President. *See* Dodd, *supra* note 8, at 27–38. In 1805, Congress provided Georgetown with a council elected along the lines of the City of Washington's. *Id.*

In 1871, Congress first authorized a comprehensive local government for the District, consisting of a governor appointed by the President, and a unicameral 22–member house of delegates elected by the male citizens of the District. An Act to Provide a Government for the District of Columbia, 16 Stat. 419, ch. 62 (1871). That form of representative local government was short-lived; Congress abolished it in 1874. An Act for the Government of the District of Columbia, and for Other Purposes, 18 Stat. 116, ch. 337 (1874). From 1874 until 1967, three unelected Commissioners, appointed by the President, governed the District. *Id.;* An Act Providing a Permanent Form of Government for the District of Columbia, 20 Stat. 102, ch. 180 (1878). [26] In 1967, Congress replaced the Board of Commissioners with an appointed 9–member Council and an appointed Commissioner. Reorganization Plan No. 3 of 1967, 32 F.R. 11669.

26 *See also* Tindall, *supra* note 8, at 141; *see generally* Franchino, *supra* note 10, at 214–223.

It was not until the early 1960's that the voting landscape in the District began to change. On March 29, 1961, the Twenty-third Amendment was ratified. It gave residents of the District of Columbia the right to appoint electors for the election of the President and Vice President of the United States.[27] In 1970, Congress authorized residents of the District to elect a non-voting delegate to the House of Representatives. *See* 2 U.S.C. § 25a. As a corollary, in the wake of the Twenty-third Amendment and the 1970 provision for election of a non-voting delegate to the House, the District became equipped with a rudimentary voting system.

27 The Twenty–Third Amendment provides:

> Section 1. The District constituting the seat of Government of the United States shall appoint in such manner as Congress may direct:
>
> A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.
>
> U.S. Const. amend. XXIII.

In 1973, Congress further relaxed its "exclusive legislation" power over the District by passage of the Home Rule Act of 1973.[28] *See* District of Columbia Self–Government and Governmental Reorganization Act, Pub.L. No. 93–198, 87 Stat. 774 (1973). By that Act, Congress granted District citizens the right to elect a Council authorized to enact local legislation, subject to Congress' ultimate authority, provided the District with an elected Mayor, and further perfected the election apparatus ***81** earlier created to administer presidential and non-voting delegate elections. *Id.* Congress created the District government "to relieve Congress of the burden of legislating essentially local District matters." *Id.* A few years earlier, the Court Reorganization Act of 1970 had created state-like courts of general jurisdiction whose appellate decisions are appealable directly to the Supreme Court by the same process that state court decisions are appealable.[29] In 1995, Congress established the Control Board, consisting of five members appointed by the President, to "eliminate budget deficits and management inefficiencies in the government of the District of Columbia." Pub.L. No. 104–8, 109 Stat. 97 (1995).

28 Over the years, Congress has similarly relaxed its exclusive jurisdiction in enclaves. *See infra* Part III.

29 The judges of these courts are appointed by the President, and they displace the general jurisdiction formerly exercised by the federal District Court and Court of Appeals for the District of Columbia.

Meanwhile, the population of the District, which in 1800 had been less than one fifth of the smallest state, Delaware,[30] and less than a quarter of that contemplated by the Northwest Ordinance of 1787 for the admission of a new state,[31] had burgeoned by 1990 to over 600,000—a number more than equal to the population of several states, *see supra* note 7.

30 Delaware's population in 1800 was approximately 64,000; the District's was approximately 8,000. U.S. Department of Commerce, Bureau of the Census, Historical Statistics of the United States: Colonial Times to 1970, Bicentennial Edition, Part 2, at 25 (1975).

31 The Northwest Ordinance of 1787, ratified by the First Congress in 1789, provided that new states created from the lands of the Northwest Territories needed a minimum population of 50,000 before they could be admitted to the Union. *See* I Stat. 50–52.

5. Evolution of Voting Rights Nationally

Paralleling the evolution of the District of Columbia and a voting apparatus therein, was the evolution of voting rights nationally, "a continuing expansion of the scope of the right of suffrage in this country." *Reynolds v. Sims,* 377 U.S. 533, 555, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). Voting nationally has evolved from 18th century suffrage limited to white, property-owning, tax-paying males, over the age of 21, to the virtual universal suffrage today enjoyed by all but minors, felons, and the people of the District of Columbia. *See also* Alexander Plaintiffs Memorandum in Support of Motion for Summary Judgment, Appendix A.

II

ARTICLE I

The foregoing facts bring the following legal considerations into focus. In *Wesberry,* the Supreme Court considered whether state laws creating congressional voting districts with widely disproportionate populations violated the voting rights of inhabitants of less populous districts guaranteed to them by Article I, section 2 of the Constitution. The Court concluded that the Constitution requires that districts be apportioned so as to satisfy as nearly as possible the maxim "one person, one vote." *Wesberry,* 376 U.S. at 18, 84 S.Ct. 526. The plain statement in *Wesberry,* bears repeating:

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that *unnecessarily* abridges that right.

Wesberry, 376 U.S. at 17–18, 84 S.Ct. 526 (emphasis added). For people in the District of Columbia, Congress is the ultimate "exclusive" legislature. The Secretary's continued failure to include the people of the District of Columbia in apportionment contributes to their heretofore permanent disenfranchisement in their ultimate legislature ***82** — Congress—because the place where they live, once part of the State of Maryland, is not now literally a State. Those who would interfere with the exercise of the "precious" right to vote have a heavy burden of persuasion and proof that their interference is "necessary." To put it simply, the defendants have failed to persuade me that it is necessary for the Secretary to exclude the people of the District from apportionment and thus interfere with their voting for a Member of the House of Representatives.

A

It would seem to be axiomatic that interference with a person's "precious" right to vote for a Member of Congress, such as that exercised by District inhabitants before 1801, and protected from dilution by the *Wesberry* doctrine, violates a constitutional right. In any event, the Supreme Court long ago determined, and has often reiterated, that such a right has a firm foundation in the Constitution.

In a series of cases, beginning with *Ex parte Yarbrough* (*The Ku–Klux Cases*), 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274 (1884), the Supreme Court has held that the Constitution is the source of, and guarantees protection for, the right to vote for Members of the House of Representatives. In *Yarbrough,* the Court validated a statute making it a federal crime to interdict voting by force or intimidation because "the exercise of the right [to vote] [for minorities and for other citizens] is *guaranteed by the constitution,* and should be kept free and pure by congressional enactments whenever that is necessary." *Id.* at 665, 4 S.Ct. 152 (emphasis added). *Yarbrough* clarified the Court's earlier decision in *Minor v. Happersett,* 21 Wall. 162, 88 U.S. 162, 22 L.Ed. 627 (1874). In *Minor,* the Court held that the Fourteenth Amendment's privileges and immunities clause did not confer upon females a right to vote, stating that "the Constitution of the United States does not confer the right of suffrage upon any one." *Id.* at 178. The *Yarbrough* Court explained that this statement did not mean that the Constitution conferred the right to vote upon "no one," but only that it did not confer it upon anyone who happened to claim such a right. *Yarbrough,* 110 U.S. at 664, 4 S.Ct. 152. Females were not a class upon whom the Constitution conferred the right to vote because, as the *Minor* court recognized, at the time of its adoption most states did not permit females to vote and because the very text of the Fourteenth Amendment suggested, in another context, that it contemplated only male voters.[32] *Minor,* 88 U.S. at 172–74, 21 Wall. 162. Of particular significance for the political posterity of the pre–1801 voters, the *Minor* court cautioned that "[t]he right of suffrage, when granted, will be protected. He who has it can only be deprived of it by due process of law, but in order to claim the protection, he must first show that he has the right." *Minor,* 88 U.S. at 176, 21 Wall. 162.

32 Section 2 of the Fourteenth Amendment provides (emphasis added):

> But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature

> thereof, is denied to any of the *male inhabitants* of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis for representation therein shall be reduced in the proportion which the number of such *male citizens* shall bear to the whole number of *male citizens* twenty-one years of age in such State.
>
> U.S. Const. amend. XIV.

Since *Yarbrough,* the Supreme Court has never wavered from its conclusion there that voting in federal elections is a constitutionally-protected right. For example, in 1941, the Court held that qualified voters have a right to participate in congressional primary elections, stating that the right to vote in congressional elections "whatever its appropriate constitutional limitations, ... is a right established and guaranteed by the Constitution." ***83** *United States v. Classic,* 313 U.S. 299, 314, 320, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941). In 1964, the Court started its analysis of the constitutionality of the apportionment of seats in a State legislature from the premise that "[u]ndeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections." *Reynolds,* 377 U.S. at 554, 84 S.Ct. 1362; *see also Wesberry,* 376 U.S. at 17, 84 S.Ct. 526. A few years later, the Court reiterated that "the right to vote in federal elections is conferred by Art. I, § 2, of the Constitution." *Harper v. Virginia State Bd. of Elections,* 383 U.S. 663, 665, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966). More recently, the Supreme Court, in concluding that States may not add to the qualifications for members of Congress that are enumerated in Article I, §§ 2 and 3, observed that "[e]lecting representatives to the National Legislature was a new right, arising from the Constitution itself." *U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779, 805, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995); *see also Burdick v. Takushi,* 504 U.S. 428, 433, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992) ("It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.' ") (quoting *Illinois State Bd. of Elections v. Socialist Workers Party,* 440 U.S. 173, 184, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979)). Accordingly, I would conclude that the inhabitants of the District who voted for representation in the House of Representatives before 1801 were exercising a right to vote created and protected by the Constitution.

B

It is undisputed that the inhabitants of the District ceased to vote for a Member of the House of Representatives after the enactment of the Organic Act in 1801. Yet, neither the Organic Act nor any of the other statutes or instruments effecting cession purported, by their terms, to extinguish that right. The question remains whether that Act, or the cession transaction as a whole, nonetheless necessarily and otherwise lawfully terminated the pre–1801 voting rights of those persons ceded.

The defendants rely heavily upon Chief Justice Marshall's statement in *Loughborough v. Blake,* 5 Wheat. 317, 18 U.S. 317, 324, 5 L.Ed. 98 (1820), that the inhabitants of the District were "a part of the society ... which has voluntarily relinquished the right of representation, and has adopted the whole body of Congress for its legitimate government." However, any reliance on *Loughborough* as controlling precedent is misplaced. The specific issue before the *Loughborough* Court was whether Congress had the power to impose a direct tax on residents of the District of Columbia, *id.* at 318, 5 Wheat. 317, even though the tax apportionment clause then in effect, like the voting apportionment clause, refers by its terms only to "States," U.S. Const. art. I, § 2. The Court held that Congress' "power to lay and collect taxes," *id.* art. I, § 8, included such a power, particularly where it had the power of "exclusive legislation," and that the directive in Article I, section 2, that "taxes shall be apportioned among the several states" did not restrict those powers, *Loughborough,* 18 U.S. at 322–25, 5 Wheat. 317. The statement that District inhabitants "voluntarily relinquished the right to representation," made in response to the argument that taxing the District violated the principle that there should be no taxation without representation, is, at best, dictum. The statement does not authoritatively establish that the District or its people waived any claim to a right to voting representation in Congress. As Chief Justice Marshall said about dicta in a related context the very next year:

> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented

> for decision. The reason of this maxim is ***84** obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Cohens v. Virginia, 19 U.S. 264, 399, 6 Wheat. 264, 5 L.Ed. 257 (1821).

Even if the *Loughborough* dictum were an authoritative conclusion of law (which it was not), it would confirm by necessary inference the pre–1801 voting rights of the people ceded to the District; if they had no such pre–1801 rights they would have had nothing to "relinquish[ ]." *Loughborough,* 18 U.S. at 324, 5 Wheat. 317. More important, the Supreme Court has since held that "[a]n individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a State's electorate." *Lucas,* 377 U.S. at 736, 84 S.Ct. 1459. Although *Lucas* was a Fourteenth Amendment case, the principle it announced does not derive from the Fourteenth Amendment. Rather, the principle that voting rights are not defeasible by majority vote is intrinsic to the concept of a constitutional right. *Cf. College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.,* 527 U.S. 666, 119 S.Ct. 2219, 2229, 144 L.Ed.2d 605 (1999) ("[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights.") (quoting *Edelman v. Jordan,* 415 U.S. 651, 673, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974)). Under the *Lucas* principle, *a fortiori,* even if Maryland's cession and the United States' acceptance ended the access of inhabitants of the ceded portion of that State to the Maryland voting apparatus, the cession could not eliminate the ongoing (albeit inchoate or dormant) constitutional right to voting representation of the District inhabitants ceded there from Maryland and their political posterity.

That pre-cession constitutional rights, absent any lawful waiver, survived the cession is confirmed by Supreme Court opinions in related contexts. In 1901, the Supreme Court addressed the question of whether the provision in Article I, section 8, of the Constitution that states that "all duties, imposts and excises shall be uniform throughout the United States" barred Congress from imposing duties on products coming from the territory of Puerto Rico into the state of New York. *Downes v. Bidwell,* 182 U.S. 244, 21 S.Ct. 770, 45 L.Ed. 1088 (1901). In analyzing this question, Justice Brown, announcing the judgment of the Court, revisited the Supreme Court's decision in *Loughborough,* where the Court had held that Congress could impose a direct tax on the people of the District even though the Article I, section 2 stated that "direct Taxes shall be apportioned among the several States." *Loughborough,* 18 U.S. at 322–325, 5 Wheat. 317. Justice Brown explained the decision in *Loughborough* as follows:

> This District had been a part of the states of Maryland and Virginia. It had been subject to the Constitution, and was a part of the United States. *The Constitution had attached to it irrevocably.* There are steps which can never be taken backward. The tie that bound the states of Maryland and Virginia to the Constitution could not be dissolved, without at least the consent of the Federal and state governments to a formal separation. The mere cession of the District of Columbia to the Federal government relinquished the authority of the states, but it did not take it out of the United States or from under the aegis of the Constitution. Neither party had ever consented to that construction of the cession. If, before the District was set off, Congress had passed an unconstitutional act affecting its inhabitants, it would have been void. If done after the District was created, it would have been equally void; in other words, Congress could not do indirectly, by carving out the District, what it could ***85** not do directly. The District still remained a part of the United States, protected by the Constitution. Indeed, it would have been a fanciful construction to hold that territory which had been once a part of the United States ceased to be such by being ceded directly to the Federal government.

Downes, 182 U.S. at 260–61, 21 S.Ct. 770 (Brown, J.) (emphasis added).

In 1933, applying the theory espoused in *Downes,* the Supreme Court addressed the question of whether the federal judges in the District were entitled to Article III protection against reduction of their compensation. *O'Donoghue,* 289 U.S. 516, 53 S.Ct. 740, 77 L.Ed. 1356. The *O'Donoghue* Court concluded that the inhabitants of the District of Columbia possess "the right to have their cases arising under the Constitution heard and determined" by a genuine Article III court. *Id.* at 540, 53 S.Ct. 740. The Court explained its decision as follows:

> It is important to bear constantly in mind that the District was made up of portions of two of the original states of the Union, and was not taken out of the Union by the cession. Prior thereto its inhabitants were entitled to all the rights guaranties, and immunities of the Constitution, among which was the right to have their cases arising under the Constitution heard and determined by federal courts created under, and vested with the judicial power conferred by, article 3. We think it is not reasonable to assume that the cession stripped them of these rights, and that it was intended that at the very seat of the national government the people should be less fortified by the guaranty of an independent judiciary than in other parts of the Union.

Id.

From the foregoing, it is apparent that the cession transaction could not lawfully terminate or effectively waive the right of "persons" ceded, particularly the 1790–1800 voters, to voting representation in the House of Representatives. Nor could the cession preclude voting representation of the "persons to be" in the ceded area. The Constitution is no mere contract, subject to some kind of rule against perpetuities, between particular individuals and the national government. On the contrary, it is a covenant in perpetuity which makes the United States a fiduciary responsible for protecting for all time the rights created in and by the people who originated the Constitution for the benefit of themselves and their "Posterity." Constitution (Preamble). The people of the District of Columbia today are the political "posterity" of the People in the District who had, and exercised, a constitutional right to vote in congressional elections from 1790 through 1800. Under established constitutional principles, neither the then-People of the District nor their Posterity forfeited that constitutional right when the District became the Seat of Government, and neither Maryland, nor the United States or its officers, had the constitutional authority to forfeit that right for them.

From another perspective, it is noteworthy that since 1820 when the *Loughborough* Court made its observation about voting by people in the District of Columbia, the voting landscape nationwide and in the District has changed dramatically, as has the District and its demographics. There is no evidence that the *Loughborough* court contemplated the time when that territory would be a body politic which was home for upwards of 500,000 people, equal to the population of at least three of the States. It is served by an elected executive authority in the form of a mayor, an elected council which was the functional equivalent of a unicameral legislature, as well as a well-tested set of qualifications and election apparatus for voting for council members, a non-voting delegate in Congress and presidential Electors. In considering the current weight to be accorded the *Loughborough* dictum, it is to be recalled that it was also Chief Justice Marshall who wrote:

> ***86** ... [W]e must never forget that it's a constitution we are expounding.
>
> . . . . .
>
> [It was] intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.

McCulloch v. Maryland, 17 U.S. 316, 407, 415, 4 Wheat. 316, 4 L.Ed. 579 (1819) (Marshall, C.J.); *see also* Byron R. White, *Tribute to Honorable William J. Brennan, Jr.,* 100 Yale L.J. 1113, 1116 (1991) (Constitution is a document cast in "majestic, open-ended clauses").

C

Given that the people living in the District from 1790–1800 had and exercised a constitutionally-protected right to vote for Congressional representation, and that that right was not, and could not have been, lost or waived in 1801 when the federal government assumed exclusive jurisdiction over the District, the question remains whether, under *Wesberry,* anything else necessitates defendants' continuing to deny or interfere with the right of their political posterity to vote for voting representation in the House of Representatives. Looking at the literal text of Article I and any necessary inferences therefrom, the 23rd amendment, nonvoting by citizens in the territories, and the lapse of time since the inhabitants of the District last voted in 1800, my answer is "nothing else."

1. Plain Language

The plain language of the Constitution does not necessitate denying the people of the District the right to voting representation in Congress. Neither the Seat of Government clause nor any other provision of Article I addresses, much less directly precludes, congressional representation for the people of the District. If the Framers intended to deny voting representation in Congress to the inhabitants of the Seat of Government, the Seat of Government clause was an appropriate place to say so. It does not.

The Framers and the drafters of the Bill of Rights knew how to say "no" directly. The original constitution said "no" twenty-seven times. *See, e.g.,* U.S. Const. art. I, § 2, cl. 2 ("*No* Person shall be a Representative who shall not ....") (emphasis added); *see also id.* art. I, § 3, cl. 3 ("*No* Person shall be a Senator who shall not ....") (emphasis added); *id.* art. II, § 1, cl. 5 ("*No* Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President ....") (emphasis added). [33] Nowhere does the Seat of Government clause or any other provision of the Constitution expressly prohibit people in the District from voting for, and enjoying the service of, voting representatives in Congress.

33 Sections 9 and 10 of Article I are a catalogue of express prohibitions. *See, e.g.,* U.S. Const. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall *not* be suspended ....") (emphasis added); *id.* art. I, § 9, cl. 3 ("*No* Bill of Attainder or ex post facto Law shall be passed.") (emphasis added); *id.* art. I., § 10, cl. 1 ("*No* State shall enter into any Treaty, Alliance, or Confederation ....") (emphasis added). Article III provides that "*No* Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." *Id.* art. III, § 3, cl. 1 (emphasis added). Article IV specifies that "*no* new State shall be formed or erected within the Jurisdiction of any other State; *nor* any State formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress." *Id.* art. IV, § 3, cl. 1 (emphasis added). The Bill of Rights also says "no" repeatedly. *See, e.g., Id.* amend. I ("Congress shall make *no* law respecting an establishment of religion, or prohibiting the free exercise thereof ....") (emphasis added); *id.* amend. III ("No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner ....") (emphasis added).

2. Inferences from the use of the word "State"

The use of the word "State" in the various provisions of Article I concerning the ***87** election of members of the House of Representatives does not necessitate denying the people of the District the right to voting representation in Congress. The defendants maintain, in effect, that the use of the word "State" in these provisions creates a necessary inference that people not in a "State," therefore, people in the District of Columbia, cannot choose or be a Representative. [34] In essence, the defendants would apply the maxim *expressio unius est exclusio alterius*—the expression of one thing is the exclusion of another—as the basis for interpreting the term "State." The *expressio unius* maxim is "[a] non-binding rule of statutory interpretation, not a binding rule of law." *Martini v. Federal Nat'l Mortgage Ass'n,* 178 F.3d 1336, 1342 (D.C.Cir.1999). As the Court of Appeals for the District of Columbia Circuit recently explained, in rejecting the application of the maxim to construe a statute,

34 The defendants rely on the following language in Article I: (1) that members of the House of Representatives are chosen by "the People of the several States"; (2) that the "Electors in each State shall have the Qualifications requisite for Electors in the most numerous Branch of the State Legislature"; (3) that Representatives are to be "apportioned among the several States"; (4) that

a Representative must "be an Inhabitant of that State in which he shall be chosen"; and (5) that the "Times, Places and Manner of holding Elections for ... Representatives, shall be prescribed in each State by the Legislature thereof." U.S. Const. art. I, §§ 2, 4; Memorandum on Behalf of Secretary Daley and the United States in Opposition to Plaintiffs' Motion for Summary Judgment and in Support [of] Their Motion To Dismiss Plaintiffs' Claims at 8–10 (filed Dec. 18, 1998) ("Sec'y Opp.").

"[t]he maxim's force in particular situations" ... "depends entirely on context, whether or not the draftsmen's mention of one thing ... does really necessarily, or at least reasonably, imply the preclusion of alternatives." ... That in turn depends on "whether, looking at the structure of the statute and perhaps its legislative history, one can be confident that a normal draftsman when he expressed 'the one thing' would have likely considered the alternatives that are arguably precluded."

Id. at 1343 (quoting *Shook v. District of Columbia Financial Responsibility and Management Assistance Auth.,* 132 F.3d 775, 782 (D.C.Cir.1998)); *see also In re Sealed Case,* 181 F.3d 128, 132, (D.C.Cir.1999) (en banc) ("The legal maxim expressio unius est exclusio alterius ... is not always correct."). As the Supreme Court has explained, "The 'exclusio' is often the result of inadvertence or accident, and the maxim ought not to be applied, when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice." *Ford v. United States,* 273 U.S. 593, 612, 47 S.Ct. 531, 71 L.Ed. 793 (1927) (internal quotations omitted); *see also* Einer Elhauge, *Are Term Limits Undemocratic?,* 64 U. Chi. L.Rev. 83, 91 (1997) ("The underlying difficulty is that the failure to list other things may reflect simple inadvertence, a failure to consider those other things, or an inability to reach a consensus ....").

The Supreme Court's decisions reflect its recognition of the limited utility of the maxim; it generally chooses to justify an interpretation that would be consistent with the maxim on other or additional grounds. [35] For example, in *Powell v.* ***88** *McCormack,* 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491, the House of Representatives adopted a resolution excluding Adam Clayton Powell, Jr. from membership because it found that he had wrongfully diverted House funds and made false reports on expenditures of foreign currency. These facts framed an issue of whether Congress had the power to exclude an individual elected to the House of Representatives for any reason other than those set forth in the text of the Qualifications Clause of the Constitution. [36] The Court concluded that "the Constitution does not vest in the Congress a discretionary power to deny membership by a majority vote" because the qualifications for office expressed in the Constitution were intended to be exclusive, *i.e.,* no additional qualifications could be imposed by Congress. *Id.* at 548, 89 S.Ct. 1944. Although such an interpretation is consistent with the application of the *expressio unius* maxim, the Court did not mention it. Instead, the Court pointed to the Framers' concern that a future Congress might fall into the error committed by Parliament in its 18th century harassment of its non-conformist member, John Wilkes. *Id.* at 527–31, 89 S.Ct. 1944. With Wilkes' experience in mind, the *Powell* Court did not rest its interpretation of the Qualifications Clause on any maxim. Instead, it relied heavily upon the "relevant historical materials" and "the basic principles of our democratic system." *Id.* at 522, 548, 89 S.Ct. 1944.

35 In this analysis of the role of the *exclusio unius* maxim to the circumstances of this case, I do not overlook the several occasions in which the Supreme Court, and the Framers themselves invoked or discussed the maxim. For example, Alexander Hamilton argued that the enumeration of certain cases over which the federal courts have jurisdiction, *see* U.S. Const. art. III, § 2, cl. 1, "marks the precise limits beyond which the federal courts cannot extend their jurisdiction," because "the specification would be nugatory if it did not exclude all ideas of more extensive authority." The Federalist No. 83, at 497 (Alexander Hamilton). He explained that "an affirmative grant of special powers would be absurd, as well as useless, if a general authority were intended." *Id.* In *Marbury v. Madison,* Chief Justice Marshall echoed Hamilton's reasoning in concluding that Congress could not augment the original jurisdiction of the Supreme Court as described in Article III, § 2, clause 2. 5 U.S. 137, 174, 1 Cranch 137, 2 L.Ed. 60 (1803).

The Supreme Court has also treated the Constitution's enumeration of particular exceptions as barring the recognition of other exceptions. In *INS v. Chadha,* in considering the constitutionality of the legislative veto, the Court identified four "carefully delineated exceptions from presentment and bicameralism," which generally served as prerequisites for the exercise of legislative authority. 462 U.S. 919, 956, 103 S.Ct. 2764, 77

L.Ed.2d 317 (1983). The Court concluded that the legislative veto was unconstitutional in part because the veto "was not within any of the express constitutional exceptions authorizing one House to act alone." *Id.*

None of the foregoing applications of negative inference necessitates the use of negative inference to read Article I as denying congressional representation to the people of the District. The provisions of Article I at issue here do not fall into the category of affirmative grants of specific powers such as were discussed by Hamilton in The Federalist No. 83 or at issue in *Marbury;* nor do they involve enumerated exceptions, as in *Chada.* Moreover, unlike the provisions construed in *Marbury* and *Chadha,* the defendants' proposed interpretation of Article I is not necessary to avoid an "absurd" or "nugatory" meaning.

36 With respect to the House of Representatives, the Constitution provides: "No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen." U.S. Const. art. I, § 2, cl. 2.

Similarly, in *Term Limits,* 514 U.S. 779, 115 S.Ct. 1842, the Supreme Court concluded that the Qualifications Clause barred States from imposing term limits on members of Congress. Again, although its interpretation of the clause was consistent with the application of the *expressio unius* maxim,[37] the Court based its conclusion on "the text and structure of the ***89** Constitution, the relevant historical materials, and, most importantly, the 'basic principles of our democratic system.' " *Id.* at 806, 115 S.Ct. 1842 (quoting *Powell,* 395 U.S. at 548, 89 S.Ct. 1944).

37 In reaching this conclusion, I do not overlook footnote 9 in the *Term Limits* majority opinion which acknowledges that the same result could be reached through application of the maxim. However, the majority was merely responding to the dissent's argument that the application of the maxim had no place in the analysis, rejecting the argument that "it had no merit." The majority's decision, however, clearly was not controlled by the maxim, as shown by the fact that its only mention appears in a footnote. Even Justice Story, whom the *Term Limits* court cites as supporting the application of the maxim in the interpretation of the Qualifications Clause, cautioned that this maxim was "susceptible of being applied, and indeed [is] often ingeniously applied, to the subversion of the text and the objects of the instrument." 1 Joseph Story, Commentaries on the Constitution § 448, at 342 (Melville M. Bigelow, 5th ed.1905). In his view, therefore, "[t]he truth is, that, in order to ascertain how far an affirmative or negative provision excludes or implies others, we must look to the nature of the provision, the subject-matter, the objects, and the scope of the instrument." *Id.* at 343.

In light of the interpretive principles articulated and applied by *Powell* and *Term Limits,* I believe that the issue before this Court should not be resolved simply by rote application of the *expressio unius* maxim. The question remains whether other considerations justify the negative inference from the use of the term "States" proposed by the defendants. An examination of the structure and purpose of Article I, the relevant historical materials, parallel constitutional provisions, and the basic principles of our democratic system, leads me to the conclusion that none do.

a. *Structure and Purpose of Article I*

There is nothing in the use of the word "States" in the provisions of Article I pertaining to the election of members of the House of Representatives that expressly precludes recognition of a right for the inhabitants of the District to vote for voting representation in Congress. More importantly, no policy purpose would be served by adopting such an interpretation. The primary purpose of the references to "States" in Article I is apparent when one considers that it was a priority of the Framers to set up a mechanism to create a *national* form of representative government. As Justice Kennedy observed in his concurring opinion in *Term Limits:* "the Constitution takes care both to preserve the States and to *make use of their identities and structures at various points in organizing the federal union.*" *Id.* at 840, 115 S.Ct. 1842 (Kennedy, J., concurring) (emphasis added). In 1787, the 13 original States were the obvious and, actually, only political subdivisions capable together of conducting national elections. Chief Justice Marshall made the point in respect to the discrete role of States and the people in the process employed to ratify the original Constitution:

> It is true, [the people] assembled in their several states—and *where else should they have assembled?* ... [W]hen they act, they act in their states. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the state governments.

McCulloch, 17 U.S. at 403, 4 Wheat. 316 (emphasis added). It does not denigrate the "sovereignty" of States and their other roles, internally and vis-a-vis the national government, to recognize the very significant use of their "identities and structures" in the national election process. *Term Limits,* 514 U.S. at 840, 115 S.Ct. 1842. Nor does such use of them in that process necessarily impute to the Framers an intention to confer on the States anything other than an essentially ministerial role in that process. Nor does it necessarily imply an intention to exclude the people of the District from that process.

As the *Term Limits* Court further explained, "the Framers envisioned a uniform national system, rejecting the notion that the Nation was a collection of States, and instead creating a direct link between the National Government and the people of the United States." *Term Limits,* 514 U.S. at 803, 115 S.Ct. 1842. With this goal in mind, the majority of the references to "States" in Article I can best be understood as specifying and using the most practical mechanisms available in the 18th century by which the people scattered among the several States could select their national representatives. *See also* The Federalist No. 61, at 372 (Alexander Hamilton) (referring to Article I as "the provisions respecting elections"). So understood, their employment in the circumstances that obtained in the late 18th century should not preclude employment by the people of the District of the election apparatus only available to them since the 1960's through which to regain representation in the House of Representatives ***90** enjoyed by their political forebears until 1801.

The requirement that a Representative be an inhabitant of the State which he or she represents, *see* U.S. Const. art. I, § 2, is the only reference to States in the context of choosing Representatives that is not related to using the States as a mechanism for selecting Representatives. It seems obvious, however, that the primary, if not sole, purpose of that requirement was to see to it that each Representative live among the people represented. It should be obvious that this requirement was not aimed at denying the right of the people of the District to vote for voting representation in the House of Representatives. At most, it means that if the inhabitants of the District enjoyed representation by a member from the District, their Representative should reside there.

The Supreme Court's decisions in *Powell* and *Term Limits* do not undermine, indeed they tend to confirm, these interpretations. In both *Powell* and *Term Limits,* the Court was concerned with the question of whether additional qualifications beyond those expressly stated in the Qualifications Clauses of the Constitution could be imposed on a potential member of Congress. In both cases, the Court held that they could not, relying in large part on its understanding that the Framers' intent in adopting those clauses was to ensure that the opportunity to serve as a Member of the House of Representatives should be open to as many as possible. *Term Limits,* 514 U.S. at 794–95, 819, 115 S.Ct. 1842; *Powell,* 395 U.S. at 547, 89 S.Ct. 1944. The precise question here is not whether to impose additional qualifications, but rather how to interpret the meaning and scope of one of those qualifications. In an important sense, including the people of the District (whose political forebears were people of one of the several States) and representation for them in the House of Representatives in the apportionment process will serve a constitutional purpose honored by the *Powell* and *Term Limits* courts that "election to the National Legislature should be open to all people of merit." *Term Limits,* 514 U.S. at 819, 115 S.Ct. 1842; *see also Powell,* 395 U.S. at 547, 89 S.Ct. 1944.

b. *Historical Materials*

The relevant historical materials do not necessitate a conclusion that the Framers intended to deny to the inhabitants of the yet-to-be-selected Seat of Government the right to vote for voting representation in Congress through the use of the term "States" in Article I. On the contrary, the Framers had a clear purpose in creating a national Seat of Government subject to "exclusive legislation" by Congress and fully independent of any State, *see supra* Part I.B.1, a purpose not furthered by denying its inhabitants the right to vote for voting representation in the House of Representatives. Indeed, the only recorded discussions of, or references to, voting by the inhabitants of the District appear

to have occurred after the Constitutional Convention, either during the ratification debates, at the time of the passage of the Organic Act in 1801, or in later Supreme Court opinions.

(i) *Seat of Government Clause*

It is undisputed that the Framers' primary, if not only, policy purpose with respect to the Seat of Government clause, was to create a specific Seat of Government, instead of a roving one, subject to the exclusive legislative power of Congress, and free from dependence upon, and the interference from, any State. *See supra* Part I.B.1. There is no showing that adopting the negative inference proposed by the defendants and, thereby, denying the inhabitants of the District the right to vote for voting representation in the House of Representatives would further that policy purpose, [38] or that the Framers ***91** thought that it would. [39]

38 Indeed, the ultimate test might well be: would voting for representation in the House of Representatives interfere with the special authority of the federal government in respect to the federal enclave that is the Seat of Government. It seems obvious that a voting representative in the House of Representatives for District residents would no more "interfere[ ] with the jurisdiction asserted by the Federal Government," than did Kentucky's imposition of a license tax on residents of a federal enclave, approved by the Supreme Court in *Howard v. Commissioners of Sinking Fund,* 344 U.S. 624, 73 S.Ct. 465, 97 L.Ed. 617 (1953).

39 Indeed, in other instances where the Framers were particularly concerned about the influence of States, the denial of voting representation in Congress was never part of the solution. For example, to ensure the independence of Representatives and Senators, the Constitution provides that the National Treasury, not the States, pays their salaries. U.S. Const. art. I, § 6; *Term Limits,* 514 U.S. at 809–10, 115 S.Ct. 1842. Similarly, to ensure the independence of Article III Justices and judges, Article III guarantees life tenure during good behavior, and proscribes diminution of judges' compensation while in office. *See* The Federalist No. 79 (Alexander Hamilton). If the Framers thought that denial of voting representation in Congress was necessary to assure independence from the States, they should have also denied it to Representatives, Senators and, particularly, Article III judges.

(ii) *James Madison*

In The Federalist Number 43, in discussing the Seat of Government, James Madison wrote:

> as [the federal district] is to be appropriated to this use with the consent of the State ceding it; as the State will no doubt provide in the compact for the rights and the consent of the citizens inhabiting it; as the inhabitants will find sufficient inducements of interest to become willing parties to the cession; as they *will have had their voice in the election of the government which is to exercise authority over them;* as a municipal legislature for local purposes, derived from their own suffrages, will of course be allowed them; and as the authority of the legislature of the State, and of the inhabitants of the ceded part of it, to concur in the cession will be derived from the whole people of the State in their adoption of the Constitution, every imaginable objection seems to be obviated.

The Federalist No. 43, at 272–73 (James Madison) (emphasis added). It has been suggested that the "plain meaning" of Madison's statement that the inhabitants of the District "will have had their voice" is that "only the first generation of District residents will have had a vote with respect to their destiny." Stephen J. Markman, Statehood for the District of Columbia 39 (1988). Markman explains:

> [Madison] speaks in the future perfect tense, "they will have *had* their voice." If he meant that District residents would have a continuing voice in the national government, the proper language would have been "they will have their voice."

Id. However, a more plausible reading, context considered, is that Madison's statement is, at most, ambiguous on

the question of District citizens' right to vote for voting representation in Congress.

Interpreting Madison's statement that the inhabitants of the Seat of Government "will have had their voice in the election of the government which is to exert authority over them" as a concession that those inhabitants would permanently lose their voice in congressional elections is in substantial tension with—in fact, seems to contradict—the natural reading of other contributions to The Federalist by Madison. A basic principle of Madison's conception of the House of Representatives was that, under the Constitution, the authority of the sitting Congress over the People derives from the most recent election and continues only until the next one. *See* The Federalist No. 52, at 330 (James Madison) ("the greater the power is, the shorter ought to be its duration"). Under Article I, the composition of the government which is to exercise authority over ***92** the District changes with each biennial federal election. If District inhabitants are unable to participate in the election of each new Congress, they have not "had a voice" in the election of their government merely because they *once* had a voice in the election of a predecessor government. Thus, Madison's statement is arguably consistent with the prospect that District inhabitants would have voted for the incumbent Congress or government and would expect to vote every two years thereafter for each of the successor Congresses or governments.

Moreover, Madison also stated that "*every imaginable objection* seems to be obviated." The Federalist No. 43, at 273 (emphasis added). It is difficult to reconcile that statement with an interpretation that inhabitants of the District would have only one last chance to elect representatives to a single session of the House of Representatives, while new Congresses, elected every two years, would continue to exercise authority over them *ad infinitum,* without their being represented there. It is difficult to believe that Madison, his strong views about representative government and individual rights considered, could not imagine anyone objecting to such disenfranchisement. In point of fact, the District residents of the area ceded by Madison's very own Virginia objected so vigorously and so long to their lack of voting representation in Congress that they ultimately persuaded Congress to cede that area back to Virginia. *See supra* note 23. Indeed, Madison's conclusion that every objection would be obviated followed his statement that "the State will no doubt provide in the compact for the rights and the consent of the citizens inhabiting [the federal district]." Madison might well have been assuming that the Constitution required the ceding State to provide for the protection of the certain rights, including the right to vote for voting representation in the House of Representatives, if not by the ceding State, then by the United States as a state-imposed condition of the cession. Of course, Maryland did no such thing, further reducing the precedential force Madison's ambiguous observation.

The substantive problems flowing from interpreting Madison as recognizing that the inhabitants of the District would be denied their right to vote for voting representation in Congress are far more troubling than any purported grammatical awkwardness which may result from a contrary interpretation. Therefore, I conclude that Madison's statement does not necessitate a conclusion that the Framers intended to deny the people of the District the right to vote for voting representation in the House of Representatives or that the references to "States" should be interpreted to have that effect.

(iii) *Alexander Hamilton*

Alexander Hamilton, a vigorous proponent of the Constitution, unsuccessfully offered the following amendment during the New York ratifying convention:

> That When the Number of Persons in the District of Territory to be laid out for the Seat of the Government of the United States, shall according to the Rule for the Apportionment of Representatives and direct Taxes amount to _____ such District shall cease to be parcel of the State granting the Same, and Provision shall be made by Congress for their having a District Representation in that Body.

5 The Papers of Alexander Hamilton 189–90 (Harold C. Syrett & Jacob E. Cooke eds., 1962). Although the amendment, had it been ratified, would have ensured District inhabitants the future right to vote for voting representation in Congress, it does not follow that its failure of adoption necessitates denial of that right.

So far as I have been able to determine from the parties' submissions and other research, neither the records of the New York convention nor Hamilton's papers reveal any

remarks by Hamilton explaining his proposal. *See* Papers of Alexander ***93** Hamilton. One possible interpretation is that the amendment was designed to provide a formula for District representation because Article I would require such representation for the District once it was created. Another is that is that Hamilton believed that, absent his amendment, the District would remain part of the ceding State to the extent that its residents would vote through that State's apparatus. Also, Hamilton's proposal is consistent with the possibility that Hamilton believed that an amendment to the Constitution would be required to allow the people of the residents of the District to vote. Given the number of alternative explanations of this amendment, all of which are speculative, I would conclude that the mere existence of this proposed amendment is not significant evidence that the Framers intended to deny the people of the District the right to vote for voting representation in Congress or that the references to "States" were intended to have that effect.

(iv) *Thomas Tredwell*

Thomas Tredwell argued in the New York ratifying convention that inhabitants of the proposed Seat of Government would not and should not be able to participate in congressional elections:

> The plan of the *federal city,* sir, departs from every principal of freedom, as far as the distance of the two polar stars from each other; for, *subjecting the inhabitants of that district to the exclusive legislation of Congress, in whose appointment they have no share or vote, is laying a foundation on which may be erected as complete a tyranny as can be found in the Eastern world.*

2 Elliot's Debates at 402, *reprinted in* 3 Kurland and Lerner, *supra* note 12, at 225 (emphasis added). However, Tredwell opposed not only the Seat of Government clause, but the entire Constitution. As such an opponent, his characterization of the Constitution's effect on District inhabitants is "entitled to little weight." *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 203 n. 24, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976) ("Remarks of this kind made in the course of legislative debate or hearings other than by persons responsible for the preparation or the drafting of a bill, are entitled to little weight. This is especially so with regard to the statements of legislative opponents who in their zeal to defeat a bill understandably tend to overstate its reach.") (internal citations, ellipsis and quotation marks omitted); William N. Eskridge, Jr., *Should the Supreme Court Read the Federalist but not Statutory Legislative History?,* 66 Geo. Wash. L.Rev. 1301, 13__ (1998) ("[Opponents'] strategic statements are worth little in understanding the provision if it is adopted, because their incentives are to exaggerate and distort the meaning and effect of the provision."). Accordingly, Tredwell's statements shed little, if any, light on the Framers' intent with respect to the voting rights of the inhabitants of the District or the interpretation of the references to "States" in Article I.

(v) *Organic Act*

There were statements made at the time of the enactment of the Organic Act in 1801 which assume that its enactment would have the effect of terminating the right of inhabitants of the District to vote for voting representation in the House of Representatives.[40] I do not consider those statements to be persuasive evidence that the Framers' of the Constitution intended such a outcome to result from their use of the term "States" or from the language of any other provision in the Constitution. The Organic Act debates occurred over fourteen years after the Constitutional Convention and over ten years after the First Congress selected the location of the Seat of Government. The views of individual participants in those debates, even if they could be attributed to the Sixth Congress as a whole, would be an unreliable indication of the understanding of the ***94** Founders during the time before the location of the Seat of Government had been determined. Defendants do not suggest that those who made the statements participated in the Convention or were "au courant" in 1787. Moreover, given the modest size of the District's population in 1801, the drafters of the Organic Act might well have assumed, without knowing, that the Framers had simply not considered providing affirmatively, yet not affirmatively precluding, for the District's relatively few inhabitants. A member of Congress and two Senators representing 8,000 souls could have very awkward and disruptive of the power balance. Had populous New York or Philadelphia been chosen as the permanent Seat of Government, however—certainly a possibility in 1787, *see supra* Part I.B.1,—it seems unlikely that 1801 Congressmen would have seen the denial of voting representation for the District's population as the Framers' manifest design. These facts make it, in my view,

unreasonable to assume that the views expressed at the time of the adoption of the Organic Act reliably reflect any decision by the Framers, which were have necessarily been formed without knowing whether the site of the Seat of Government would be New York, Philadelphia, or some other place, urban or rural.

40 *See* Maj. Op. at notes 29, 30, 32, 34 and accompanying text.

(vi) *Loughborough*

Finally, there is Chief Justice Marshall's 1820 statement in *Loughborough* that the inhabitants of the District were "a part of the society ... which has voluntarily relinquished the right of representation, and has adopted the whole body of Congress for its legitimate government." 18 U.S. at 324, 5 Wheat. 317. Defendants rely very heavily upon the *Loughborough* statement because, among other things, Chief Justice Marshall was present at the creation. As Justice Jackson put it so elegantly, the Chief Justice "wrote from close personal knowledge of the Founders and the foundation of our constitutional structure ...." *National Mut. Ins. Co. v. Tidewater Transfer Co.,* 337 U.S. 582, 586–87, 69 S.Ct. 1173, 93 L.Ed. 1556 (1949). But the *Loughborough* dictum does not necessarily support defendants' persistent contention that the Constitution *ab initio* precluded voting representation in Congress for inhabitants of the Seat of Government, wherever it might ultimately be. Rather the *Loughborough* dictum can better be read to mean what it says and clearly implies: Chief Justice Marshall believed that some time after the Constitution was ratified, the "part of the society" constituting inhabitants of the District "voluntarily relinquished" voting rights that they had previously enjoyed, including specifically, apportioned rights to representation in the House of Representatives. However, the *Loughborough* dictum cannot be reconciled with the present understanding of the nature of constitutional rights—including rights under the *original* Constitution. The parties have not cited (and my research has not disclosed) any documentary evidence that inhabitants of the District ever actually waived their voting rights individually or collectively, either before cession or after it. Finally, as previously discussed, the concept of relinquishment "by constructive consent is not a doctrine commonly associated with surrender of constitutional rights." *College Savings Bank,* 119 S.Ct. at 2229 (quoting *Edelman,* 415 U.S. at 673, 94 S.Ct. 1347); *Lucas,* 377 U.S. at 736, 84 S.Ct. 1459; *see supra* Part II.B. Accordingly, this dictum does not necessitate a conclusion that by using the word "States" in Article I or in drafting any other provisions of the Constitution in 1787 the Framers intended to deny to the inhabitants of the yet-to-be-selected Seat of Government the right to vote for voting representation in the House of Representatives.

c. Parallel Constitutional Provisions

The use of the term "State" in parallel provisions of the Constitution does not necessitate or justify the negative inference proposed by the defendants. To the contrary, as Supreme Court decisions make ***95** clear, the term "State" is not necessarily interpreted as meaning "and not the District of Columbia."

The defendants rely heavily on the Supreme Court's decision in *Hepburn & Dundas v. Ellzey,* 6 U.S. 445, 2 cranch 445, 2 L.Ed. 332 (1805). In *Hepburn,* the Supreme Court considered whether citizens of the District could bring suits in federal court. Section 11 of the Judiciary Act of 1789 gave federal courts jurisdiction to hear cases where "the suit is between the citizen of the State where the suit is brought, and a citizen of another State." 1 Stat. 73, 78. The Court looked to Article III of the Constitution, which confers power on the federal courts to hear suits "between Citizens of different States," to answer the question of whether the reference to "States" in the statute included the District. The *Hepburn* Court concluded that the reference to "States" in the Constitution, and therefore in the statute, did not include the District. *Id.* at 452–53, 2 Cranch 445. However, it did not consider whether the reference to States in Article III *precluded* jurisdiction over suits between citizens of the District and citizens of a State.

In 1948, Congress enacted a statute that treated the District as a State so that its residents could maintain diversity suits in federal courts. 62 Stat. 869 (codified at 28 U.S.C. § 1332(d)). In 1949, the Supreme Court upheld that statute as an appropriate exercise of Congress' power under the District Clause, even though Article III, § 2, clause 1, only refers to cases "between Citizens of different States." *Tidewater,* 337 U.S. 582, 69 S.Ct. 1173. There is no majority opinion. However, the *Tidewater holding* confirms what is now the law: the Constitution does not bar Congress from conferring federal diversity jurisdiction in cases brought by a District resident even though that individual is not literally a citizen of a "State." Accordingly, the use of the term "State" in the diversity jurisdiction clause of the Constitution cannot mean "and not of the District of Columbia."

Similarly, the Supreme Court has held that the Full Faith and Credit clause in Article IV of the Constitution, which provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State," U.S. Const. art. IV, § 2, binds the courts of the District equally with the courts of the States. *Loughran v. Loughran,* 292 U.S. 216, 228, 54 S.Ct. 684, 78 L.Ed. 1219 (1934).

Further, if the references to "States" in Article I, § 2, necessarily exclude the people of the District, then the reference to "Citizens of each State" in Article IV, § 2, clause 1, would prohibit the enjoyment of an enforceable right to travel by District citizens. Article IV, § 2, clause 1, guarantees that "[t]he Citizens of each *State* shall be entitled to all Privileges and Immunities of Citizens in the Several States" (emphasis added). This provision of the Constitution protects a fundamental component of the right to travel, "the right of a citizen of one State ... to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State." *Saenz v. Roe,* 526 U.S. 489, 119 S.Ct. 1518, 1525, 143 L.Ed.2d 689 (1999). The privileges and immunities clause of Article IV "provides important protections for nonresidents who enter a State whether to obtain employment, to procure medical services, or even to engage in commercial shrimp fishing." *Id.* at 1526 (internal citations omitted). It defies common sense to suppose that the clause implicitly requires the denial of an enforceable right to travel to citizens of the District, leaving treatment of District citizens to the exclusive discretion of each State they visit. It is only slightly less implausible to imagine that the Framers meant to leave District citizens' right to travel dependent upon the legislative grace of Congress. In any event, the implausibility of these two interpretations of the Article IV privileges and immunities ***96** clause—that it prohibits a right to travel for District citizens, or that it neither prohibits nor guarantees such a right—suggests that neither interpretation follows simply from the application of common sense to the plain language of the clause.

Accordingly, the interpretations of the term "State" in other provisions of the Constitution support a conclusion that the references to "States" in Article I do not necessarily imply "and not the District of Columbia."

d. Democratic principles

As reiterated by the Supreme Court in *Term Limits* and *Powell,* interpretation of the Constitution, particularly Article I, should be guided by the fundamental democratic principles upon which this nation was founded. *Powell,* 395 U.S. at 547, 89 S.Ct. 1944; *Term Limits,* 514 U.S. at 819–823, 115 S.Ct. 1842. Absent any persuasive evidence that the Framers' intent in using the term "State" was to deny the inhabitants of the District the right to vote for voting representation in the House of Representatives, a consideration of fundamental democratic principles further supports the conclusion that the use of that term does not necessitate that result.

A republican, that is representative, form of government, is a keystone in the Constitution's structure, a keystone hewn directly from the Declaration of Independence; the denial of representation was one of the provocations that generated the Declaration and the War that implemented it.[41] Article I creates the republican form of the national government; Article IV guarantees that form to each state and its people.

41 For example, the Declaration stated that the King: "has refused to pass other Laws for the Accommodation of large Districts of People, unless those People would relinquish the Right of Representation in the Legislature, a Right inestimable to them, and formidable to Tyrants only." The Declaration of Independence ¶ 5 (U.S.1776).

Recent Supreme Court analysis confirms the continuing vitality of these principles. As Justice Kennedy, writing for the Court, aptly described it:

> By splitting the atom of sovereignty, the founders established two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.

Alden v. Maine, 527 U.S. 706, 119 S.Ct. 2240, 2265, 144 L.Ed.2d 636 (1999) (internal quotations omitted). Thus, the people of each state are sovereign in that state; the people of the Nation are sovereign vis-a-vis the national government. As the Supreme Court has explained:

> [R]epresentatives owe primary allegiance not to the people of a State, but to the people of the Nation. As Justice Story observed, each Member of Congress is "an officer

> of the union, deriving his powers and qualifications from the constitution, and neither created by, dependent upon, nor controllable by, the states.... Those officers owe their existence and functions to the united voice of the whole, not of a portion, of the people."

Term Limits, 514 U.S. at 803, 115 S.Ct. 1842 (quoting 1 Story § 627). The Court emphasized that "the right to choose representatives belongs not to the States, but to the people.... Thus the Framers, in perhaps their most important contribution, conceived of a Federal Government directly responsible to the people, possessed of direct power over the people, and *chosen directly, not by the States, but by the people.*" *Term Limits,* 514 U.S. at 820–21, 115 S.Ct. 1842 (emphasis added). The Court found the principle firmly grounded in Chief Justice Marshall's oft-cited observation that

> [t]he government of the Union, then, ... is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised ***97** directly on them, and for their benefit.

Id. (quoting *McCulloch,* 17 U.S. at 404–05, 4 Wheat. 316).

Reciprocally, the authority of the national government operates directly upon the people, as distinguished from the states themselves.

> [T]he constitutional design secures the founding generation's rejection of the concept of a central government that would act upon and through the States in favor of a system in which the State and Federal Governments would exercise concurrent authority over the people—who were, in Hamilton's words, "the only proper objects of government."

Alden, 119 S.Ct. at 2247 (quoting The Federalist No. 15, at 109) (Alexander Hamilton) (other internal quotations omitted); *Term Limits,* 514 U.S. at 803, 115 S.Ct. 1842 ("In adopting [the Constitution], the Framers envisioned a uniform national system, rejecting the notion that the Nation was merely a collection of States, and instead creating a direct link between the National Government and the people of the United States."); *New York v. United States,* 505 U.S. 144, 166, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992) ("[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.").

The importance of voting by the people in a representative democracy, such as the Constitution established, is so obvious that it is difficult to articulate its provenance. Yet, there is no dispute that voting by the people and the existence of a representative democracy are inextricably linked. One simply cannot exist without the other. As the Supreme Court has repeatedly recognized, following the words of Alexander Hamilton, it is a "fundamental principle of our representative democracy ... that 'the people should choose whom they please to govern them.' " *Term Limits,* 514 U.S. at 795, 115 S.Ct. 1842 (quoting *Powell,* 395 U.S. at 547, 89 S.Ct. 1944 (quoting 2 Elliot's Debates 257)). As the *Reynolds* Court observed, "the right of suffrage is a fundamental matter in a free and democratic society" and "the right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." 377 U.S. at 555, 561, 84 S.Ct. 1362.

Thus, the very structure of the national government, subjected by the Constitution to the ultimate sovereignty of the people, strongly negates the argument that either the Article I references to "States," or the absence of any mention of voting for the people of the District in the District Clause, necessarily precludes voting by and representation of the people of the District. Accordingly, the democratic principles reflected in the structure of the government created pursuant to the Constitution weigh decisively against the negative inference proposed by the defendants—an inference that would result in the denial of the right to vote for voting representation in the legislature with exclusive authority over the District.

For all of the above reasons, the literal references to the "States" in Article I do not necessitate denying to the people of the District the right to vote for voting representation in the House of Representatives.

3. Twenty–Third Amendment

Defendants also argue that the adoption of the Twenty-third Amendment, giving the people of the District to right to choose electors to participate in the elections of the President and Vice–President, necessarily means that a similar constitutional amendment would be required to provide the inhabitants of the District with the right to vote

for voting representation in the House of Representatives. First, the defendants maintain the adoption of the amendment "confirm[s] the understanding *and intent* of both Congress and the people of the ratifying States that the District of Columbia is not otherwise a 'State' for ***98** purposes of federal elections except as provided for by this Amendment." Sec'y Opp. at 12–13; *see also* Memorandum of Points and Authorities in Support of the Motion to Dismiss of Defendants Robin H. Carle, Wilson Livingood and James M. Eagen III, and Opposition to Plaintiffs' Motion for Summary Judgment in *Alexander, et al. v. Daley, et al.* at 23–24 (filed Dec. 18, 1998) ("House Officers Opp."). However, the suggestion that the understanding of the people adopting a constitutional amendment in 1961 could confirm the 1787 understanding of the Framers of the Constitution appears to have no precedent in constitutional interpretation.

Next, the defendants point to the legislative history of the amendment which includes the statement that it "would not authorize the District to have representation in the Senate or the House of Representatives." H. Rep. No. 86–1698, at 2–3, *reprinted in* 1960 U.S.C.C.A.N. 1459, 1462. Of course, no one is suggesting that the Twenty-third Amendment authorizes such representation.

Finally, the defendants argue plaintiffs' position must be rejected because "if plaintiffs' argument were correct, the 23rd Amendment would have been unnecessary." House Officers Opp. at 24. The defendants invoke Chief Justice Marshall's statement in *Marbury v. Madison* that "[i]t cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such construction is inadmissible, unless the words require it." 5 U.S. 137, 174, 1 Cranch 137, 2 L.Ed. 60 (1803). First, there is only a presumption, and not a rigid rule, against interpretations that yield superfluous constitutional provisions. For example, the Supreme Court has noted that Article I, section 8, clause 14, of the Constitution, which spells out Congress' power "[t]o make Rules for the Government and Regulation of the land and naval Forces," is "technically superfluous," *United States v. Stanley,* 483 U.S. 669, 682, 107 S.Ct. 3054, 97 L.Ed.2d 550 (1987), in light of Article I, section 8, clause 18—the Necessary and Proper Clause. *See also* Akhil Reed Amar, *Constitutional Redundancies and Clarifying Clauses,* 33 Val. U.L.Rev. 1 (1998); Sanford Levinson, *Accounting for Constitutional Change,* 8 Const. Commentary 409, 422–28 (1991). Second, the application of the presumption can, at best, only illuminate the meaning of the Twenty-third Amendment, not provisions of the original Constitution, such as Article I. The logic of the presumption is that the drafters of a document are unlikely to have included redundancies, but, of course, the drafters of Article I did not include the Twenty-third Amendment. In light of these considerations, the adoption of the 23rd amendment should not be relied upon in interpreting the original constitutional provisions at issue here. For the same reasons, the proposed, but never adopted, amendments pertaining to voting by District inhabitants shed no light on the issues before us. [42]

42 In 1978, Congress approved and submitted to the states for ratification an amendment to the Constitution providing that "for purposes of representation in Congress ... the District ... shall be treated as though it were a State." H.R.J. Res. 554, 95th Cong., 2d Sess. (1978). Only sixteen states approved it. *D.C. Vote Amendment Dies,* Cong. Q. 404, 404–05 (1985 Almanac). History records that, over the years between 1801 and 1978, Congress entertained up to 150 resolutions to amend the Constitution "to provide the District with some measure of voting to enfranchise District residents." *District of Columbia Representation in Congress: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary,* 95th Cong., at 353–54 (1978) (Issue Brief, Congressional Research Service). After the failure of the 1978 amendment, a principal sponsor observed: "We all know what's going on here. Opponents of statehood have felt in the past that the District of Columbia is too urban, too liberal, too Democratic, too black." 124 Cong Rec. 26345 (1978) (statement of Sen. Kennedy).

4. Territories

Two circuits have concluded that residents of the Territories have no right to participate in the election of the President ***99** or Vice President. *See De La Rosa v. United States,* 32 F.3d 8 (1st Cir.1994) (per curiam), *cert. denied,* 514 U.S. 1049, 115 S.Ct. 1426, 131 L.Ed.2d 308 (1995); *Attorney General of Territory of Guam v. United States,* 738 F.2d 1017 (9th Cir.1984), *cert. denied,* 469 U.S. 1209, 105 S.Ct. 1174, 84 L.Ed.2d 323 (1985). Assuming, *arguendo,* that citizens of territories also lack the right to vote in Congressional elections, that would not necessitate denying the people of the District the right to vote for voting representation in the House of Representatives. No territory or its inhabitants were ever part of the "several States"; nor did the inhabitants of

our territories ever vote for representation in the House. Nor were the people in the territories, or their forbears, ever ceded there. In contrast, the inhabitants of the District today are the political posterity of the original people of the District, who were, until ceded to the United States, "people of the several States" who voted in federal elections until 1801. Citizens of the territories cannot claim a similar provenance. The foregoing considered, it simply does not follow that because people of the territories have never been entitled to voting representation in Congress that the people of the District must necessarily be denied renewal of their right to vote for voting representation in the House of Representatives.

5. Lapse of Time

The mere fact that nonvoting by the people of the District has been a continuous and unbroken practice since 1801 does not necessitate denying the people of the District today the right to vote for voting representation in the House of Representatives.[43] The Supreme Court has never hesitated to recognize constitutional rights, no matter when recognition is sought and no matter how long practices to the contrary have continued. Not so long ago, the Court observed, "That an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date." *Powell,* 395 U.S. at 546–47, 89 S.Ct. 1944; *cf. Puerto Rico v. Branstad,* 483 U.S. 219, 229, 107 S.Ct. 2802, 97 L.Ed.2d 187 (1987) ("Long continuation of decisional law or administrative practice incompatible with the Constitution's requirements cannot overcome this Court's responsibility to enforce those requirements.").

43 From the perspective of an 80 year old, 200 years is not all that long a time.

The Supreme Court has a long history of recognizing previously unrecognized constitutional rights. For example, its landmark decision in 1954 that racial segregation of public school students violated the Fourteenth Amendment, *see Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), reversed its 1896 decision that "separate, but equal" was all the equal protection clause required, *see Plessy v. Ferguson,* 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896). In 1964, the Court adopted the one-person, one-vote maxim as the standard for state legislative apportionment, *Reynolds,* 377 U.S. at 568, 84 S.Ct. 1362, even though, as Justice Frankfurter had pointed out in an earlier dissent in "[t]he notion that representation proportioned to the geographic spread of population," had "never been generally practiced, today or in the past," *Baker v. Carr,* 369 U.S. 186, 301, 82 S.Ct. 691, 7 L.Ed.2d 663 (Frankfurter, J., dissenting). In 1986, the Court held that racially-based peremptory challenges violated the equal protection clause, *see Batson v. Kentucky,* 476 U.S. 79, 100, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), reversing its 1965 decision holding that peremptory challenges were immune from equal protection scrutiny largely because such scrutiny "would entail a radical change in the nature and operation of the challenge," *Swain v. Alabama,* 380 U.S. 202, 221–22, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). In *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), the Court held that the right to privacy encompassed a woman's right to seek an abortion, even though abortion ***100** had long been treated as a crime in many states. Poll taxes, grandfather clauses, and white primaries were once commonplace; all are now unconstitutional. *See Harper,* 383 U.S. 663, 86 S.Ct. 1079; *Guinn v. United States,* 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340 (1915); *Smith v. Allwright,* 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944). Just this past year, the Supreme Court severely curtailed Congress' power to abrogate States' sovereign immunity, despite years of permitting it virtually free rein in that area. *Alden,* 119 S.Ct. 2240. And, of course, the literal application of the Bill of Rights to the States was not recognized until many years after adoption of the Fourteenth Amendment, and then only by a gradual process. *Compare, e.g., Adamson v. California,* 332 U.S. 46, 67 S.Ct. 1672, 91 L.Ed. 1903 (1947) *with Malloy v. Hogan,* 378 U.S. 1, 4–6, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964) *and Gideon v. Wainwright,* 372 U.S. 335, 341–345, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

For years, many voter apportionment issues never reached the courts because it was accepted doctrine that the apportionment of legislative districts involved a political question beyond the reach of the judiciary. *See, e.g., Colegrove v. Green,* 328 U.S. 549, 66 S.Ct. 1198, 90 L.Ed. 1432 (1946). It was not until the Court's 1962 decision in *Baker,* 369 U.S. 186, 82 S.Ct. 691, overruling *Colegrove,* that the courts began to address many long-suffered voting rights deprivations. Thus, as a practical matter, until *Baker v. Carr,* a suit like the plaintiffs would have been an exercise in futility.

III

EQUAL PROTECTION

The *Wesberry* Court notably limited to Article I its analysis of "one person, one vote" in congressional elections, putting

aside any consideration of other constitutional provisions as sources of the right to vote. *Wesberry,* 376 U.S. at 9 n. 10, 84 S.Ct. 526. The principle of *Wesberry,* standing alone, requires that the people of the District, the political posterity of the pre–1801 voters, who were "people of the Several States," be given the opportunity to vote for a Member of the House of Representatives. Even if *Wesberry* itself did not mandate this conclusion, the plaintiffs argue, and I am persuaded, that the Equal Protection Clause of the Fourteenth Amendment, made applicable to the United States and its officers by the Fifth Amendment, provides a strong additional ground for a declaration that the inhabitants of the District have a constitutional right to vote for voting representation in the House of Representatives and that the failure of the Secretary to include inhabitants of the District in the apportionment violates equal protection principles. Accordingly, the Secretary has a constitutional duty to include the people of the District in any future apportionment and to calculate and report to the President the representation commensurate with such apportionment.

The Equal Protection Clause of the Fourteenth Amendment provides that "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. The Supreme Court has held that the principles embodied in this clause apply equally to the federal government, for the benefit of persons residing in the District of Columbia, by virtue of the due process clause of the Fifth Amendment. *See Bolling v. Sharpe,* 347 U.S. 497, 500, 74 S.Ct. 693 (1954) (holding that the principles embodied by the equal protection clause of the Fourteenth Amendment that prohibited States from maintaining racially segregated schools were applicable in the District of Columbia by virtue of the Fifth Amendment due process clause); *Weinberger v. Wiesenfeld,* 420 U.S. 636, 638 n. 2, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975) (noting that "[t]his Court's approach to the Fifth Amendment equal protection claims has ... been precisely the same as to equal protection claims under the Fourteenth ***101** Amendment"); *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 217–18, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (confirming continued vitality of *Weinberger*).

Basic equal protection principles require government, state and national, to treat similarly situated persons equally, particularly with respect to constitutionally-based rights and privileges. *See, e.g., Cleburne v. Cleburne Living Center,* 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); *Plyler v. Doe,* 457 U.S. 202, 216–217, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982). The equal protection clause embodies a three-tiered system of review. Generally, the classification at issue is subject to "ordinary scrutiny." Under this test, the classification satisfies the requirements of equal protection as long as it is rationally related to a legitimate government end. *Kadrmas v. Dickinson Public Schools,* 487 U.S. 450, 457–58, 108 S.Ct. 2481, 101 L.Ed.2d 399 (1988); *San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1, 16–17, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973); *Plyler,* 457 U.S. at 217–18, 102 S.Ct. 2382. At the other end of the spectrum are racial classifications and other governmental actions that impact on fundamental rights. These are subject to "strict scrutiny"; the government must demonstrate a compelling interest, and the classification must be narrowly tailored to meet that end. *See, e.g., Austin v. Michigan Chamber of Commerce,* 494 U.S. 652, 666, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990); *Plyler,* 457 U.S. at 217, 102 S.Ct. 2382. In the middle are classifications involving, for example, gender, which are subject to "intermediate scrutiny"—the end must be important, the means substantially related to the end. *See, e.g., Craig v. Boren,* 429 U.S. 190, 197, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976). Application of any of these tests to continued denial of the right of District inhabitants to vote for voting representation in the House of Representatives should yield the same result: the equal protection clause entitles them to such representation because the United States has no interest, compelling or otherwise, in denial of it.

With respect to voting, the Supreme Court has held that the right to cast votes of equal weight in the selection of representatives to a legislature is a fundamental right whose denial must be subject to the strictest scrutiny. *See Reynolds,* 377 U.S. at 562, 84 S.Ct. 1362 ("Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."); *Dunn v. Blumstein,* 405 U.S. 330, 337, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972) ("[I]f a challenged statute grants the right to vote to some citizens and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest." (internal quotation marks omitted)); *Harper,* 383 U.S. at 665, 86 S.Ct. 1079 ("[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."). As the Court explained in *Reynolds v. Sims,* in invalidating malapportioned state legislative districts:

> Diluting the weight of votes because of *place of residence* impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race or economic status.

377 U.S. at 565, 84 S.Ct. 1362 (internal citations omitted) (emphasis added).

The people of the District of Columbia are citizens of the United States, are subject to the laws passed by the Congress of the United States, and are the political posterity of the residents of the area which became the District in 1801, who voted for Congressional representation from 1790 until ceded to the United States in 1800. The population of the District has always been included in the decennial census. Yet, for the purpose of allocating seats in the House of Representatives, it is the practice and intention of the Secretary to ***102** exclude the District and the people there. Thus, the federal government treats the people of the District of Columbia differently from people residing in States, who are apportioned seats in the House of Representatives. In addition, the people of the District are treated differently from people residing in federal enclaves, over which Congress holds the same constitutional power of "exclusive legislation" that it holds over the people of the District. U.S. Const. art. I, § 8. Yet, the inhabitants of enclaves are included in apportionment and vote in Congressional elections in the state within which the federal enclave exists. *Evans v. Cornman,* 398 U.S. 419, 426, 90 S.Ct. 1752, 26 L.Ed.2d 370 (1970) (people of enclave are also people of state surrounding enclave). The people of the District have no such apportionment or vote. Finally, the people of the District are treated differently from United States citizens who reside overseas, who, by virtue of the Uniformed and Overseas Citizens Absentee Voting Act, Pub.L. 99–410, 100 Stat. 924 (1986) (codified at 42 U.S.C. § 1973ff et seq.) (Overseas Voting Act), vote in Congressional elections in the state where they most recently lived.

None of the defendants disputes the fundamental nature of the right to vote, or that, generally, classifications, including classifications according to place of residence, impacting on that right must be subject to strict scrutiny. Nor do they contend that the federal government has a compelling interest that could justify depriving the people of the District of their right to vote for congressional representation. For the most part, the defendants argue, on several different grounds, that principles of equal protection simply do not apply. The closest they come to addressing the equal protection issue head on is to argue that if the plaintiffs' equal protection claim is accepted, then felons, minors and residents of territories must also be enfranchised. *See* House Officers' Reply to *Alexander* Plaintiffs' Consolidated Memorandum in Opposition to Defendants' Motions To Dismiss, and Reply in Support of Ps' Motion for Summary Judgment at 19 (filed Mar. 10, 1999) ("House Officers' Reply"). I will address each argument in turn. I find none persuasive.

First, the defendants argue that for equal protection to apply, the plaintiffs must have a preexisting constitutional right to vote. As Article I cannot be the source of that right, in their view, there is no cognizable equal protection claim. *See* Reply Memorandum of Secretary Daley and the United States in Support of Their Motion to Dismiss the Claims Brought by the *Alexander* Plaintiffs at 9–10 (filed Mar. 8, 1999). As I disagree with the defendants' premise that the people of the District do not have a preexisting constitutional right to vote, I see no merit in this argument. As previously explained in detail, the people of the District are the political posterity of the people who lived in the District between 1790 and 1800. Those people had and exercised a constitutional right to vote for Congressional representation. Neither cession or any other event in the intervening years could have constitutionally taken away that right. Nor is the denial of that right mandated by the Constitution or reasonable negative inferences from it. Accordingly, the people of the District have a constitutional right to vote, albeit one that has been dormant since 1800; continued denial of that right where there is no compelling governmental interest violates equal protection principles.

Next, the defendants argue that the equal protection claims are invalid on their face because any statutory restriction on the plaintiffs' right to vote is merely reflective of the Constitution itself. If the Constitution precludes voting by DC, they argue, then there is no "constitutional" challenge that can be made to change that result. Secy' Opp. at 17. Again, as I disagree with the defendants' premise that the Constitution itself bars voting by the people of the District, *see supra* Part II, I see no merit in this argument either.

***103** The defendants also argue that the equal protection clause does not apply because "plaintiffs have not challenged

any classification actually drawn by Congress." House Officers' Opp. at 28. The plaintiffs respond that they are challenging "statutes and House and Senate rules—and [ ] the conduct of defendants in enforcing those statutes and rules." Alexander Plaintiffs Consolidated Memorandum in Opposition to Defendants' Motions to Dismiss, and Reply in Support of Plaintiffs' Motion for Summary Judgment at 4 (filed Feb. 8, 1999). The essence of the plaintiffs' case, however, is a challenge to the apportionment statute, as applied by the Secretary, which is properly subject to equal protection scrutiny. *Cf. Reynolds,* 377 U.S. at 568, 84 S.Ct. 1362 (sustaining equal protection challenge to state apportionment scheme).

In addition, the defendants argue that equal protection principles cannot be applied because the people of the District are not "similarly situated" with respect to citizens of States, residents in federal enclaves, or overseas voters. The people of the District cannot be compared to citizens of States, they argue, because the Constitution itself, in Article I, Amendment XVII, and Amendment XIV, § 2, distinguishes between the two. *See* House Officers' Opp. at 28–29. Even assuming *arguendo* that the defendants are correct in stating that the Constitution "distinguishes" between the citizens of the District and citizens of States, that does not resolve the issue. As discussed *supra,* there is nothing in the Constitution itself, or necessarily implied from it, that requires denying voting representation in Congress to the people of the District. [44] Moreover, the people of the District and citizens of States are similarly situated in that citizens of the States and the posterity of the pre–1801 District inhabitants are subject to the laws of the United States and, before the cession, both were inhabitants "of the several states." Accordingly, the two groups are "similarly situated" for equal protection purposes.

44 It is noteworthy that the *Loughborough* Court approved direct taxation of District residents despite the fact that the tax apportionment requirement of Article I, like its voting apportionment requirement, referred only to apportionment among the several States. U.S. Const. art. I, § 2. The Court found that the negative inference, here invoked by defendants with respect to voting apportionment, was trumped by another provision of the Constitution: the taxing power vested in Congress by Article I. *Loughborough,* 18 U.S. at 322–23, 5 Wheat. 317. So here, any such negative inference is trumped by other provisions of the Constitution, adopted in the wake of the Civil War and imported thereafter into the original Due Process clause of the Fifth Amendment: the Equal Protection clause.

With respect to enclaves, the defendants argue that enclaves are significantly different from the District because residents of an enclave remain citizens of the State, enclaves do not change state boundaries, and states continue to exercise jurisdiction over enclaves. House Officers' Opp. at 29–30. However, the same clause of the Constitution authorizes the establishment of the District and federal enclaves and provides that Congress shall have the same power to exercise exclusive jurisdiction in each case. The people living in the areas that became the District, just as the people living in the areas that have become federal enclaves, had a constitutional right to vote for representation in Congress. The Supreme Court has held, in *Evans v. Cornman,* 398 U.S. at 426, 90 S.Ct. 1752, that residents of federal enclaves retain that right. The people of the District have the same interest as the people in federal enclaves, if not a greater interest, in having a voice in Congress, their ultimate legislature. At one time, when a presidentially-appointed three-person Board of Commissioners constituted the local legislative and executive authority in the District of Columbia (subject, of course, to Congress' exclusive legislation) there may have been a material difference between the political status of enclave people and the people of the District. However, since 1973, when Congress created a local government ***104** consisting of an elected mayor and an elected council with legislative authority (subject, of course, to Congress' exclusive legislation), and the equivalent of a state court system, the functional differences between the political status of District people and that of enclave people is more theoretical than real. Congress' exclusive legislative authority is ultimate. It can preempt any ordinance of the District Council and, it seems obvious, could also pre-empt any state law which purported to bind the people of any federal enclave in any state.

Defendants make much of the difference between Congress' exercise of its power of "exclusive legislation" with respect to the District and its exercise of its identical power with respect to the enclaves. They concede the obvious—that Congress' power with respect to the enclaves and with respect to the District is identical. [45] They disregard, however, the extent to which Congress' relaxation of its latent power with respect to the District parallels the relaxation with respect to the enclaves. Just as Congress has passed statutes permitting States to exercise their own authority in federal enclaves, so it has passed statutes permitting the District government to

exercise its own authority within its enclave. For example, in federal enclaves, state criminal laws apply to "acts not punishable by any enactment of Congress," 18 U.S.C. § 13, states are permitted to levy and collect income, gasoline, sales and use taxes, 4 U.S.C. §§ 104–110, and state unemployment laws and workers' compensation laws apply, 26 U.S.C. § 3305; 40 U.S.C. § 290. Moreover, at least at the National Institutes of Health (NIH), the federal enclave whose status was at issue in the *Evans* case, residents register their cars in Maryland, obtain drivers' permits and license plates from Maryland, are subject to the process and jurisdiction of the Maryland state courts, and send their children to Maryland public schools. *Evans,* 398 U.S. at 424, 90 S.Ct. 1752. Similarly, the District, not the federal government, exercises direct, hands-on authority over motor vehicle registration and has its own school system. The District also has its own court system, completely independent of the federal courts, except that, like state courts, the decisions of its highest court are reviewable by the Supreme Court. District residents pay income, sales and other taxes to the District. In view of the foregoing, to distinguish the right of District residents to the same protection of the laws from that enjoyed by enclave residents is to belabor a distinction without a material difference. Accordingly, the apportionment statute, as applied by the Secretary, deprives the people of the District of equal protection of the laws because for apportionment it includes the census population of federal enclaves in the population of the state within which the enclave exists while excluding the census population of the District from the apportionment process.

45 For example, the National Institutes of Health became a federal enclave in 1953 when Maryland ceded jurisdiction over the property to the United States. *Evans,* 398 U.S. at 420–21, 90 S.Ct. 1752 (citing Md.Code Ann. art. 96, § 34).

The Overseas Voting Act, requires a State to "permit overseas voters" to participate (by absentee ballot) in "in general elections for Federal office." 42 U.S.C. § 1973ff–1(3). An "overseas voter" includes "a person who resides outside the United States and (but for such residence) would be qualified to vote in the last place in which the person was domiciled before leaving the United States." *Id.* § 1973ff–6(5)(C). The Act does not require States to permit overseas voters to vote in local or state elections. Nor does an overseas voter under the Act need to be a citizen of the State where voting occurs. [46] As a result, an overseas voter, despite the language ***105** of Article I, may vote in federal elections without having "the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. Const. art. I, § 2, cl. 1.

46 The Act expressly specifies that "[t]he exercise of any right under this subchapter shall not affect, for purposes of any Federal, State or local tax, the residence or domicile of a person exercising such right." 42 U.S.C. § 1973ff–5.

The defendants argue that inhabitants of the District and overseas voters are not similarly situated for equal protection purposes because Congress has authorized voting by overseas voters. *See* House Officers' Opp. at 27. [47] However, the critical fact for equal protection analysis is not that there is a statute giving overseas voters their voting rights, but that this Act permits voting in federal elections by persons who are not citizens of any State nor qualified under the literal terms of Article I to vote in federal elections, [48] while inhabitants of the District, who are similarly situated, are denied that right.

47 There is one difference—except for members of the Armed Forces living abroad, United States citizens overseas are there voluntarily. The political forebears of District inhabitants were ceded there without their consent.

48 In fact, under the Overseas Voting Act, a United States citizen residing outside the United States may be eligible to participate in federal elections, even though he or she had never been eligible to participate in any election while a citizen of a State. For example, the Act applies to an overseas voter who was too young to vote while a citizen of a State.

The defendants' suggestion that the Overseas Voting Act "extends" State citizenship to overseas voters in a manner that could not be applied equally to residents of the District is unsound. The Supreme Court has indicated that, at least with respect to elections of state officers, a State may limit participation to "bona fide residents" who live within its geographical boundary and have the intention to make the State their home indefinitely. *See Carrington v. Rash,* 380 U.S. 89, 94, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965). An "overseas voter," however, does not reside within any State, and need not have any intention to make a particular State his or her home. *See Attorney General of Guam,* 738 F.2d at 1020. If Congress can disregard an overseas voter's failure to satisfy the two most basic traditional prerequisites for state citizenship, there is no reason why the fact that the overseas

voter, unlike some residents of the District, was *recently* a bona fide resident of a State should be the distinction of ultimate constitutional dimension.

As the plaintiffs point out, if there is no constitutional bar to voting by overseas voters who are not "citizens of a State," there is no constitutional bar to voting by the people of the District. Accordingly, the inhabitants of the District and overseas voters are similarly situated and that the extension of voting rights to one group, but not the other, must be justified by a compelling government interest. [49]

49 It is true that the First Circuit has asserted that, because the Overseas Voting Act "does not infringe [the right to vote] but rather limits a state's ability to restrict it," the Act "need only have a *rational basis* to pass constitutional muster." *De La Rosa,* 32 F.3d at 10 & n. 2 (emphasis added). However, the Act goes beyond checking States' restrictions on the franchise; it permits voting by electors who are not eligible to vote for the most numerous branch of a State's legislature. Thus, it affirmatively extends the right to vote to United States citizens who are not literally qualified to vote under Article I, § 2, clause 1.

In applying the principles of equal protection in the context of State elections, the Supreme Court has made it clear that strict scrutiny is applied to State "statutes distributing the franchise" which have the effect that "some resident citizens are permitted to participate and some are not." *Kramer v. Union Free Sch. Dist. No. 15,* 395 U.S. 621, 628–29, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969); *see also Harper,* 383 U.S. at 665, 86 S.Ct. 1079. These same principles apply to the federal government through the due process clause of the Fifth Amendment—not as a formality, but because essentially the same justification for strict scrutiny of *statutes* governing the right to vote applies to both federal and state laws:

> The presumption of constitutionality and the approval given 'rational' classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality.

Kramer, 395 U.S. at 628, 89 S.Ct. 1886. The Overseas Voting Act is therefore squarely within the class of voting laws subject to strict scrutiny under the equal protection clause.

The majority also suggests that, in any event, citizens of the District who have never lived in any of the fifty states could not have an equal protection claim. The majority fails to suggest any compelling governmental interest in distinguishing between overseas voters and those District residents who have never lived in a State. Moreover, the majority apparently recognizes the violation of equal protection principles with respect to those District residents who previously have lived in a State.

***106** Given that inhabitants of the District and citizens of States, residents of enclaves and overseas voters are all similarly situated for equal protection purposes, and that the defendants do not argue that the government has any compelling interest in denying the right of District inhabitants to vote for voting representation in the House of Representatives, a right enjoyed by members of each of these other groups, the continued denial of that right violates equal protection principles. I have not overlooked that the defendants argue that the comparison to people in enclaves and overseas at most entitles the people of the District to vote for federal officers in State elections, not to elect their own Representatives. However, the fact that residents of enclaves and expatriates vote for federal officers in state elections does not necessarily imply that the only relief for the people of the District would be to vote in the elections of the state of Maryland. For residents of enclaves and overseas voters, voting in state elections can be seen as essentially a matter of convenience. As Marshall said about state ratifying conventions—where else should they vote? The pragmatic answer with respect to voting representation in the House of Representatives for the people of the District is that it is more convenient and logical that the political posterity of the pre–1801 voters for representation in the House should and could use the District apparatus for electing presidents, mayors and council members, available only in the last half of the Twentieth century.

Finally, the defendants argue that if the people of the District have an equal protection right to vote in Congressional elections, so too must felons, minors and residents of territories. However, equal protection principles do not dictate such a conclusion. Felons, for example, forfeit certain constitutional rights, including the right to vote, because

of their criminal conduct. The government's interests in depriving felons of their voting rights, presumably deterrence and punishment, arguably compelling interests for equal protection purposes, bear no relation to the government's ephemeral interest, if any, in depriving the people of the District of voting rights merely because of the place where they live. Moreover, the Supreme Court has held that the Fourteenth Amendment, which provides that a State's representation in Congress shall not be reduced if it disenfranchises citizens for "participation in rebellion, or other crime," U.S. Const. amend. XIV, § 2, contemplates and approves of the disenfranchisement of convicted felons. *See Richardson v. Ramirez,* 418 U.S. 24, 54, 94 S.Ct. 2655, 41 L.Ed.2d 551 (1974). The explicit constitutional recognition that felons can be disenfranchised, and the fact that their loss of voting rights is directly attributable to their own misconduct, is a material difference which renders untenable any comparison of their nonvoting with recognizing the voting rights of the people of the District.

Nor does the nonvoting of minors as a group preclude restoration of voting representation for the people of the District on equal protection grounds. First, there has been no showing that minors (however defined) as a class ever voted. In contrast, residents of the District voted for a Member of the House of Representatives until 1801. Second, minors have never been considered as having the same constitutional rights as adults. *See Vernonia Sch.* ***107** *Dist. v. Acton,* 515 U.S. 646, 654, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995) (upholding random urinalysis testing of minors in a public school); *Hutchins v. District of Columbia,* 188 F.3d 531, 541 (D.C.Cir.1999) ("children's rights are not coextensive with those of adults"). Finally, although this precise issue has never been addressed, I believe that the government has a compelling interest in foreclosing minors, who are presumptively not qualified by intelligence or experience to participate in its political process, from voting. If not compelling, the government's interest is certainly important, arguably the applicable standard under the equal protection clause where it is the fundamental rights of minors being infringed.[50] *Hutchins,* 188 F.3d at 541 (applying heightened scrutiny). Accordingly, denying their voting rights while enfranchising the people of the District does not violate equal protection principles.

50 The Supreme Court recently reaffirmed that classifications based simply on age are not suspect under the equal protection clause and are evaluated only to determine whether they bear a rational relationship to a legitimate governmental interest. *Kimel v. Florida Bd. of Regents,* 528 U.S. 62, 120 S.Ct. 631, 645, 145 L.Ed.2d 522 (2000); *see also Gregory v. Ashcroft,* 501 U.S. 452, 473, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991); *Vance v. Bradley,* 440 U.S. 93, 97, 99 S.Ct. 939, 59 L.Ed.2d 171 (1979); *Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 316–17, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976). That analysis does not dispose of the issue here, however, because a denial of the right to vote also infringes on a fundamental right which merits either strict or intermediate scrutiny.

Finally, recognizing the voting rights of the people of the District would not necessitate enfranchising residents of United States territories. *See supra* Part II.C.4. To reiterate, people residing in territories, or their political predecessors, were never part of the "people of the several states" and they have never enjoyed a constitutionally protected right to vote. Absent any such right, the people of the territories have no claim that they would be denied equal protection of the laws if District inhabitants have voting representation while the status quo is continued in the territories. For this reason, recognizing voting rights for the people of the District would not necessitate a similar result with respect to the people in the territories.

IV

Accordingly, for the reasons set forth, the people of the District of Columbia are entitled to participate in the election of members of the United States House of Representatives. The apportionment statutes, as presently applied, interfere with the exercise of constitutional rights of residents of the District of Columbia. I would declare these statutes, as applied, unconstitutional and declare that the Secretary of Commerce has a constitutional duty to include the population of the District of Columbia in the apportionment of seats to the House of Representatives. Again, as the questions with respect to the Senate and the Control Board are not a challenge to apportionment—the basis for convening this three-judge district court—I agree that this Court should "decline to exercise any discretionary jurisdiction we may have over" those claims. *Adams v. Clinton,* 40 F.Supp.2d 1, 5 (D.D.C.1999).

All Citations

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444 F.Supp.3d 118
United States District Court, District of Columbia.

Angelica **CASTAÑON**, et al., Plaintiffs,

v.

UNITED STATES, et al., Defendants.

Civil Action No. 18-2545 Three-Judge Court (RDM, RLW, TNM)
|
Signed March 12, 2020

Synopsis

Background: Registered voters residing in District of Columbia brought action against United States, President Pro Tempore of Senate, Vice President in his capacity as president of Senate, Clerk and Sergeant at Arms of Senate, Speaker of U.S. House of Representatives, Clerk of U.S. House of Representatives, Sergeant at Arms and Doorkeeper of U.S. House of Representatives, President and Secretary of Commerce of United States to secure ability for themselves, and others similarly situated, to elect voting representatives to United States Congress. Voters moved for convening of three-judge panel. Voters voluntarily dismissed House defendants. Defendants moved to dismiss, and voters moved for summary judgment.

Holdings: A three-judge panel of the District Court, Wilkins, J., held that:

[1] claims that District of Columbia should be treated as State, that District residents should be able to vote as Maryland residents, and that District's lack of House representation violated Equal Protection, Privileges or Immunities, Due Process, and Republican Guarantee Clauses of Constitution properly were before three-judge District Court;

[2] claims aimed at senatorial representation that were brought by registered voters residing in District of Columbia to secure ability for themselves, and others similarly situated, to elect voting representatives to United States Congress had to be remanded to single judge;

[3] voters who were denied right to voting representation in Congress suffered injury in fact;

[4] President of United States and Secretary of Commerce did not cause inaction by Congress to provide registered voters residing in District of Columbia with right to vote for representation in Congress, and therefore voters did not have standing to pursue that claim against them;

[5] President Pro Tempore of Senate and Vice President in his capacity as president of Senate did not cause inaction by Congress to provide registered voters residing in District of Columbia with right to vote for representation in Congress, and therefore voters did not have standing to pursue that claim against them;

[6] inaction by Congress to provide registered voters residing in District of Columbia with right to vote for representation in Congress was not redressable; and

[7] exclusion of registered voters residing in District of Columbia from congressional district apportionment was not violative of their rights to equal protection, due process, and association and representation.

Ordered accordingly.

West Headnotes (30)

[1] **Federal Civil Procedure** In general; injury or interest

Federal Courts Necessity of Objection; Power and Duty of Court

Jurisdictional issues are to be considered and resolved at the threshold, and the party invoking federal jurisdiction bears the burden of establishing that the plaintiffs have standing. Fed. R. Civ. P. 12(b)(1).

[2] **Federal Courts** Evidence; Affidavits

On a motion to dismiss for lack of subject matter jurisdiction, a court may look beyond the complaint. Fed. R. Civ. P. 12(b)(1).

[3] **Federal Courts** Pleadings and motions

On a motion to dismiss for lack of subject matter jurisdiction, a complaint will be construed broadly and liberally. Fed. R. Civ. P. 8(e), 12(b)(1).

[4] **Courts** Operation and effect in general

A summary affirmance has considerably less precedential value than an opinion on the merits, and it is an affirmance of the judgment only, rather than an affirmance of the reasoning of the lower court.

[5] **Courts** Operation and effect in general

A summary affirmance's precedential effect can extend no farther than the precise issues presented and necessarily decided by those actions.

[6] **Courts** Operation and effect in general

A summary disposition affirms only the judgment of the court below, and no more may be read into the action than was essential to sustain that judgment.

[7] **Courts** Operation and effect in general

Divining what was necessarily decided by a summary affirmance necessitates an examination of the jurisdictional statements submitted to the Supreme Court pursuant to the prior direct appeals; a lower court also must discern whether there are any legally significant differences between the case before it and the cases that were the subject of summary affirmances, and whether there have been superseding doctrinal developments since the summary affirmance.

[8] **Federal Courts** Elections and reapportionment

Challenge by registered voters residing in District of Columbia to District of Columbia's lack of representation in House of Representatives, arguing that District should be treated as State, that District residents should be able to vote as Maryland residents, and that District's lack of House representation violated Equal Protection, Privileges or Immunities, Due Process, and Republican Guarantee Clauses of Constitution properly were before three-judge District Court. U.S. Const. Amend. 5; U.S. Const. art. 4, § 2, cl. 1; 28 U.S.C.A. § 2284(a).

[9] **Federal Courts** Elections and reapportionment

Claims aimed at senatorial representation that were brought by registered voters residing in District of Columbia to secure ability for themselves, and others similarly situated, to elect voting representatives to United States Congress had to be remanded to single judge, after three-judge panel was convened; governing statute was limited to action challenging constitutionality of apportionment of congressional districts, proper exercise of jurisdiction over such non-core claims was discretionary, resolution of Senate claims would deprive Court of Appeals of opportunity to review panel's work, and misstep could result in Supreme Court finding that it may not consider on direct appeal panel's judgment on Senate claims. 28 U.S.C.A. § 2284(a).

1 Case that cites this headnote

[10] **Federal Courts** Effect of joining nonjurisdictional claims

A three-judge district court may consider ancillary claims where resolution of those claims would dispose of the entire case, including those claims over which the panel has original jurisdiction. 28 U.S.C.A. § 2284(a).

1 Case that cites this headnote

[11] **Federal Civil Procedure** In general; injury or interest

Federal Civil Procedure Causation; redressability

In order to meet the irreducible constitutional minimum of standing, a plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. U.S. Const. art. 3, § 2, cl. 1.

[12] **Constitutional Law** 🔑 Civil Remedies and Procedure

Constitutional Law 🔑 Particular Issues and Applications

The standing inquiry is especially rigorous when reaching the merits of the dispute would force the court to decide whether an action taken by one of the other two branches of the federal government was unconstitutional. U.S. Const. art. 3, § 2, cl. 1.

[13] **Federal Civil Procedure** 🔑 Pleading

In performing the standing analysis, a court accepts as true all material allegations of the complaint construes the complaint in the plaintiffs' favor and assumes the plaintiffs' success on the merits of their claims. U.S. Const. art. 3, § 2, cl. 1.

[14] **United States** 🔑 Judicial review and enforcement

Registered voters residing in District of Columbia who were denied right to voting representation in Congress suffered injury in fact, as required for Article III standing; although their asserted injury was widely shared, harm was concrete. U.S. Const. art. 3, § 2, cl. 1.

[15] **Constitutional Law** 🔑 Elections

Voters who allege facts showing disadvantage to themselves as individuals have standing to sue. U.S. Const. art. 3, § 2, cl. 1.

[16] **United States** 🔑 Review of presidential actions

President of United States and Secretary of Commerce did not cause inaction by Congress to provide registered voters residing in District of Columbia with right to vote for representation in Congress, and therefore voters did not have standing to pursue that claim against them, since alleged injury was caused by House and Senate. U.S. Const. art. 3, § 2, cl. 1.

[17] **United States** 🔑 Judicial review and enforcement

President Pro Tempore of Senate and Vice President in his capacity as president of Senate did not cause inaction by Congress to provide registered voters residing in District of Columbia with right to vote for representation in Congress, and therefore voters did not have standing to pursue that claim against them, since individual legislators did not have any power to pass legislation and alleged injury was caused by House and Senate. U.S. Const. art. 3, § 2, cl. 1.

[18] **United States** 🔑 Speech or debate

The Speech or Debate Clause poses an absolute bar to suit where plaintiffs seek to assign liability for any act that falls within the sphere of legitimate legislative activity. U.S. Const. art. 1, § 6, cl. 1.

[19] **Injunction** 🔑 Persons entitled to apply; standing

Inaction by Congress to provide registered voters residing in District of Columbia with right to vote for representation in Congress was not redressable through injunctive relief, and therefore voters did not have Article III standing to pursue that claim, since injunctive relief contemplated by voters was unlikely due to Speech or Debate Clause and separation-of-powers principles more broadly. U.S. Const. art. 1, § 6, cl. 1; U.S. Const. art. 1, § 8, cl. 17; U.S. Const. art. 3, § 2, cl. 1.

[20] **Federal Civil Procedure** In general; injury or interest

Standing is not dispensed in gross; a plaintiff must demonstrate standing for each form of relief that is sought. U.S. Const. art. 3, § 2, cl. 1.

[21] **Federal Civil Procedure** Causation; redressability

Redressability, as required for Article III standing, is present where it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. U.S. Const. art. 3, § 2, cl. 1.

[22] **Declaratory Judgment** Subjects of relief in general

Claims by registered voters residing in District of Columbia that Congress violated Constitution by neglecting to use its District Clause powers to give House franchise to District residents was not redressable through declaratory judgment, and therefore voters did not have Article III standing to pursue it; favorable decision depended on unfettered choices made by independent actors not before court and whose exercise of broad and legitimate discretion court could not presume either to control or to predict. U.S. Const. art. 1, § 6, cl. 1; U.S. Const. art. 1, § 8, cl. 17; U.S. Const. art. 3, § 2, cl. 1.

[23] **Declaratory Judgment** Existence and effect in general

A request for declaratory relief may be considered independently of whether other forms of relief are appropriate. 28 U.S.C.A. § 2201.

[24] **Constitutional Law** Elections

United States Judicial review and enforcement

Registered voters residing in District of Columbia had standing to raise claims challenging constitutionality of exclusion of District of Columbia from apportionment of congressional districts. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 17; 2 U.S.C.A. §§ 2a(a), 25a(a); 13 U.S.C.A. § 141.

1 Case that cites this headnote

[25] **Constitutional Law** Redistricting and reapportionment

Constitutional Law Electoral Districts

Constitutional Law Redistricting and reapportionment

United States Equality of representation and discrimination; Voting Rights Act

Exclusion of registered voters residing in District of Columbia from congressional district apportionment was not violative of their rights to equal protection, due process, and association and representation, since Congress's District Clause power did not include power to contravene Constitution's express provisions, and Constitution by its terms limited House representation to "the people of the several States." U.S. Const. art. 1, § 2, cl. 1-4; U.S. Const. art. 1, § 4, cl. 1; U.S. Const. art. 1, § 8, cl. 17; U.S. Const. art. 2, § 1; U.S. Const. Amends. 1, 5, 14; 2 U.S.C.A. § 2a; 13 U.S.C.A. § 141.

[26] **Constitutional Law** Nature and Authority of Constitutions

The Constitution is not self-destructive.

[27] **District of Columbia** Legislative power of Congress

Congress's power over the District of Columbia is plenary, save as controlled by the provisions of the Constitution.

[28] **United States** Apportionment of Representatives; Reapportionment and Redistricting

Article I limited House representation to the people of the States. U.S. Const. art. 1, § 2, cl. 1.

[29] Constitutional Law Plain, ordinary, or common meaning

The framers of the constitution employed words in their natural sense; and, where they are plain and clear, resort to collateral aids to interpretation is unnecessary, and cannot be indulged in to narrow or enlarge the text.

[30] District of Columbia Status and governmental powers and functions in general

Whether the District of Columbia constitutes a "State or Territory" within the meaning of any particular statutory or constitutional provision depends upon the character and aim of the specific provision involved.

Attorneys and Law Firms

***122** Christopher J. Wright, Deepika Ravi, Timothy J. Simeone, Patrick Pearse O'Donnell, Harris, Wiltshire, & Grannis LLP, Washington, DC, for Plaintiffs.

Rebecca Michelle Kopplin, United States Department of Justice, Washington, DC, for Defendants.

MEMORANDUM OPINION

Wilkins, Circuit Judge:

This suit is brought by registered voters residing in the District of Columbia (the "District") in an effort to secure for themselves, and others similarly situated, the ability to elect voting representatives to the United States Congress. Plaintiffs challenge their lack of the congressional franchise as unconstitutional because violative of their rights to equal protection, due process, and association and representation. This case is a close cousin of a suit litigated a generation ago, ***123** *Adams v. Clinton*, 90 F. Supp. 2d 35 (D.D.C.), *aff'd sub nom. Alexander v. Mineta*, 531 U.S. 940, 121 S.Ct. 336, 148 L.Ed.2d 269 (2000) (mem.), and *aff'd*, 531 U.S. 941, 121 S.Ct. 336, 148 L.Ed.2d 270 (2000) (mem.), whose reasoning necessarily informs ours and whose outcome, in the end, we echo.

Beyond the gravity of its substance, perhaps this suit's most notable attribute is its bifurcation – the gap between Plaintiffs' central theory of the case and those tertiary aspects of Plaintiffs' claims whose merits we are empowered to address. We recognize that District residents' lack of the congressional franchise is viewed by many, even most, as deeply unjust, and we have given each aspect of Plaintiffs' claims most serious consideration, but our ruling today is compelled by precedent and by the Constitution itself.

I. Procedural History

Plaintiffs – who are U.S. citizens, registered voters, and residents of the various Wards of the District of Columbia, Am. Compl. ¶ 21, ECF No. 9 – filed their Complaint on November 5, 2018, and amended it on November 26, 2018, *see generally id.* The Amended Complaint "seeks to secure the right to full voting representation in the United States Congress for American citizens living in the District of Columbia," *id.* ¶ 1, and alleges three counts: denial of equal protection, denial of due process, and infringement of the right to association and representation, *id.* ¶¶ 135-42. Originally named as defendants were: the Speaker, the Clerk, and the Sergeant at Arms of the U.S. House of Representatives (collectively, "the House Defendants"); the President *Pro Tempore*, the Secretary, and the Sergeant at Arms and Doorkeeper of the U.S. Senate, as well as the Vice President in his capacity as President of the Senate ("the Senate Defendants"); and the President and the Secretary of Commerce of the United States ("the Executive Defendants"). *Id.* ¶¶ 59-67. But on March 27, 2019, Plaintiffs voluntarily dismissed the House Defendants, and the House later filed an *amicus* brief in support of Plaintiffs' cause.

On the day Plaintiffs filed the Amended Complaint, they brought a motion for the convening of a three-judge panel, pursuant to 28 U.S.C. § 2284(a), which provides that "[a] district court of three judges shall be convened ... when an action is filed challenging the constitutionality of the apportionment of congressional districts[.]" District Judge Randolph D. Moss, to whom the case was originally assigned, found it appropriate to convene a three-judge District Court; he therefore requested that then-Chief Judge Merrick B. Garland of the U.S. Court of Appeals for the District of Columbia Circuit designate two other judges to serve on this panel. *See* 28 U.S.C. § 2284(b)(1) (authorizing the chief judge of the circuit to designate a three-judge court).

Before us are a motion to dismiss ("MTD") pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), filed jointly by the Executive and Senate Defendants, ECF No. 21, and Plaintiffs' motion for summary judgment ("MSJ") pursuant to Federal Rule of Civil Procedure 56, ECF No. 23. *Amici* have filed a total of eight briefs. [1]

[1] *Amici* are: (1) Concerned District of Columbia Legal Organizations and Concerned District of Columbia Legal Professionals, in support of Plaintiffs, ECF No. 43; (2) the District of Columbia, in support of Plaintiffs, ECF No. 42; (3) Historians Kenneth R. Bowling, William C. diGiacomantonio, and George Derek Musgrove, in support of Plaintiffs, ECF No. 39 ("Historians' Br."); (4) David C. Krucoff, Executive Director and Founder of the non-profit organization "Douglass County, Maryland," in support of Plaintiffs, ECF No. 45-1; (5) constitutional law scholars Alan B. Morrison, Peter B. Edelman, Lawrence Lessig, Peter M. Shane, Peter J. Smith, and Kathleen M. Sullivan, in support of Plaintiffs, ECF No. 40 ("Scholars' Br."); (6) U.S. House of Representatives, in support of Plaintiffs, ECF No. 38 ("House's Br."); (7) John H. Page, in support of Plaintiffs in part and of Defendants in part, ECF No. 46; and (8) Washington Lawyers' Committee for Civil Rights and Urban Affairs, Neighbors United for DC Statehood, the League of Women Voters of the United States, the League of Women Voters of the District of Columbia, DC Vote, and American Civil Liberties Union of the District of Columbia, in support of Plaintiffs, ECF No. 41 ("Orgs.' Br.").

***124** Having benefitted from oral argument, the parties' filings, and the submissions of *amici*, we now consider, in turn, the applicable standards of review, relevant legal history, this panel's subject-matter jurisdiction, the justiciability of the claims over which we assert jurisdiction, and the merits of the justiciable claims.

II. Standards of Review

[1] **[2]** **[3]** "[T]he scope of Rule 12(b)(1) is flexible," comprehending standing as well as most justiciability issues. *See* 5B FED. PRAC. & PROC. CIV. § 1350 (Wright & Miller 3d ed.). Jurisdictional issues are to be considered and resolved at the threshold, and the party invoking federal jurisdiction – here, Plaintiffs – bears the burden of establishing that the plaintiffs have standing. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95, 104, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). The Court may look beyond the complaint in resolving questions of jurisdiction. *See Am. Freedom Law Ctr. v. Obama*, 821 F.3d 44, 49 (D.C. Cir. 2016). On a Rule 12(b)(1) motion, "it is well-settled that the complaint will be construed broadly and liberally, in conformity with the general principle set forth in Rule 8(e)[.]" 5B FED. PRAC. & PROC. CIV. § 1350 (Wright & Miller 3d ed.); *see also Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) ("[I]t is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader."), *abrogated on other grounds as recognized in Davis v. Scherer*, 468 U.S. 183, 191, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984).

When considering a motion to dismiss for failure to state a claim under Rule 12(b)(6), the Court assesses whether the complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868, (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). Here, too, the Amended Complaint is construed in Plaintiffs' favor, *Scheuer*, 416 U.S. at 236, 94 S.Ct. 1683, and its material allegations are accepted as true, *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937. In considering a Rule 12(b)(6) motion, we "consider the complaint in its entirety," and may also consider "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights*, 551 U.S. 308, 322, 127 S.Ct. 2499, 168 L.Ed.2d 179 (2007) (citing 5B FED. PRAC. & PROC. CIV. § 1357 (Wright & Miller 3d ed. 2004 and Supp. 2007)).

Summary judgment, meanwhile, is appropriate where the movant can demonstrate "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A dispute about a material fact "is 'genuine' ... if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). At the summary-judgment stage, ***125** "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn

in his favor." *Id.* at 255, 106 S.Ct. 2505. There are no disputes of material fact here.

III. Background

The Seventeenth Amendment to the U.S. Constitution provides that "[t]he Senate of the United States shall be composed of two Senators from each state, elected by the people thereof[.]" U.S. CONST. amend. XVII. Article I of the Constitution, meanwhile, provides that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States[.]" *Id.* art. I, § 2, cl. 1. The Fourteenth Amendment dictates that "Representatives shall be apportioned among the several States according to their respective numbers," *id.* amend. XIV, and Article I provides that an "actual Enumeration" shall be conducted every ten years, *id.* art. I, § 2, cl. 3. The provisions of the Constitution relating to the apportionment of House representation are effectuated by statute. The Secretary of Commerce is charged, by 13 U.S.C. § 141, with the conduct of the decennial census; that statute also mandates that the Secretary tabulate the total population "by States" and report the same to the President within nine months of the census date, *id.* § 141(b). The President must then "transmit to the Congress a statement showing the whole number of persons in each State ... and the number of Representatives to which each State would be entitled[.]" 2 U.S.C. § 2a(a). "Each State shall be entitled ... to the number of Representatives shown" in the President's statement, and within fifteen days of receiving that statement, the Clerk of the House must "send to the executive of each State a certificate of the number of Representatives to which such State is entitled[.]" *Id.* § 2a(b). It is undisputed, and the Court takes judicial notice of the fact, *see* FED. R. EVID. 201, that District residents are unrepresented in Congress by anyone but the Delegate, who by statute has a seat in the House and may debate, but may not vote, 2 U.S.C. § 25a(a).

IV. *Adams*

Neither we nor the parties write on a blank slate. Twenty years ago, another three-judge panel of this Court had occasion to pass on claims very similar to those now before us, issuing a well-reasoned opinion we are inclined to follow to the extent we are not bound to do so. The holdings of the *Adams* court, together with the Supreme Court's summary affirmances of the *Adams* panel's judgment, serve as the background against which we rule.

Adams represented the consolidation of two cases: *Adams v. Clinton* and *Alexander v. Daley*. 90 F. Supp. 2d at 37-38. In both cases, the plaintiffs alleged that the failure to apportion House representatives to the District, and to permit District residents to vote in House and Senate elections, was unconstitutional because violative of District residents' rights to equal protection and to a republican form of government. *Id.* at 37. Additionally, some plaintiffs brought claims that the defendants, among them the Secretary of Commerce and the President, violated Article I, the Seventeenth Amendment, and their due-process rights, and abridged their privileges and immunities as U.S. citizens, via their exclusion from the congressional franchise. *Id.* at 38. The plaintiffs in the consolidated suit "d[id] not dispute that to succeed they must be able to characterize themselves as residents of a 'state.' " *Id.* at 46 (citations omitted). Among the relief sought from the *Adams* panel was an injunction against the Secretary of Commerce, compelling him to include the District in his population report ***126** to the President. *See id.* at 43; *see also Alexander* Compl. 59, ECF No. 21-2.

Considering those defendants' motions to dismiss and plaintiffs' motions for summary judgment, the *Adams* panel – in a thorough opinion accompanied by a similarly thoughtful partial dissent – remanded for consideration by a single-judge District Court those claims that did not concern apportionment, 90 F. Supp. 2d at 39-40, and then ruled in favor of the defendants and dismissed the remaining claims, *id.* at 72. The *Adams* panel concluded that, while the plaintiffs had standing to pursue their apportionment claims, *id.* at 45, dismissal of those claims was appropriate because Article I restricted the House franchise to "citizens of states," and the District could not "be considered a state for purposes of congressional representation under Article I." *Id.* at 56.

The plaintiffs proceeded to the Supreme Court by right of direct appeal, which 28 U.S.C. § 1253 makes available to "any party ... in any civil action, suit or proceeding required by an Act of Congress to be heard and determined by a district court of three judges" where such appeal is from "an order granting or denying ... an interlocutory or permanent injunction." The Supreme Court, in twin issuances, summarily affirmed the *Adams* panel's judgment. *Alexander v. Mineta*, 531 U.S. 940, 121 S.Ct. 336, 148 L.Ed.2d 269 (2000) (mem.); *Adams v. Clinton*, 531 U.S. 941, 121 S.Ct. 336, 148 L.Ed.2d 270 (2000) (mem.).

[4] The import of the Supreme Court's treatment of *Adams* – and thus the extent to which this Court is bound – is not immediately clear. Lower courts have been admonished that, while a summary affirmance is a disposition on the merits and thus may not be disregarded, *see Hicks v. Miranda*, 422 U.S. 332, 344, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975) ("[T]he lower courts are bound by summary decisions by this Court until such time as the Court informs them that they are not." (alterations, citation, and internal quotation marks omitted)), a summary affirmance has "considerably less precedential value than an opinion on the merits," *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 180-81, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979). Moreover, "a summary affirmance is an affirmance of the judgment only," *Comptroller of the Treasury v. Wynne*, 575 U.S. 542, 135 S. Ct. 1787, 1801, 191 L.Ed.2d 813 (2015) (quoting *Mandel v. Bradley*, 432 U.S. 173, 176, 97 S.Ct. 2238, 53 L.Ed.2d 199 (1977)), rather than an affirmance of the reasoning of the lower court, *id.* That said, the Supreme Court has several times treated a lower court's reasoning as relevant to a summary affirmance's import. *See, e.g.*, *Harris v. Ariz. Indep. Redistricting Comm'n*, —— U.S. ——, 136 S. Ct. 1301, 1310, 194 L.Ed.2d 497 (2016) (citing summary affirmance in *Cox v. Larios*, 542 U.S. 947, 124 S.Ct. 2806, 159 L.Ed.2d 831 (2004), and approvingly discussing the *Cox* District Court's reasoning); *Morse v. Republican Party of Va.*, 517 U.S. 186, 202, 116 S.Ct. 1186, 134 L.Ed.2d 347 (1996) (citing "the logic of" a prior summary affirmance as something that should have been instructive to the *Morse* lower court, and quoting the prior District Court's reasoning).

[5] **[6]** **[7]** Two relevant questions emerge from this amalgam: those of substance and weight. As to substance (and despite some jurisprudential inconsistency on this score), the Court is guided by the Supreme Court's statements in *Illinois State Board of Elections*: A summary affirmance's "precedential effect ... can extend no farther than 'the precise issues presented and necessarily decided by those actions.' " 440 U.S. at 182, 99 S.Ct. 983 (quoting *Mandel*, 432 U.S. at 176, 97 S.Ct. 2238). "A summary ***127** disposition affirms only the judgment of the court below, and no more may be read into our action than was essential to sustain that judgment." *Id.* (citations omitted). Divining what was necessarily decided by a summary affirmance necessitates an examination of the jurisdictional statements submitted to the Supreme Court pursuant to the prior direct appeals. *See* William J. Schneier, *The Do's and Don'ts of Determining the Precedential Value of Supreme Court Summary Dispositions*, 51 BROOK. L. REV. 945, 960-61 & n.101 (1985) (citing *Ill. State Bd. of Elections*, 440 U.S. at 182, 99 S.Ct. 983; *see also Anderson v. Celebrezze*, 460 U.S. 780, 784-85 n.5, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983); *Washington v. Confederate Band & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 477 n.20, 99 S.Ct. 740, 58 L.Ed.2d 740 (1979); *Mandel*, 432 U.S. at 176, 97 S.Ct. 2238; *Tully v. Griffin, Inc.*, 429 U.S. 68, 74, 97 S.Ct. 219, 50 L.Ed.2d 227 (1976)). A lower court must also discern whether there are any legally significant differences between the case before it and the cases that were the subject of summary affirmances, *see* Schneier, *Do's and Don'ts*, *supra*, 960 & n.100 (citing *Ill. State Bd. of Elections*, 440 U.S. at 181-82, 99 S.Ct. 983; *Mandel*, 432 U.S. at 176-77, 97 S.Ct. 2238; *Celebrezze*, 460 U.S. at 784-85 n.5, 103 S.Ct. 1564; *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 499, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981) (plurality)), and whether there have been superseding doctrinal developments since the summary affirmance, *id.* at 961 & n.104 (citing *Hicks*, 422 U.S. at 344-45, 95 S.Ct. 2281; *Mandel*, 432 U.S. at 180, 97 S.Ct. 2238 (Brennan, J., concurring)).

On weight, in addition to understanding that a summary affirmance's precedential value is "considerably less" than that of a full opinion, *Ill. State Bd. of Elections*, 440 U.S. at 180-81, 99 S.Ct. 983, we are informed by the Supreme Court's endorsement of a "do-it-yourself" approach. In *Anderson v. Celebrezze*, the Supreme Court noted with approval that the Sixth Circuit had "correctly recogniz[ed] the limited precedential effect to be accorded summary dispositions," and had undertaken an "independent[ ]" analysis. 460 U.S. at 784-85, 103 S.Ct. 1564; *see also id.* at 784 n.5, 103 S.Ct. 1564 ("The Court of Appeals quite properly concluded that our summary affirmances ... were a 'rather slender reed' on which to rest its decision." (citation omitted)).

Against this backdrop, we proceed to the case now before us, beginning, as we must, with an analysis of whether we have jurisdiction to review each of the claims in this case. *Steel Co.*, 523 U.S. at 94, 118 S.Ct. 1003.

V. Jurisdiction over Plaintiffs' House Claims

[8] In the first of several threshold issues, Defendants contend that this case ought not to have been referred to a three-judge panel "because Plaintiffs' [Amended C]omplaint challenges the District's lack of representation in the House, not any particular apportionment of congressional districts." Mem. in Supp. of MTD at 9 n.9 (citing *City of Philadelphia*

v. Klutznick, 503 F. Supp. 657, 658 (E.D. Pa. 1980)). This argument is foreclosed, however, by the Supreme Court's summary affirmances of the *Adams* panel's decision on the merits of those plaintiffs' House-related claims. Like these Plaintiffs, the plaintiffs in *Adams* challenged the District's lack of representation in the House, there arguing that the District should be treated as a State, that District residents should be able to vote as Maryland residents, and that the District's lack of House representation violated the Equal Protection, Privileges or Immunities, Due Process, and Republican Guarantee ***128** Clauses of the Constitution. 90 F. Supp. 2d at 46, 56, 65. The *Adams* panel's jurisdiction to hear those plaintiffs' claims was essential to the Supreme Court's direct review under 28 U.S.C. § 1253; had such jurisdiction been lacking, the Supreme Court would have found itself to lack jurisdiction to consider the matter on direct appeal. *See, e.g.*, *Moody v. Flowers*, 387 U.S. 97, 104, 87 S.Ct. 1544, 18 L.Ed.2d 643 (1967) ("[A] three-judge court was improperly convened. Appeals should, therefore, have been taken to the respective Courts of Appeals, not to this Court."); *Adams v. Clinton*, 531 U.S. at 941, 121 S.Ct. 336 (mem.) ("Justice Stevens would dismiss the appeal."). We therefore hold that those of Plaintiffs' claims that challenge the District's lack of representation in the House are properly before us as a three-judge District Court.

VI. Jurisdiction over Plaintiffs' Senate Claims

[9] An important threshold issue – though one neither the parties nor *amici* address in their filings – is the question of this panel's jurisdiction over the claims aimed at senatorial representation. The statute giving rise to this three-judge District Court provides for the convening of such a court "when an action is filed challenging the constitutionality of the apportionment of congressional districts[.]" 28 U.S.C. § 2284(a). But Plaintiffs' suit extends beyond their lack of representation in the House – the chamber that "the apportionment of congressional districts" concerns. Each of Plaintiffs' three causes of action decries their lack of voting representation not just in the House, but in Congress writ large, *see* Am. Compl. ¶¶ 135, 137, 141; they have named as defendants the President *Pro Tempore* of the Senate, the Vice President in his capacity as president of the Senate, and both the Clerk and the Sergeant at Arms of the Senate, *see id.* ¶¶ 62-65; and among the relief sought are injunctions compelling each of the Senate Defendants to take action to the end of securing for District residents representation in the Senate, *see id.* Prayer for Relief ¶ 5. We are thus confronted with the question of the propriety of our considering Plaintiffs' senatorial claims.[2] *Cf. Perez v. Ledesma*, 401 U.S. 82, 87, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971) ("Even where a three-judge court is properly convened to consider one controversy between two parties, the parties are not necessarily entitled to a three-judge court and a direct appeal on other controversies that may exist between them." (citation omitted)).

2 In considering this question, we are mindful of, but not bound by, the *Adams* panel's discussion of the same question. The *Adams* panel's decision not to accept jurisdiction of the Senate claims presented there was in no way "essential to sustain that judgment," as would be necessary to give that holding in *Adams* binding force through the operation of the Supreme Court's summary affirmances. *See Ill. State Bd. of Elections*, 440 U.S. at 182, 99 S.Ct. 983.

[10] The Supreme Court has made clear that a properly convened three-judge district court has some ability to exercise a brand of supplemental jurisdiction over claims beyond those that form the core of its statutory jurisdictional grant. Claims that have been found to be proper subjects for the exercise of such supplemental jurisdiction have generally borne an intimate relation to those that impelled the formation of a three-judge district court in the first instance. For example, while interpreting now-repealed 28 U.S.C. § 2281 (which provided that any injunction "restraining the enforcement, operation or execution of a State statute" due to unconstitutionality could only be granted by a ***129** three-judge district court), the Supreme Court held in *Allee v. Medrano* that a three-judge district court may properly assert jurisdiction over "every question pertaining to the prayer for the injunction" that was the original basis for its convening. *See* 416 U.S. 802, 812 n.8, 94 S.Ct. 2191, 40 L.Ed.2d 566 (1974) (citing *Pub. Serv. Comm'n v. Brashear Freight Lines*, 312 U.S. 621, 625 n.5, 61 S.Ct. 784, 85 L.Ed. 1083 (1941)); *see also Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 504 n.5, 92 S.Ct. 1749, 32 L.Ed.2d 257 (1972) (indicating that "a three-judge court is the proper forum for all claims against" (there) a challenged statute). As the *Adams* panel observed, a three-judge court may also decide ancillary claims where their resolution is "necessary ... to provide a 'final and authoritative decision of the controversy' among the parties" to the claims that gave rise to the three-judge court. *See* 90 F. Supp. 2d at 39 (citing *Brashear Freight Lines*, 312 U.S. at 625 n.5, 61 S.Ct. 784, and *Allee*, 416 U.S. at 812 n.8, 94 S.Ct. 2191). And it is permissible for a three-judge

district court to consider ancillary claims where resolution of those claims would dispose of the entire case, including those claims over which the panel has original jurisdiction. *See United States v. Ga. Pub. Serv. Comm'n*, 371 U.S. 285, 287-88, 83 S.Ct. 397, 9 L.Ed.2d 317 (1963) ("Once convened the case can be disposed of below or here on any ground, whether or not it would have justified the calling of a three-judge court." (citations omitted)).

Only on the margins might any of these factors be said to be present here. It certainly cannot be declared that disposition of Plaintiffs' Senate claims is necessary to settle the controversy between Plaintiffs and the Executive Defendants, against whom the apportionment claims are asserted, *see Brashear Freight Lines*, 312 U.S. at 625 n.5, 61 S.Ct. 784, or that resolution of the apportionment claims would obviate the need to decide the Senate claims, *see Ga. Pub. Serv. Comm'n*, 371 U.S. at 287-88, 83 S.Ct. 397. And while the Senate claims do of course "pertain" to Plaintiffs' quest for representation in Congress as a whole, it is Plaintiffs' challenge to apportionment – not any challenge to their exclusion from Congress writ large – that is the basis on which this Court convened. *See Allee*, 416 U.S. at 812 n.8, 94 S.Ct. 2191.

Moreover, even if there is some framing of Plaintiffs' Senate claims that would lend propriety to this panel's consideration of them, the Supreme Court has made clear that even the proper exercise of jurisdiction over such non-core claims is discretionary. *See, e.g.*, *Hagans v. Lavine*, 415 U.S. 528, 544, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974) (noting that, when a three-judge district court was presented with a claim that fell outside its core statutory purview, "the most appropriate course may well have been to remand to the single district judge for findings and the determination of [that] claim" (quoting *Rosado v. Wyman*, 397 U.S. 397, 403, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970)). We are cognizant of the fact that our resolution of the Senate claims would "deprive the Court of Appeals of the opportunity to review our work." *Adams*, 90 F. Supp. 2d at 39 (citing 28 U.S.C. § 1253). Moreover, a misstep in this sphere could result in the Supreme Court finding that it may not consider on direct appeal our judgment on the Senate claims. *See, e.g.*, *Perez*, 401 U.S. at 85-88, 91 S.Ct. 674 ("Under 28 U.S.C. § 1253, we have jurisdiction to consider on direct appeal only those civil actions 'required ... to be heard and determined' by a three-judge court. Since the constitutionality of this parish ordinance was not 'required ... to be heard and determined' by a three-judge panel, there is no jurisdiction in this ***130** Court to review that question." (alterations in original)). These considerations lead us to decline to consider those of Plaintiffs' claims that concern Senate representation. We remand those claims for Judge Moss's sole consideration.

VII. Justiciability of Plaintiffs' Principal House Claims

We now turn to what we perceive to be the heart of the matter: Plaintiffs' supposition that Congress is under a constitutional obligation to act affirmatively in a way it has not yet done, and that this Court may (and should) use its power to the end of compelling such action. *See, e.g.*, Am. Compl. ¶¶ 11-13, 114, 141; *id.* Prayer for Relief ¶¶ 1, 5; Mem. in Supp. of MSJ at 40-41. To the extent Plaintiffs' claims are premised on this notion – that is, insofar as they seek to litigate or redress Congress's allegedly wrongful *in*action – we find such claims not to be justiciable, and accordingly dismiss them.

To set the stage, Plaintiffs contend that Congress is empowered by the District Clause of Article I of the U.S. Constitution to provide by legislation for the congressional enfranchisement of District residents. *E.g.*, Am. Compl. ¶¶ 4, 11, 13, 92-104; *see* U.S. CONST. art. 1, § 8, cl. 17 ("The Congress shall have Power ... [t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States[.]"). Plaintiffs further assert that Congress's failure to use its District Clause power to this end, Am. Compl. ¶¶ 112-14 (noting this failure), is violative of their rights of equal protection, *id.* ¶ 125, due process, *see id.* ¶ 5, and association and representation, *id.* ¶¶ 118-19. They seek, as relevant here: (1) a declaration to the effect that they (and all others similarly situated) have a constitutional right to the congressional franchise, that the Defendants have violated this right, and that "the continuing deprivation of this right violates one of the most precious attributes of United States citizenship," *id.* Prayer for Relief ¶ 1; and (2) after the Court defers "further relief for a reasonable period of time to provide Congress an opportunity, on the basis of the Court's declaratory judgment, to fashion a constitutional remedy that will vindicate the constitutional rights" of District residents to the congressional franchise, *id.* ¶ 3, an "order [of] injunctive relief," which "could include ... ordering the Defendants to present plans" for how they will enfranchise District residents and then "ordering Defendants to pursue the steps that will most appropriately assure" that

District residents will secure the congressional franchise, *id.* ¶ 5.

We are troubled by the import of Plaintiffs' central premise: that it is both feasible and proper for this Court to order (or otherwise seek to compel) Congress to enact particular legislation. The concerns raised by such a premise include Article I's Speech or Debate Clause, U.S. CONST. art. I, § 6, cl. 1; *see, e.g.*, *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 502, 95 S.Ct. 1813, 44 L.Ed.2d 324 (1975) ("The purpose of the Clause is to insure that the legislative function the Constitution allocates to Congress may be performed independently."), general separation-of-powers principles, and Article III standing. We explicate and rely on the last of these, the analysis of which necessarily implicates them all.

We first pause, however, to note that the justiciability of these claims is not among those issues on which our hand is guided by *Adams* and its summary affirmances, in binding or even persuasive fashion. As Plaintiffs themselves acknowledge, their focus on the District Clause sets their ***131** central claims apart from those asserted in *Adams*. *E.g.*, Am. Compl. ¶¶ 10 ("[U]nlike the equal protection challenge in *Adams*, Plaintiffs' claims here are .... based on Congress's refusal to exercise its authority to protect the voting rights of District residents in the face of its recognition, post-*Adams*, that it has the power to do so."), 124 ("[U]nlike the *Adams* plaintiffs, the plaintiffs here contend that they are constitutionally entitled to voting representation notwithstanding that they are not residents of a State and that legislative and legal developments after *Adams* entitle them to that representation."); Mem. in Supp. of MSJ at 8 ("The argument that Congress has the authority under the District Clause to grant voting rights to District residents was neither made nor addressed in *Adams*."). The *Adams* panel expressed no opinion on the particular issues now before us; although the *Alexander* complaint prayed for items of relief virtually identical to those here at issue, *see Alexander* Compl. 57-60, the *Adams* panel construed the thrust of those plaintiffs' House-related claims to be concerned largely with apportionment, and in any case did not pass on any theory analogous to the one Plaintiffs now press. *See generally* 90 F. Supp. 2d 35. Nor – in case there were any remaining doubt – does either of the jurisdictional statements submitted to the Supreme Court by the *Adams* and *Alexander* plaintiffs, respectively, squarely present the theory Plaintiffs assert here: that it is unconstitutional for Congress to have neglected to use its District Clause powers to give District residents the House franchise. *See generally* Jurisdictional Statement, *Alexander v. Mineta*, 531 U.S. 940 (2000) (No. 99-2062); Jurisdictional Statement, *Adams v. Clinton*, 531 U.S. 941 (2000) (No. 00-97), 2000 WL 33999989. Because this argument "was neither made nor addressed in *Adams*," Mem. in Supp. of MSJ at 8, neither that decision nor its twin summary affirmances marks or illuminates our path.

[11] **[12]** In order to meet "the 'irreducible constitutional minimum' of standing," *Spokeo, Inc. v. Robins*, —— U.S. ——, 136 S. Ct. 1540, 1547, 194 L.Ed.2d 635 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)), a plaintiff "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision," *id.* (citing *Lujan*, 504 U.S. at 560-61, 112 S.Ct. 2130). The "standing inquiry [is] especially rigorous when reaching the merits of the dispute would force [the Court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines v. Byrd*, 521 U.S. 811, 819, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997).

[13] In performing the standing analysis, the Court "accept[s] as true all material allegations of the complaint," *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), construes the complaint in the plaintiffs' favor, *id.*, and assumes the plaintiffs' success on the merits of their claims, *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003) (per curiam). We therefore accept, for the moment, the validity of Plaintiffs' premises concerning the import of the District Clause, and generally assume for present purposes that Plaintiffs will prevail.

[14] **[15]** Defendants do not contend that Plaintiffs have not suffered an injury in fact, but of course that does not end our inquiry. *See United States v. Hays*, 515 U.S. 737, 742, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995) ("The question of standing is not subject to waiver[.]"). Plaintiffs' asserted injury is the denial of the right to voting representation in Congress. *See,* ***132** *e.g.*, Am. Compl. ¶ 1. Assuming the merits of Plaintiffs' claims – in particular, that they have a constitutional right to the House franchise – they have suffered an injury in fact as a result of that denial. "[V]oters who allege facts showing disadvantage to themselves as individuals have standing to sue." *Baker v. Carr*, 369 U.S. 186, 206, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) (finding an injury in fact where plaintiffs asserted that an apportionment impaired their right to vote for county representatives). We also reject any notion that the asserted injury is a generalized

one. "[W]here a harm is concrete, though widely shared, the Court has found 'injury in fact.' " *FEC v. Akins*, 524 U.S. 11, 24, 118 S.Ct. 1777, 141 L.Ed.2d 10 (1998) (citation omitted); *see also Baker*, 369 U.S. at 207-08, 82 S.Ct. 691 ("The injury which appellants assert is that this classification disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality vis-à-vis voters in irrationally favored counties. A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution .... If such impairment does produce a legally cognizable injury, they are among those who have sustained it."). Plaintiffs have, we conclude, suffered an injury in fact.

[16] **[17]** But having cleared the first of the three hurdles, Plaintiffs are confronted with the difficult obstacles of causation and redressability. Unpacking causation requires consideration of the actions of the Executive Defendants and those Senate Defendants who might be fairly said to remain before us even after our remand of Plaintiff's Senate claims: the President *Pro Tempore* of the Senate and the Vice President in his capacity as President of the Senate, both of whom could be required to vote on any legislation granting District residents the House franchise.[3] Our discussion of redressability brings us back to the issue of our own power, and in particular its limitations.

3 Because we disclaim jurisdiction over Plaintiffs' Senate claims, those Senate Defendants whose duties pertain only to Senate operations and do not comprehend legislating – the Secretary of the Senate and its Sergeant at Arms – are no longer before us. *See* Am. Compl. ¶¶ 63 (noting that the Secretary of the Senate "serves as an administrative and financial officer"), 64 (stating that the Sergeant at Arms of the Senate "is the chief law enforcement officer of the Senate"); *id.* Prayer for Relief ¶¶ 5(d) (seeking an injunction against the Secretary of the Senate as to the transmission of Senate-election forms), (b) (seeking an injunction against the Sergeant at Arms of the Senate requiring him to seat a District-elected Senator), (e) (seeking an injunction compelling the Sergeant at Arms of the Senate to otherwise "give effect to votes cast by the citizens of the District" in a senatorial election). But the President *Pro Tempore* of the Senate and the Vice President may be required to play a role in vindicating Plaintiffs' House claims. *Cf.* U.S. CONST. art. I, § 3, cl. 4 (providing that the Vice President may vote in the Senate where necessary to break ties). Therefore, our remand of Plaintiffs' Senate claims to a single District Court judge does not remove the President *Pro Tempore* of the Senate or the Vice President from the picture as we consider Plaintiffs' remaining claims.

Again, the causation analysis requires us to consider whether the alleged injury in fact is fairly traceable to the challenged conduct of the defendants. *Spokeo*, 136 S. Ct. at 1547. Moreover, "it does not suffice if the injury complained of is 'the result of the independent action of some third party not before the court[.]' " *Bennett v. Spear*, 520 U.S. 154, 169, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) (quoting *Lujan*, 504 U.S. at 560-61, 112 S.Ct. 2130 (brackets and emphasis omitted)). In other words, "[t]he causation element requires that a proper defendant be sued." ***133** *Common Cause v. Biden*, 748 F.3d 1280, 1284 (D.C. Cir. 2014) (citations omitted). It is abundantly clear that insofar as Plaintiffs are pressing the theory that Congress should have acted in a particular way but has wrongfully not bestirred itself to do so, neither of the Executive Defendants can be held responsible for Plaintiffs' lack of the House franchise. Nor can those Senate Defendants whose duties comprehend voting on legislation be charged with "causing" Plaintiffs' injury. The nonexistence of any statutes granting Plaintiffs the House franchise is not fairly traceable to individual legislators, who themselves have no power to pass legislation, but rather is caused by the inaction of the chambers of Congress writ large.[4] "In short, [Plaintiffs'] alleged injury was not caused by any of the defendants, but by [ ] 'absent third part[ies]' " – the House and the Senate. *See Common Cause*, 748 F.3d at 1285 (quoting *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 663 (D.C. Cir. 1996)).

4 Even were we to take a different view of causation as to the Senate Defendants, the end result would not change, as the Speech or Debate Clause would preclude Plaintiffs from pursuing individual legislators for their "legitimate legislative activity." *Eastland*, 421 U.S. at 503, 95 S.Ct. 1813.

[18] We do not wonder at Plaintiffs' failure to name the correct parties as defendants, of course, for it is well established that the Speech or Debate Clause would pose "an absolute bar to suit" where plaintiffs seek to assign liability for "any act that falls 'within the sphere of legitimate legislative activity.' " *Common Cause*, 748 F.3d at 1283 (quoting *Eastland*, 421 U.S. at 503, 95 S.Ct. 1813); *see* U.S. CONST. art. I, § 6, cl. 1. But we find Plaintiffs' attempted

workaround to be fatally infirm. "Article III 'requires no more than *de facto* causality,' " *Dep't of Commerce v. New York*, —— U.S. ——, 139 S. Ct. 2551, 2565, 204 L.Ed.2d 978 (2019) (quoting *Block v. Meese*, 793 F.2d 1303, 1309 (D.C. Cir. 1986)) – but it does require that much, and it is not present here. We find, therefore, that Plaintiffs have failed to establish the "causation" prong of Article III standing with respect to those aspects of their claims that are premised on the wrongfulness of congressional inaction.

[19] **[20]** **[21]** We also observe that Plaintiffs cannot carry their burden to establish redressability as to these claims. Redressability is present where it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130 (citation and internal quotation marks omitted). And "standing is not dispensed in gross," *Town of Chester v. Laroe Estates, Inc.*, —— U.S. ——, 137 S. Ct. 1645, 1650, 198 L.Ed.2d 64 (2017) (quoting *Davis v. FEC*, 554 U.S. 724, 734, 128 S.Ct. 2759, 171 L.Ed.2d 737 (2008)); rather, "a plaintiff must demonstrate standing ... for each form of relief that is sought," *id.* (quoting *Davis*, 554 U.S. at 734, 128 S.Ct. 2759). Again viewing Plaintiffs' claims in the light in which they are primarily cast – as arising from congressional inaction, and thus presumably redressable only by affirmative congressional action – we find highly dubious the notion that Article III redressability could be present, given the confines of the federal judiciary's power. The Speech or Debate Clause – not to mention separation-of-powers principles more broadly – make quite impossible the injunctive relief Plaintiffs appear to contemplate. *See* Am. Compl. Prayer for Relief ¶ 5(h) (praying that the court "order[ ] Defendants to pursue the steps that will most appropriately assure the rights of District of Columbia citizens to participate in the election of voting members of Congress"); *see also Eastland*, 421 U.S. at 503, 95 S.Ct. 1813 (noting that the Speech or ***134** Debate Clause confers immunity for any act that falls "within the sphere of legitimate legislative activity"); U.S. CONST. art I, § 1, cl. 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States[.]").

[22] **[23]** As to the declaratory relief Plaintiffs seek, "a request for declaratory relief may be considered independently of whether other forms of relief are appropriate." *Powell v. McCormack*, 395 U.S. 486, 517-18, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969) (finding redressability while "express[ing] no opinion about the appropriateness of coercive relief" against officers of the House). But Plaintiffs face an uphill climb to establish that ultimate redress would "likely" follow our issuance of a declaratory judgment in their favor should they prevail. *See Lujan*, 504 U.S. at 561, 112 S.Ct. 2130. "Whether [Plaintiffs'] claims of [ ] injury would be redressed by a favorable decision in this case depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989).

At argument and in their filings, Plaintiffs rely heavily on *Utah v. Evans*, 536 U.S. 452, 122 S.Ct. 2191, 153 L.Ed.2d 453 (2002), and *Franklin v. Massachusetts*, 505 U.S. 788, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992), contending that the standing principles iterated therein support their contention that redressability is present here. In *Franklin* – where the plaintiffs were challenging the allocation of overseas federal employees to States for apportionment purposes, 505 U.S. at 795, 112 S.Ct. 2767 – a plurality of the Supreme Court found redressability in the potential for declaratory relief against the Secretary of Commerce, reasoning that it was "substantially likely that the President and other executive and congressional officials would abide by an authoritative interpretation of the census statute and constitutional provision by the District Court, even though they would not be directly bound by such a determination," *id.* at 803, 112 S.Ct. 2767. A Court majority cited this language with approval in *Evans*, 536 U.S. at 460, 464, 122 S.Ct. 2191, there considering a challenge to the methodology used in the 2000 decennial census, *id.* at 457-58, 122 S.Ct. 2191. In addressing redressability, the *Evans* Court found that "a declaration leading, or an injunction requiring, the Secretary" of Commerce to issue a new census report using a different calculation method "would amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered," *id.* at 464, 122 S.Ct. 2191, as "the relevant calculations and consequent apportionment-related steps" that would follow a new report's issuance (and would redress the asserted injuries) "would be purely mechanical," *id.* at 463, 122 S.Ct. 2191.

We do not find the reasoning espoused in *Franklin* or *Evans* to be controlling here. No one can be heard to say that congressional enactment of legislation – which here is the key link in the chain leading to ultimate redress – is "purely mechanical," as would bring this case within *Evans*'s scope. And while we could *posit* that members of Congress would "abide by an authoritative interpretation of the ... [C]onstitution[ ]" by this Court, *Franklin*, 505 U.S. at

803, 112 S.Ct. 2767, such persons acting in their capacity as legislators are not the sorts of "congressional officials" contemplated by the *Franklin* Court as likely to provide ultimate redress via dutiful, predictable adherence to a court's declaration of the law. Compounding this latter problem is the fact that Plaintiffs ***135** have dismissed the House Defendants from the suit, meaning that we could not (even in the absence of all other impediments) issue any relief running against them. *See, e.g.*, *Lujan*, 504 U.S. at 568-71, 112 S.Ct. 2130 (finding an absence of redressability where remediation of plaintiffs' injuries would have required action by entities who "were not parties to the case" and were thus beyond the lower court's remedial reach).

We cannot say that the issuance of the requested declaratory judgment would make it "likely, as opposed to merely speculative," that Congress would undertake the affirmative action that, under Plaintiffs' central theory of the case, would be necessary to vindicate their asserted constitutional right to the House franchise. *See Lujan*, 504 U.S. at 561, 112 S.Ct. 2130. The daylight between this case on the one hand, and *Franklin* and *Evans* on the other, shines in large part from the separation of powers. It is simply not the role of this Court to legislate, any more through declaratory action than through injunction. The bridge from our issuance of declaratory relief to Plaintiffs' receipt of ultimate redress would necessarily pass through independent congressional action, with all the political choices and policy considerations entailed therein. It is a bridge too far.

We recognize some surface tension between this case and *FEC v. Akins*, cited by the *Evans* Court as supporting its finding of redressability and thus standing. *See Evans*, 536 U.S. at 464, 122 S.Ct. 2191 (citing *Akins*, 524 U.S. at 25, 118 S.Ct. 1777). *Akins* concerned those plaintiffs' quest to persuade the Federal Election Commission to designate a certain group as a "political committee," in the hopes ultimately of obtaining information about the group via statutorily mandated disclosures that would likely follow from such a designation. 524 U.S. at 15-16, 118 S.Ct. 1777. The *Akins* plaintiffs brought suit seeking review of FEC's dismissal of their administrative complaint. *Id.* at 18, 118 S.Ct. 1777. The Supreme Court found redressability to be present, notwithstanding the fact that "the agency ... might later, in the exercise of its lawful discretion, reach the same result for a different reason." *See id.* at 25, 118 S.Ct. 1777. And though at least one Court of Appeals judge has read *Akins*'s redressability finding to rest on the "assur[ance] that the FEC's discretionary decision [would be] based on a correct understanding of the relevant law," *Igartúa-de la Rosa v. United States*, 417 F.3d 145, 182 (1st Cir. 2005) (en banc) (Torruella, J., dissenting), the Supreme Court itself casts *Akins*'s redressability finding as being premised on the increased likelihood of FEC ultimately requiring reporting, despite its power not to do so, *Evans*, 536 U.S. at 464, 122 S.Ct. 2191; *accord Akins*, 524 U.S. at 21, 118 S.Ct. 1777 (casting the injury at issue as the "inability to obtain information").

The superficial parallels are at first pass persuasive. Here, as in *Akins*, the relief requested is but an initial step toward ultimate redress, Plaintiffs' achievement of which is dependent upon choices by government actors who the Court is powerless in the first instance to control. But again we see daylight between *Akins* and our case, in that FEC, on receipt of a complaint like the one in *Akins*, is *obligated* to take some action. *See* 52 U.S.C. § 30109 (detailing how FEC must respond to such complaints). In other words, *Akins* is not a case in which the Supreme Court found redressability in the potential for an independent political actor under *absolutely no obligation* to act to bestir itself to do so, and then to act in a way that redressed the asserted injury; rather, it was inevitable in *Akins* that *some* action would be taken on those petitioners' complaint following a favorable ***136** Court ruling. Not so here. We cannot pretend to predict the workings of Congress, and congressional issuances are not compelled as are FEC's. To posit that Congress will act, let alone act in any particular way, is to engage in the sort of speculation that *Lujan* instructs may not be the basis for Article III standing. *See* 504 U.S. at 561, 112 S.Ct. 2130.

Finding an absence of both causation and redressability, we hold that insofar as Plaintiffs' House-related claims are premised on allegedly wrongful congressional inaction, those claims are nonjusticiable for want of Article III standing and accordingly are dismissed.

VIII. Justiciability of House Claims that Resemble Those Considered in *Adams*

[24] The above analysis does not close the book on all of Plaintiffs' claims, however. Although the central thrust of Plaintiffs' suit is nonjusticiable, there are portions of the Amended Complaint that assert a more conventional challenge: one to Plaintiffs' exclusion from apportionment and, in the same vein, to the apportionment statutes themselves.[5] In line with the conclusion reached in

Adams, we find that Plaintiffs' constitutional challenges to apportionment are justiciable.

5 We do not understand Plaintiffs to be challenging the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), Pub. L. No. 99-410, 100 Stat 924 (1986) (codified at 52 U.S.C. §§ 20301-11). UOCAVA requires States (as well as U.S. territories and the District of Columbia) to permit otherwise-qualified voters residing or stationed overseas to vote in the last place they were domiciled prior to leaving the United States. 52 U.S.C. §§ 20302, 20310. Although the Amended Complaint does make repeated mention of UOCAVA with respect to Plaintiffs' equal-protection claim, *see, e.g.*, Am. Compl. ¶¶ 4, 111, 112, 114, 125, 135, it has none of the hallmarks we would expect of a complaint challenging UOCAVA's constitutionality or contending that UOCAVA should be expanded to grant some District residents the congressional franchise. For instance, the Amended Complaint's focus is evidently on securing congressional representation for District residents *qua* District residents, not as (former) residents of States. *See, e.g.*, *id.* ¶¶ 6 (arguing for "the constitutional right of District residents to band together to further their political beliefs"), 133 ("Without voting representation in the House and the Senate, District residents are unable to rely on local champions in Congress arguing for a fairer distribution of federal funds."). None of Plaintiffs' allegations as to the Defendants sued pertains to UOCAVA. *See id.* ¶¶ 59-67. And none of the requested relief addresses UOCAVA – either striking the statute down wholesale or allowing those District residents who previously resided and voted in States to continue to vote there. *See id.* Prayer for Relief ¶¶ 1-7. Because we conclude that Plaintiffs' constitutional claims are otherwise foreclosed, we have no occasion for further discussion of UOCAVA.

The Amended Complaint makes evident that, though apportionment is not their primary focus, Plaintiffs do challenge their exclusion therefrom. In their discussion of each of the Executive Defendants, Plaintiffs zero in on their respective roles in apportionment. *See* Am. Compl. ¶¶ 66 (the Secretary of Commerce), 67 (the President). And among the various items of relief sought are some directed at apportionment: Plaintiffs seek a declaration that the apportionment statutes (2 U.S.C. § 2a and 13 U.S.C. § 141) "are unconstitutional insofar as they require or have been applied" to exclude District residents from apportionment, Am. Compl. Prayer for Relief ¶ 1, and also pray for injunctive relief compelling the Secretary, the President, "and their successors in office[ ] to include the District" in their apportionment calculations and transmissions, *id.* ¶ 5(f). [6]

6 We construe Plaintiffs' apportionment claims as being asserted only against the Executive Defendants, as the Amended Complaint makes no apportionment-related allegations against either the Vice President or the President *Pro Tempore* of the Senate, *see generally* Am. Compl., and no other defendants remain before us.

***137** These aspects of Plaintiffs' claims map onto *Adams*, where the panel addressed whether "the failure to apportion congressional representatives to the District ... violate[d those plaintiffs'] constitutional rights[.]" *See* 90 F. Supp. 2d at 37. The *Adams* panel considered, in turn, the political-question and standing doctrines, finding the apportionment claims justiciable on both scores. 90 F. Supp. 2d. at 40-45. In finding no political-question barrier, the panel noted that "[t]he Supreme Court has repeatedly declared that '[c]onstitutional challenges to apportionment are justiciable,' " *id.* at 40 (quoting *Franklin*, 505 U.S. at 801, 112 S.Ct. 2767 (plurality)), and that the question of whether "District residents are among those qualified to vote for congressional representatives under Article I" was a "purely legal issue" that "the courts are perfectly capable of resolving," *id.* As to standing, the *Adams* panel found sufficient causation in the Secretary of Commerce's actions pursuant to the apportionment statute. 90 F. Supp. 2d at 41. On redressability, the panel relied primarily on *Franklin*, and concluded that "the ability of the court to enjoin the Secretary establishes the necessary redressability." 90 F. Supp. 2d at 41-43; *see also Evans*, 536 U.S. at 459-64, 122 S.Ct. 2191 (Court majority endorsing *Franklin's* redressability analysis).

The Supreme Court's summary affirmances in *Adams v. Clinton*, 531 U.S. 941, 121 S.Ct. 336, 148 L.Ed.2d 270 (2000) (mem.) and *Alexander v. Mineta*, 531 U.S. 940, 121 S.Ct. 336, 148 L.Ed.2d 269 (2000) (mem.), necessarily endorsed both of these justiciability holdings. Had the Supreme Court disagreed with the *Adams* panel's justiciability findings, its action would have been in the nature of dismissal rather than affirmance. *See, e.g.*, *Rucho v. Common Cause*, —— U.S. ——, 139 S. Ct. 2484, 2508, 204 L.Ed.2d 931 (2019)

(finding a nonjusticiable political question, vacating merits decisions of two three-judge district courts, and remanding "with instructions to dismiss for lack of jurisdiction"); *Va. House of Delegates v. Bethune-Hill*, —— U.S. ——, 139 S. Ct. 1945, 1956, 204 L.Ed.2d 305 (2019) (finding absence of standing and dismissing appeal "for lack of jurisdiction"); *see also Adams v. Clinton*, 531 U.S. at 941, 121 S.Ct. 336 ("Justice Stevens would dismiss the appeal."). That both summary affirmances were issued in a post-*Steel Co.* era, *see Steel Co.*, 523 U.S. 83, 118 S.Ct. 1003, moreover, lends additional credence to our conclusion that the Supreme Court considered the jurisdictional questions and accounted for them in summarily affirming the *Adams* panel's judgment. In view of the similarity between the claims asserted before the *Adams* panel and those asserted here – claims that the District's exclusion from apportionment violates the Constitution, paired with a prayer for redress via injunctive relief against the Secretary of Commerce – we believe we are bound by *Adams* and its summary affirmances to find Plaintiffs' apportionment claims justiciable and thus assert jurisdiction over them.

Before proceeding to the merits of those claims still before us, we note that Defendants also argue for the dismissal of the President from the suit on the grounds that the Court may not order equitable relief against him for his official conduct and that there is no cause of action against him. To the extent the first of these arguments is distinct from the second, it goes to the justiciability of Plaintiffs' claims, ***138** and we find it unnecessary to reach the issue. Again, *Adams* anchored its redressability analysis (and thus its finding of standing) in the court's ability to enjoin the Secretary of Commerce, 90 F. Supp. 2d at 43-44, and the Supreme Court's affirmances on the merits, *Alexander v. Mineta*, 531 U.S. 940, 121 S.Ct. 336, 148 L.Ed.2d 269 (2000) (mem.); *Adams v. Clinton*, 531 U.S. 941, 121 S.Ct. 336, 148 L.Ed.2d 270 (2000) (mem.), dictate that we find standing here. In the absence of any need to do so, we decline to wade into the question of the President's amenability to equitable relief. "[T]he partial relief [Plaintiffs] can obtain against [a] subordinate executive official[ ] .... is sufficient for standing purposes when determining whether we can order more complete relief would require us to delve into complicated and exceptionally difficult questions regarding the constit[ut]ional relationship between the judiciary and the executive branch." *Swan v. Clinton*, 100 F.3d 973, 980-81 (D.C. Cir. 1996); *accord Franklin*, 505 U.S. at 803, 112 S.Ct. 2767 (plurality) ("For purposes of establishing standing, however, we need not decide whether injunctive relief against the President was appropriate, because we conclude that the injury alleged is likely to be redressed by declaratory relief against the Secretary alone." (citations omitted)). As to the existence of a cause of action against the President, we need not decide that issue either, because we conclude that dismissal of Plaintiffs' remaining claims on Rule 12(b)(6) grounds, including their claims against the President, is otherwise appropriate.

IX. The Merits of Plaintiffs' Justiciable House Claims

[25] As explained above, insofar as Plaintiffs' claims are targeted at remediating congressional inaction, Plaintiffs lack Article III standing to pursue them. With all claims targeting representation in the Senate remanded to the single-judge District Court from whence they came, what remains to be decided is whether the apportionment statutes, 13 U.S.C. § 141 and 2 U.S.C. § 2a, and the Secretary of Commerce's and the President's actions in conformity with the same, violate Plaintiffs' rights to equal protection, due process, or freedom of association and representation due to the resultant denial to Plaintiffs of the House franchise. We answer these questions, ultimately, in the negative. Our analysis begins with consideration of the effect of *Adams* on our disposition of the issues; we then elucidate and unpack the parties' central premises before proceeding, finally, to the merits.

A. *Adams*

Our conclusion that Plaintiffs' apportionment claims fail to state a claim upon which relief can be granted may be foreordained, in whole or in part, by *Adams* and its summary affirmances. The *Adams* panel concluded that Article I restricts representation in the House to "the residents of actual states," 90 F. Supp. 2d at 47, and on that basis denied those plaintiffs' equal-protection, privileges-and-immunities, due-process, and Republican Guarantee Clause challenges to their exclusion from apportionment, *id.* at 65-72. The Supreme Court's summary affirmances of that panel's decision – which, again, we are counseled to treat as binding, *see Hicks*, 422 U.S. at 344, 95 S.Ct. 2281 – beg the question of what was both necessarily decided there and essential to sustain the District Court's judgment, *see* Schneier, *Do's and Don'ts*, *supra*, 960-61. An examination of the jurisdictional statements submitted to the Supreme Court is illuminating to a point; the (original) *Adams* plaintiffs presented, ***139** as relevant here, [7] only their equal-protection challenge to their exclusion from apportionment, *see* Jurisdictional Statement,

Adams, 531 U.S. 941 (No. 00-97), 2000 WL 33999989, at *i, while the *Alexander* plaintiffs disputed the *Adams* panel's more basic conclusion that Article I, Section 2 of the Constitution divests District residents of the congressional franchise, as well as the broader holding that such a restriction did not conflict with subsequent constitutional amendments, *see* Jurisdictional Statement, *Alexander*, 531 U.S. 940 (No. 99-2062), at i.

7 The *Adams* plaintiffs also "provisionally" presented the question of whether the *Adams* panel's handling of their case had violated their rights to due process. Jurisdictional Statement, *Adams*, 531 U.S. 941 (No. 00-97), 2000 WL 33999989, at *i.

The jurisprudential landscape as to the precedential effect of summary affirmances is in such a state as to make the search for a firm place on which to rest a substantive holding exceedingly difficult. Pressed by necessity, however, we believe that the Supreme Court must have affirmed the *Adams* holding that was the basis for the *Adams* panel's rejection of each of those plaintiffs' specific constitutional challenges: the holding that Article I contemplates that only "residents of actual states" have and may exercise the House franchise. We reach this conclusion because this holding is the central premise, and the narrowest ground, on which we perceive *Adams* to rise or fall.

But we do not rest wholly on *Adams*, for several reasons. For starters, Plaintiffs here are adamant that their claims are not foreclosed by *Adams* due, *inter alia*, to Congress's recent discovery of the applicability of (and Plaintiffs' resultant reliance on) the District Clause.[8] *See, e.g.*, Am. Compl. ¶¶ 124-27 (citing, in addition, the interposition of *Obergefell v. Hodges*, 576 U.S. 644, 135 S. Ct. 2584, 192 L.Ed.2d 609 (2015), *Vieth v. Jubelirer*, 541 U.S. 267, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004), and *Gill v. Whitford*, —— U.S. ——, 138 S. Ct. 1916, 201 L.Ed.2d 313 (2018)). Plaintiffs' new theories, they contend, take the instant case outside the ambit of the *Adams* ***140** decisions and warrant our fresh consideration of the issues presented. We do not pass on whether these distinctions, standing alone, would be sufficient to remove this case from *Adams*'s ambit, for they are joined by additional considerations. We are heedful of the Supreme Court's repeated statements that summary affirmances have less precedential weight than do full opinions. *See, e.g.*, *Wynne*, 135 S. Ct. at 1800; *Morse*, 517 U.S. at 203 n.21, 116 S.Ct. 1186. And because the twin summary affirmances in *Adams* present "rather slender reed[s]" on which to rest our decision, *Celebrezze*, 460 U.S. at 784 n.5, 103 S.Ct. 1564 (citation omitted), we conduct our own independent analysis, an approach of which the Supreme Court has previously approved, *see id.* at 784-85, 103 S.Ct. 1564. For the reasons that follow, we reach the same conclusion on the question of Article I's import as did the *Adams* panel twenty years ago. As in *Adams*, the conclusion must follow that Plaintiffs' constitutional challenges to their exclusion from apportionment and from the House franchise fail.

8 As Plaintiffs and several *amici* observe, both chambers of Congress have concluded in the time since *Adams* that Congress does have the at-issue power. In 2007, the House passed H.R. 1905, which, *inter alia*, would have treated the District as a congressional district for the purposes of representation in the House. H.R. 1905, 110th Cong. (2007). In 2009, the Senate passed S.160, which would have provided the District with a voting seat in the House. S.160, 111th Cong. (2009). Plaintiffs note also that two former D.C. Circuit Judges – Kenneth Starr and Patricia Wald – testified before Congress in support of Congress's ability to use its District Clause powers in this manner. *See Hearing on S. 1257, the District of Columbia House Voting Rights Act of 2007, Before the S. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Patricia M. Wald); *Common Sense Justice for the Nation's Capital: Hearing Before the H. Comm. on Gov't Reform*, 108th Cong., at 75-84 (2004) (statement of Kenneth Starr); *but see* 155 Cong. Rec. S2529 (daily ed. Feb. 26, 2009) (statement of John P. Elwood, Deputy Assistant Attorney General) (contending the 2007 bill was unconstitutional). Scholars have also weighed in on both sides of this issue. *See, e.g.*, Jonathan Turley, *Too Clever by Half: The Unconstitutionality of Partial Representation of the District of Columbia in Congress*, 76 GEO. WASH. L. REV. 305 (Feb. 2008); Mark S. Scarberry, *Historical Considerations and Congressional Representation for the District of Columbia: Constitutionality of the D.C. House Voting Rights Bill in Light of Section Two of the Fourteenth Amendment and the History of the Creation of the District*, 60 ALA. L. REV. 783 (2009); Orrin G. Hatch, *"No Right is More Precious in a Free Country": Allowing Americans in the*

District of Columbia to Participate in National Self-Government, 45 HARV. J. ON LEGIS. 287 (Summer 2007); CONG. RESEARCH SERV., THE CONSTITUTIONALITY OF AWARDING THE DELEGATE FOR THE DISTRICT OF COLUMBIA A VOTE IN THE HOUSE OF REPRESENTATIVES OR THE COMMITTEE OF THE WHOLE (2009).

B. The Parties' Arguments

To review, Article I of the Constitution provides that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. CONST. art. I, § 2, cl. 1. Section 2, Clauses 2 through 4,[9] Section 4, Clause 1,[10] Article II Section 1, Clause 2,[11] and Section 2 of the Fourteenth Amendment[12] also refer to ***141** "States" in discussing House representation. Meanwhile, the District Clause, contained in Article I, Section 8 of the Constitution, provides that "[t]he Congress shall have Power ... To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States[.]" *Id.* art. I, § 8, cl. 17.

9 No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

U.S. CONST. art. I, § 2, cl. 2-4.

10 The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

U.S. CONST. art. I, § 4, cl. 1.

11 Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

U.S. CONST. art. II, § 1, cl. 2.

12 Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the

> whole number of male citizens twenty-one years of age in such State.
>
> U.S. CONST. amend. XIV § 2.

Defendants argue that the Constitution itself "reserves representation in the House and Senate to residents of a state – a group that does not include residents of the District." Mem. in Supp. of MTD at 20. As Defendants see it, because "the Constitution dictates the lack of representation for residents of the District, ... all of Plaintiffs' claims must fail, regardless of which sections of the Constitution Plaintiffs cite." *Id.* at 25 ("Plaintiffs ... cannot successfully establish that the Constitution itself is unconstitutional."). Plaintiffs, on the other hand, argue that "while the Constitution explicitly *requires* citizens of States to have voting representation," it also authorizes Congress, via the District Clause, to provide the congressional franchise to District residents. [13] Mem. in Supp. of MSJ at 8 (emphasis in original); *see* Pls.' Reply at 3, ECF No. 50 ("The constitutional provisions requiring voting representation for state residents set a floor, not a ceiling."); *see generally id.* at 3-11. Plaintiffs' argument is, essentially: that the District Clause empowers Congress to treat the District for apportionment purposes as if it were a State; that voting is a fundamental right that Congress must allocate to all citizens on an equal basis absent a compelling reason to do otherwise; and that such compelling reason is absent here. It is on this basis that Plaintiffs seek to establish that the apportionment statutes, 2 U.S.C. § 2a and 13 U.S.C. § 141, are unconstitutional for their exclusion from the apportionment process, and their resultant exclusion from House representation, of District residents.

13 Several *amici* join Plaintiffs in contending that Congress is empowered by the District Clause to grant District residents the congressional franchise. *See generally* Scholars' Br.; House's Br.; *see also* Historians' Br. at 3-6 (arguing that there is no historical evidence that the Framers intended to disenfranchise District residents).

[26] In a way, the parties are asking the Court to answer different questions. Defendants would have the Court determine if the Constitution contemplated that *only* "the People of the several States" would have voting representation in Congress. If that is the constitutionally ordained system, say Defendants, Plaintiffs' claims cannot succeed, as the Constitution cannot be unconstitutional. Plaintiffs contend that the Court should instead ask if Congress *can* use its District Clause powers to allocate Representatives to the District, [14] because if it is empowered to do so, then the ability to elect House Representatives is not inherently limited to "the People ***142** of the several States," and so it is not a contradiction in terms to say that District residents' lack of the House franchise is unconstitutional. [15]

14 *See supra* note 8.

15 Plaintiffs do not seriously contest the point that the Constitution cannot be unconstitutional; indeed, they "agree" with Defendants that "the constitutional provisions ... allocating representatives and Senators to the [S]tates .... are constitutional." Pls.'s Reply at 3. This is an eminently reasonable position, and we see no need to belabor the tautology, as it is "settled beyond dispute that the Constitution is not self-destructive." *Billings v. United States*, 232 U.S. 261, 282-83, 34 S.Ct. 421, 58 L.Ed. 596 (1914); *accord, e.g.*, *Morgan v. United States*, 801 F.2d 445, 448 (D.C. Cir. 1986) ("Unless the Constitution were unconstitutional, one would think that, on those hypotheses, further review *would certainly* be barred." (emphasis in original)); *Igartúa v. United States*, 626 F.3d 592, 596 (1st Cir. 2010) (concluding that Article I by its terms prohibits Puerto Rico from having a House Member, and observing that "it cannot, then, be unconstitutional to conclude the residents of Puerto Rico have no right to vote for Representatives"); *Mercer v. Magnant*, 40 F.3d 893, 898 (7th Cir. 1994) ("[P]rocedures required by the Constitution are not themselves unconstitutional.").

[27] One difficulty here is that the inquiry Plaintiffs would have the Court undertake is rather circular: Plaintiffs contend that Congress's plenary power over the District is what renders those constitutional provisions that tie House representation to the States nonexclusive. But we break through this chicken-or-egg conundrum by observing that multiple Supreme Court pronouncements undercut the notion that Congress's District Clause power has no outer limits. The Supreme Court has repeatedly recognized that the other provisions of the Constitution serve as a check on Congress's District Clause power. *See, e.g.*, *Keller v. Potomac Elec. Power Co.*, 261 U.S. 428, 442-44, 43 S.Ct. 445, 67 L.Ed. 731 (1923) (concluding that Congress could not contravene Article III by using its District Clause powers to create jurisdiction in the Supreme Court to consider appeals from the D.C. Court of Appeals' review of utility commission proceedings). That is, Congress's power over the District is

indeed "plenary" – "save as controlled by the provisions of the Constitution." *Binns v. United States*, 194 U.S. 486, 491, 24 S.Ct. 816, 48 L.Ed. 1087 (1904); *see also Atl. Cleaners & Dyers v. United States*, 286 U.S. 427, 434-35, 52 S.Ct. 607, 76 L.Ed. 1204 (1932) (Congress may legislate with respect to the District "so long as other provisions of the Constitution are not infringed" (citation omitted)); *Capital Traction Co. v. Hof*, 174 U.S. 1, 5, 19 S.Ct. 580, 43 L.Ed. 873 (1899) (Congress may legislate with respect to the District "so long as it does not contravene any provision of the constitution of the United States" (citation omitted)); *see also Palmore v. United States*, 411 U.S. 389, 397, 93 S.Ct. 1670, 36 L.Ed.2d 342 (1973) (quoting this language from *Capital Traction Co.*); *cf. Stoutenburgh v. Hennick*, 129 U.S. 141, 147, 9 S.Ct. 256, 32 L.Ed. 637 (1889) (stating that, under the District Clause, Congress "possess[es] the combined powers of a general and of a state government in all cases *where legislation is possible*" (emphasis added)).

A striking (if not immediately apparent) instance of Supreme Court recognition of this limitation can be seen in *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 69 S.Ct. 1173, 93 L.Ed. 1556 (1949), which Plaintiffs cite to support their broad reading of Congress's District Clause power. In *Tidewater*, a deeply divided Supreme Court upheld Congress's provision, in 28 U.S.C. § 1332, that diversity jurisdiction would be deemed to exist in a case between a citizen of a State and a citizen of the District. *See generally* ***143** 337 U.S. 582, 69 S.Ct. 1173, 93 L.Ed. 1556; *cf.* U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases ... between Citizens of different States[.]"). *Tidewater* is made up of four different opinions – a three-justice plurality, a two-justice concurrence, and two two-justice dissents – but six justices agreed that Congress could not use its District Clause power to override explicit constitutional provisions. *Contra* Pls.' Reply at 6-7 (arguing that both the plurality opinion and the concurrence support their position, albeit through different reasoning).

The plurality, while finding that "the District of Columbia is not a state within Article III of the Constitution," *id.* at 588, 69 S.Ct. 1173, did hold that Congress could include the District in diversity jurisdiction through a combination of its District Clause and Necessary and Proper Clause powers; in a highly contextual analysis, the plurality discussed and built upon other instances in which Congress had used other plenary Article I powers to confer non-Article-III jurisdiction on Article III courts, *id.* at 592-599, 69 S.Ct. 1173; *see also id.* at 603, 69 S.Ct. 1173 ("Congress is reaching permissible ends by a choice of means which certainly are not expressly forbidden by the Constitution.").

The two-justice concurrence, meanwhile, reasoned that "the words of Article III ... must mark the limits of the power Congress may confer on the district courts in the several states," and that those limits cannot be overridden "through invocation of Article I without making the Constitution a self-contradicting instrument," *id.* at 607, 69 S.Ct. 1173; *see also id.* at 608, 69 S.Ct. 1173 ("[I]t seems past belief that Article I was designed to enable Congress" to override Article III). The concurrence concluded, however, that § 1332 was constitutional because Article III's diversity provision should not be read as exclusive in the absence of any evidence that the Framers so intended it, *id.* at 617-25, 69 S.Ct. 1173. The four justices who dissented would have held § 1332 unconstitutional for "disregard[ing] an explicit limitation of Article III." *Id.* at 653, 69 S.Ct. 1173; *see id.* at 655, 69 S.Ct. 1173.

Plaintiffs also rely on *Loughborough v. Blake*, 18 U.S. 317, 5 Wheat. 317, 5 L.Ed. 98 (1820), contending that it supports their interpretation of the District Clause. In *Loughborough*, the Supreme Court considered whether the Constitution permitted Congress to impose a direct tax on residents of the District. 18 U.S. at 317-18. In finding that it did, the Supreme Court cited two grounds for Congress's power: Article I, Section 8, Clause 1 (the "Power To lay and Collect Taxes, Duties, Imposts and Excises"), *id.* at 319-24, and the District Clause, *id.* at 324-25. Plaintiffs here make much of Article I, Section 2, Clause 3 ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers" as determined by the census) and the Supreme Court's ultimate finding in *Loughborough* that direct taxation may be imposed on District residents, arguing that "it therefore follows that Congress may use its District Clause power to apportion 'Representatives' to the District as well," Pls.' Reply at 6. But the Supreme Court's invocation of the District Clause took place in the context of its discussion of Congress's Article I, Section 8, Clause 1 power to tax, a "general grant of power to lay and collect taxes," which the Supreme Court considered "incontrovertibl[y]" "made in terms which comprehend the district and territories as well as the States." *Loughborough*, 18 U.S. at 322. In light of that broad power, the Court considered the apportionment provision of Article I, Section 2, Clause 3 to "furnish a standard by which taxes are to be apportioned, not to exempt from their operation any part

of ***144** our country." *Id.* at 320 ("Had the intention been to exempt from taxation those who were not represented in Congress, that intention would have been expressed in direct terms."). As we discuss below, Plaintiffs' argument that the same logic could be used to extend House representation to the District via the District Clause runs up against the other provisions of Article I. In *Loughborough*, on the other hand, no other constitutional provision was pointed to as restraining Congress's District Clause powers. *See id.* at 324-25 (discussing only the potential limitations posed by the "great principle ... that representation is inseparable from taxation"). In order for Plaintiffs' analogy to and reliance on *Loughborough* to work, the Constitution would have to give Congress plenary power to apportion representatives – which it simply does not. *See generally* U.S. CONST. art. I, § 2, cl. 3; *id.* amend. XIV, § 2 (setting forth how House Representatives are to be apportioned).

In the same vein, the Supreme Court has previously found other power granted Congress by Article I to be limited by other portions thereof. *Powell v. McCormack* concerned a newly reelected Member of the House who, pursuant to a House resolution, was not permitted to take his seat (because the House suspected him of financial improprieties). 395 U.S. at 489, 89 S.Ct. 1944. The *Powell* defendants argued that the case presented a nonjusticiable political question because Article I, Section 5, Clause 1 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members") represented a textual commitment of the matter to a coordinate branch of government. 395 U.S. at 519-20, 89 S.Ct. 1944. The Supreme Court undertook an historical analysis of Section 5 and determined that "Art. I, § 5, is at most a 'textually demonstrable commitment' to Congress to judge only the qualifications expressly set forth in the Constitution." 395 U.S. at 548, 89 S.Ct. 1944 (quoting *Baker*, 369 U.S. at 217, 82 S.Ct. 691); *see also* U.S. CONST. art. I, § 2, cl. 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."). In other words, the general power granted Congress by Article I, Section 5 ran up against, and yielded to, the specific provisions of Article I, Section 2.

In a way, Plaintiffs are in fact arguing for the commonsense proposition that Congress's power to legislate for the District is cabined by the other provisions of the Constitution: Plaintiffs' contention is that Congress, by providing for apportionment in a way that does not give the House franchise to District residents, is running afoul of the First, Fifth, and Fourteenth Amendments. But this argument ignores the fact that congressional legislation on apportionment does not stand on its own; rather, it follows the dictates of other portions of the Constitution to the extent the Constitution itself limits House representation to the States. Therefore, if the Constitution limits House representation to the "States," Plaintiffs – who expressly do not concede they must be able to characterize themselves as residents of a State, and do not argue the District is a State – cannot succeed on their claims. Despite their protestations to the contrary, Plaintiffs *do* seek to establish that the Constitution is unconstitutional, because they argue that the statutes by which Congress has put Article I's provisions for apportionment into action (2 U.S.C. § 2a and 13 U.S.C. § 141) violate the First, Fifth, and Fourteenth Amendments. *See* Am. Compl. Prayer for Relief ¶ 1 (seeking a declaration that the apportionment statutes "are unconstitutional insofar as they require or ***145** have been applied to effect the exclusion of citizens of the District of Columbia from the Congressional apportionment process"). Given that Congress's District Clause power is bounded by the Constitution's other provisions, Plaintiffs' claims must rise or fall on the interpretation of those provisions that address the makeup of the House electorate.

C. The Merits

[28] We now consider whether the Constitution contemplates that only "the People of the several States" be permitted to elect voting Representatives to the House. *See* U.S. CONST. art. I, § 2, cl. 1. Our answer in the affirmative is based on the Constitution's text, judicial precedent, and, to a lesser extent, constitutional history.

1. Constitutional Text

The link between "States" and representation in the House is sewn throughout Article I. Members of the House are to be elected "by the People of the Several *States*," and the qualifications of "each *State*['s]" electors (voters) are tied to those of the electors of the "*State* Legislature." U.S. CONST. art. I, § 2, cl. 1 (emphases added). A representative must, at the time of her election, be "an Inhabitant of that *State* in which" she is chosen. *Id.* cl. 2 (emphasis added). Article I as unabridged dictated that both "Representatives and direct Taxes" are "apportioned among the several *States* which may be included within this Union," *id.* cl. 3 (emphasis added), and

the Fourteenth Amendment provides that "Representatives shall be apportioned among the several *States* according to their respective numbers, counting the whole number of persons in each *State*," *id.* amend. XIV, § 2 (emphases added). Article I, Section 2 further dictates that "each *State* shall have at Least one Representative," and lists the number of representatives to be apportioned to the thirteen States that were then members of the Union. *Id.* art. I, § 2, cl. 3 (emphasis added). Section 2 also states that, "[w]hen vacancies happen in the Representation from any *State*, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies." *Id.* cl. 4 (emphasis added). And Section 4 provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each *State* by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." *Id.* § 4, cl. 1 (emphasis added).

As the *Adams* panel noted, 90 F. Supp. 2d at 47-49, a reading of "State" in the applicable provisions of Article I that encompassed the District would lead to results that either are impossible or cannot have been contemplated by the Framers. Voter eligibility is tied to that for the "State Legislature," U.S. CONST. art. I, § 2, cl. 1, but until the 1973 passage of the Home Rule Act, Pub. L. No. 93-198, 87 Stat. 777, the District of Columbia had nothing analogous; rather, Congress itself was conceived of as the District's legislative body. *See* U.S. CONST. art. I, § 8, cl. 17; *see also, e.g.*, *Stoutenburgh*, 129 U.S. at 147, 9 S.Ct. 256 (noting that the District Clause grants Congress "the combined powers of a general and of a state government in all cases where legislation is possible"). If the "State Legislature" referred to in Article I were read to comprehend Congress as the District's legislature, "with the House as its most numerous branch, then the clause would say no more than that voters for the House must have the qualifications requisite for voters for the House—a tautology without constitutional content." *Adams*, 90 F. Supp. 2d at 48. Another example is ***146** Article I, Section 2, Clause 4 's provision for the filling of vacancies "from any State [by] the Executive Authority thereof[.]" U.S. CONST. art. I, § 2, cl. 4. Although the District now has a mayor, this is again a relatively recent invention – and Congress is the District's "ultimate executive authority," *Adams*, 90 F. Supp. 2d at 49 (citing *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 76, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982) ("Congress' power over the District of Columbia encompasses the full authority of government, and thus, necessarily, the Executive and Judicial powers as well as the Legislative.")), meaning that, were the District to be comprehended within the applicable passages, Congress itself would fill any vacancies in the District's seat(s). As the *Adams* panel cogently observed, "[t]he possibility that the Framers intended Congress to fill its own vacancies seems far too much of a stretch, even if the constitutional fabric were more flexible than it appears to be." *Id.*

[29] "The framers of the constitution employed words in their natural sense; and, where they are plain and clear, resort to collateral aids to interpretation is unnecessary, and cannot be indulged in to narrow or enlarge the text[.]" *McPherson v. Blacker*, 146 U.S. 1, 27, 13 S.Ct. 3, 36 L.Ed. 869 (1892); *but see id.* ("[B]ut where there is ambiguity or doubt, or where two views may well be entertained, contemporaneous and subsequent practical construction is entitled to the greatest weight."). Although we perceive no ambiguity in Article I's dictates concerning the "States" whose "people" are entitled to the House franchise, we proceed to dispel any remaining doubts by considering judicial constructions of the relevant portions of Article I, and reiterating an historical issue surfaced in *Adams*.

2. Precedent

[30] "Whether the District of Columbia constitutes a 'State or Territory' within the meaning of any particular statutory or constitutional provision depends upon the character and aim of the specific provision involved." *District of Columbia v. Carter*, 409 U.S. 418, 420, 93 S.Ct. 602, 34 L.Ed.2d 613 (1973). We are not persuaded that any of the Constitution's other uses of the word "State" address matters near enough to those here at issue that their judicial interpretations would shed light on the question before us; we therefore concern ourselves only with judicial pronouncements on the import of the word "State" in the at-issue provisions of Article I.

Given Plaintiffs' unusual position in the American constituency and the resultant scarcity of analogous cases, it is not surprising that the most on-point appellate precedent is only persuasive. The First Circuit considered in 2010 whether U.S. citizens residing in Puerto Rico had a right to elect a Representative to the House. *Igartúa v. United States*, 626 F.3d 592 (1st Cir. 2010). In holding that the Constitution foreclosed such a right, the First Circuit surveyed the constitutional text, and noted:

> The text of the Constitution defines the term "State" and affords no flexibility as to its meaning. The term is unambiguous and refers to the thirteen original states, which are specifically named in Article I, Section 2, [U.S. CONST.] art. I, § 2, cl. 3, and those which have since joined the Union through the process set by the Constitution, *id.* art. IV, § 3, cl. 1 .... Because Puerto Rico is not a state, it may not have a member of the House of Representatives. *Id.* art. I, § 2, cl. 1.... The text of the Constitution does not permit plaintiffs to vote for a member of the U.S. House of Representatives.

***147** *Igartúa*, 626 F.3d at 596; *see also id.* ("It cannot, then, be unconstitutional to conclude the residents of Puerto Rico have no right to vote for Representatives."). *Igartúa* also discusses how "central" statehood is "to the very existence of the Constitution." *Id.* at 596-98 (concluding that "[v]oting rights for the House of Representatives are limited to the citizens of the states absent constitutional amendment to the contrary."). Those few other federal appellate cases to have considered the precise issue have held similarly. *See Segovia v. United States*, 880 F.3d 384, 390 (7th Cir. 2018) (discussing, in a case brought by former State residents who now resided in territories, the voting rights accorded to residents of the District and the territories, and observing, "The unmistakable conclusion is that, absent a constitutional amendment, only residents of the 50 States have the right to vote in federal elections"); *Igartúa v. Trump*, 868 F.3d 24 (1st. Cir. 2017) (noting, in a four-judge statement on denial of rehearing of *Igartúa en banc*, that the plaintiff's claim "is that the United States Constitution makes it unconstitutional to apportion congressional districts as the Constitution itself says to apportion them," and that none of the judges dissenting from a denial of rehearing "even tries to explain how the Constitution itself might conceivably prohibit that which it directs 'shall be' done"). Though of course we are bound by none of these decisions, we find them persuasive – especially in the absence of any caselaw to the contrary.

Our own Court of Appeals has opined on the topic to a certain extent. The *Adams* panel, of course, concluded – after an exhaustive analysis – that "the language of Article I ... makes clear just how deeply [c]ongressional representation is tied to the structure of statehood." 90 F. Supp. 2d at 47; *see also id.* at 68 ("[T]he inability of District residents to vote is a consequence of Article I."). The D.C. Circuit, citing *Adams*, has stated in dictum that "the Constitution denies District residents voting representation in Congress." *Banner v. United States*, 428 F.3d 303, 309 (D.C. Cir. 2005) (per curiam) (citing *Adams*, 90 F. Supp. 2d at 72); *see also United States v. Thompson*, 452 F.2d 1333, 1340 (D.C. Cir. 1971) ("[F]or residents of the District, the right to vote in congressional elections is not merely restricted–it is totally denied." (dictum)), *abrogation on other grounds recognized by United States v. Cohen*, 733 F.2d 128, 135 (D.C. Cir. 1984) (en banc). The D.C. Circuit has further noted, in a 1994 case concerning a House rule that permitted the District's Delegate to vote in the Committee of the Whole, that the language of Article I, Section 2 "precludes the House from bestowing the characteristics of membership" – which include the ability "to vote in the full House" – "on someone other than those 'chosen every second Year by the People of the Several States.' " *Michel v. Anderson*, 14 F.3d 623, 630 (D.C. Cir. 1994); *see also id.* at 632 (upholding the House rule in question because "insofar as the rule change bestowed additional authority on the delegates, that additional authority is largely symbolic .... [W]e do not think this minor addition to the office of delegates has constitutional significance.").

Supreme Court pronouncements on the subject are a lightly mixed bag. Historically, the Supreme Court has evinced an understanding that House representation is limited to the people of the States. For instance, considering in 1901 whether the Constitution's revenue clauses extended to U.S. territories, the Supreme Court emphasized that "[t]he Constitution was created by the people of the *United States*, as a union of *states*, to be governed solely by representatives of the *states* .... In short, the Constitution deals with *states*, their ***148** people, and their representatives." *Downes v. Bidwell*, 182 U.S. 244, 251, 21 S.Ct. 770, 45 L.Ed. 1088 (1901) (emphases in original); *see also Hepburn & Dundas v. Ellzey*, 6 U.S. 445, 452-53, 2 Cranch 445, 2 L.Ed. 332 (1805) (quoting language from Article I regarding House, Senate, and presidential elections, and concluding, "These clauses show that the word state is used in the constitution as designating a member of the union .... [This] term ... [is] used plainly in this limited sense in the articles respecting the legislative and executive departments[.]"). The Supreme

Court has also referred to the District as having "voluntarily relinquished the right of representation." *Loughborough*, 18 U.S. at 324; *see also id.* at 324-25 ("[C]ertainly the [C]onstitution does not consider their want of a representative in Congress as exempting it from equal taxation.").

More recently, the Supreme Court has spoken of the right to vote for Members of Congress as rooted in the individual rather than deriving from the State – but these pronouncements are fairly general, not particularly on point, and ultimately insufficient to counteract what we read as the clear provisions of Article I. *See, e.g.*, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995) ("The [Constitution's] salary provisions reflect the view that representatives owe their allegiance to the people, and not to the States."); *id.* at 808, 115 S.Ct. 1842 ("As Madison noted, allowing States to differentiate between the qualifications for state and federal electors 'would have rendered too dependent on the State governments that branch of the federal government which ought to be dependent on the people alone.' " (quoting THE FEDERALIST NO. 52, at 326 (James Madison))); *Wesberry v. Sanders*, 376 U.S. 1, 14, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964) ("The House of Represen[t]atives, the Convention agreed, was to represent the people as individuals, and on a basis of complete equality for each voter.").

In sum, the weight of what precedent there is on the issue supports our reading of Article I as limiting House representation to the people of the States.

3. Constitutional History

We do not here rehearse constitutional history writ large. Although Plaintiffs (and some of their *amici*) spend a fair amount of time on historical arguments, nowhere is it contended that the Framers of the Constitution intended, by their repeated reference to "States" in Article I, to refer to anything but those entities of which the Union then had thirteen and now has fifty. *Cf. Adams*, 90 F. Supp. 2d at 56 ("There is simply no evidence that the Framers intended that not only citizens of states, but unspecified others as well, would share in the congressional franchise."). But we linger in constitutional history long enough to reiterate and underline a critical point made in *Adams*: namely, that the process by which Congress came to be composed as it is counsels against the broad, nonexclusive reading of "State(s)" that would necessarily underpin the prevalence of Plaintiffs' claims.

The bicameral structure of Congress was the result of the Constitutional Convention's Great Compromise – a deal struck between delegates who favored election by and representation of the people, and those delegates (including those from small States) who argued that the States should instead be represented. *Wesberry*, 376 U.S. at 9-14, 84 S.Ct. 526; *see also id.* at 10, 84 S.Ct. 526 ("The question of how the legislature should be constituted precipitated the most bitter controversy of the Convention."), 12, 84 S.Ct. 526 ("The dispute came near ending the Convention without a Constitution."). The *Adams* panel observed that "the House provisions ... ***149** were 'the other side of the compromise': to satisfy the larger states, the House was to be popularly elected, and 'in allocating Congressmen the number assigned to *each State* should be determined solely by the number of the State's inhabitants.' " 90 F. Supp. 2d at 50 (quoting *Wesberry*, 376 U.S. at 13, 84 S.Ct. 526) (emphasis in *Adams*). The point we underscore is that the constitution of Congress was the considered result of extensive debate, and in the absence of any evidence that the Framers intended something other than what they wrote, it is not the place of either Congress (acting via the District Clause) or this Court to revise the results of the compromise that was so central to the formation of the country as it is.

X. Conclusion

Because Congress's District Clause power does not include the power to contravene the Constitution's express provisions, and because the Constitution by its terms limits House representation to "the people of the several States," we find that Plaintiffs' claims that their exclusion from apportionment is violative of their rights to equal protection, due process, and association and representation fail to state a claim upon which relief can be granted. *See* FED. R. CIV. P. 12(b)(6). We therefore dismiss those claims. Having also dismissed those of Plaintiffs' claims that sought to compel affirmative congressional action, and having remanded to a single District Judge Plaintiffs' Senate claims, our work is now at an end.

But before we end, we note what gives us pause. We have been and remain cognizant of the gravity of Plaintiffs' asserted injury, which has long been of great concern both to those similarly injured and to sympathetic others who take to heart the democratic ideals that impelled and informed the creation

of the Union. After all, "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry*, 376 U.S. at 17, 84 S.Ct. 526. But the House's makeup, though enshrined in the Constitution, is not written in stone. The Founders provided for processes for the admission of new States, *see* U.S. CONST. art. IV, § 3, cl. 1 – which are then represented in the House under the provisions of Article I – and for amending the Constitution, *see id.* art. V, as was done to give District residents the presidential franchise, *see id.* amend. XXIII. In other words, Plaintiffs may continue to "plead their cause in other venues," *Adams*, 90 F. Supp. 2d at 72: those the Constitution countenances.

For the foregoing reasons, those of Plaintiffs' claims seeking Senate representation are **REMANDED** to the single District Judge to whom the case was originally assigned. Defendants' Motion to Dismiss, ECF No. 21, is hereby **GRANTED IN PART**; all of Plaintiffs' claims except those seeking Senate representation are **DISMISSED**. Plaintiffs' Motion for Summary Judgment, ECF No. 23, is hereby **DENIED**.

An accompanying order will follow.

All Citations

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Castañon v. US: Examining Barriers to Justice for the Bar & Litigants in DC

Additional Course Materials:

Opinion of three-judge panel of the US District Court in Castañon et al v. US, 444 F.Supp.3d 118 (D.D.C. 2020) Castañon v. United States, 444 F. Supp. 3d 118 | Casetext Search + Citator (3/12/2020)

Amicus brief filed in April 2021, before the U.S. Supreme Court in Angelica Castañon et al v. United States. This brief was filed by the DC Affairs Community and other concerned DC legal professionals and organizations;

Council for Court Excellence materials, including reports from the District Task Force on Jails and Justice (www.courtexcellence.org):

Report of the Committee on Local Control to the District Task Force on Jails & Justice (August 9, 2019)

Jails and Justice: A Framework for Change: Phase I Findings and Recommendations of the District Task Force on Jails & Justice (October 2019)

Jails and Justice: Our Transformation Starts Today (Feb 2021) - TransformationStartsToday.pdf (courtexcellence.org)

Voices from Within the Federal Bureau of Prisons: A System Designed to Silence and Dehumanize (Washington Lawyers Committee for Civil Rights and Urban Affairs report, 9/14/22 www.washlaw.org)

Restoring Local Control of Parole to the District of Columbia, Justice Policy Institute (Jan 2020) Restoring Local Control of Parole to the District of Columbia - Justice Policy Institute

Martin Austermuhle, WAMU (Aug 2017) D.C. Inmates Serve Time Hundreds Of Miles From Home. Is It Time To Bring Them Back? | WAMU

Karen Sloan, Law.com (Jan 2019) Shutdown Imperils DC Bar Exam, Swearing-In Postponed | Law.com

Mark Mazzetti and Luke Broadwater, New York Times, April 21, 2021 National Guard Deployment at the Capitol Riot Was Delayed by Confusion and Inaction - The New York Times (nytimes.com)