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Is This America?
The District of Columbia and the Right to Vote

Jamin B. Raskin

Britain, with an army to enforce her tyranny, has declared, that she has a right (not only to tax) but "to bind us in all cases whatsoever," and if being bound in that manner is not slavery, then there is not such a thing as slavery upon earth. Even the expression is impious; for so unlimited a power can belong only to God.

—Thomas Paine

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 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.

—Justice Sutherland, O'Donoghue v. United States

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.

—Justice Black, Wesberry v. Sanders

This Article is dedicated to the memory of Josephine Butler and David A. Clarke, two champions of democracy for citizens of the District. The author has received the benefit of the views of literally hundreds of persons but would like to give special thanks to Congresswoman Eleanor Holmes Norton and District of Columbia Council Chairman Linda Cropp for their invaluable support and assistance, Mark Plotkin and Councilman Kevin Chavous for their encouragement, Professor Peter Raven-Hansen for his incisive suggestions, and the Dean and faculty of the Washington College of Law.

1 THOMAS Paine, The American Crisis, Number One (R. Carlile 1819).
2 289 U.S. 516, 541 (1933) (quoting Downes v. Bidwell, 182 U.S. 244, 260–61 (1901)).
3 376 U.S. 1, 17–18 (1964).
Do American citizens have a right to vote for representatives to Congress and their state and local legislative institutions? This question goes to the very character of our Constitution, but it is more than academic in the nation's capital. Today, more than 500,000 citizens living in the District of Columbia have no voting representation in the United States Senate or the United States House of Representatives, and little prospect of achieving representation in either through political channels.

Thus far, attempts to secure representation for District residents through litigation have failed. In Loughborough v. Blake, the Supreme Court affirmed Congress' power to impose a direct federal tax on the District, refuting the principle of the American Revolution that called for "no taxation without representation" and rejecting the analogy between taxation of the disenfranchised colonists and taxation of disenfranchised Washingtonians. Similarly, the courts have rejected claims that the es-

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5 District residents have never had representation in the U.S. Senate. Since 1970, they have been represented in the House by a delegate who has no vote on final passage of legislation, although she may vote in Committee. See 2 U.S.C. § 25a (1994) (providing that the District of Columbia shall be represented by a delegate to the House of Representatives). The delegate briefly won the right to vote in the House Committee of the Whole; a policy that withstood a vigorous legal challenge, but was ultimately revoked in 1995 when the Republicans took over leadership of the House. See Michel v. Anderson, 14 F.3d 623, 624-25 (D.C. Cir. 1994). District residents participate in a limited way in the selection of electors in the presidential electoral college. See U.S. Const. amend. XXIII, § 1.

The District populace has been complaining about its subordinate status since the District was created in the eighteenth century. In 1800, the people "were so sensitive to the loss of . . . political rights and privileges, they petitioned Congress upon the matter, using these words: 'We shall be reduced to that condition of which we pathetically complained in our charges against Great Britain.'" JAMES HUGH KEELEY, SR., DEMOCRACY OR DESPOTISM IN THE AMERICAN CAPITAL 59 (1939). Protest has continued with more or less fervor to the present day and, since the 1960s, residents have made some gains. In 1961, the Constitution was amended to give District residents electoral college votes in presidential elections. See U.S. Const. amend. XXIII. In 1970, Congress created the position of non-voting delegate. See District of Columbia Delegate Act, Pub. L. No. 91-405, 84 Stat. 848 (1970) (codified in 2 U.S.C. § 25(a) (1988)). In more recent years, however, the momentum has been with the District's adversaries. In 1978, Congress passed the D.C. Voting Rights Amendment, which would have amended the Constitution to treat the District as though it were a state for purposes of federal representation, creating two U.S. senators and probably one congressperson. The amendment failed after being ratified by only 16 states within the seven-year statutory period. The District Council petitioned Congress for statehood on September 12, 1983, but nothing happened for a decade. The U.S. House of Representatives took a vote on the petition for statehood for New Columbia in 1993, but rejected it by a vote of 277-153. See 139 Cong. Rec. H10,573-75 (daily ed. Nov. 21, 1993). The Senate never conducted hearings on the statehood bill. More recently, the population has seen even the modest home rule government shorn of its powers. See infra note 12 and accompanying text. The 1998 Almanac of American Politics summed up the prospects for democratic change in the District with depressing accuracy, asserting that statehood "is a dead cause, and self-government continues in form only." MICHAEL BARONE & GRANT UJIFUSA, THE ALMANAC OF AMERICAN POLITICS 333 (1998).


7 See also Heald v. District of Columbia, 259 U.S. 114, 124 (1922) (affirming the dis-
tablishment of an unelected local government in the District is unconstitutional because it constitutes discriminatory disenfranchisement in violation of the Fifteenth Amendment.\textsuperscript{8} Still, despite the failure of previous constitutional challenges to congressional control, a strong equal protection argument is still available to District residents disenfranchised under the current regime.

The denial of representation in Congress locks District residents not only out of their national legislature but also out of what is in a structural sense their state legislature. Article I of the Constitution commits to Congress “exclusive Legislation in all Cases whatsoever” over the District that is “the Seat of the Government of the United States,”\textsuperscript{9} and the courts have likened the relationship between Congress and District residents to that of the states and their people.\textsuperscript{10} Thus, Americans living in the District are the only citizens of the United States today who have voting representation neither in Congress nor in their “state” legislative sovereign.\textsuperscript{11} This break in the democratic fabric is exacerbated by recent congressional actions transferring most of the legislative power over District affairs from the District’s “home rule” government to an unelected financial control board.\textsuperscript{12}

\textsuperscript{9} U.S. Const. art. I, § 8, cl. 17.
\textsuperscript{10} See discussion infra Part II.B.
\textsuperscript{11} The residents of the 50 states are represented in their state legislatures and, through the workings of Article I, in Congress. Residents of Puerto Rico, Guam, American Samoa, and the Virgin Islands are denied voting representation in Congress, as well as participation in the election of the president and vice-president. See Amber L. Cottle, Comment, Silent Citizens: United States Territorial Residents and the Right to Vote in Presidential Elections, 1995 U. CHI. LEGAL F. 315, 315–17 (1995). However, they do have the right to vote for their own legislatures. Congress does not govern any of these territories directly, as it does the District, although it retains plenary power over them. See id. at 316. A further difference is that residents of these territories are not taxed by the federal government, while District residents are. See U.S. Const., art. I, § 8, cl. 1 (requiring that federal taxes be “uniform throughout the United States,” but not the territories).
\textsuperscript{12} District residents presently have no voting representation in their four-year-old presidentially appointed local “control board,” as it is popularly known, or in the Emergency Transitional Educational Board of Trustees. The control board was created by Congress in response to a series of intensifying fiscal and management crises in the District government. See District of Columbia Financial Responsibility and Management Assistance Act, Pub. L. No. 104-8, § 2(a), 109 Stat. 97, 98 (1995) [hereinafter DCFRA] (finding the District government in a “fiscal emergency,” buffeted by “pervasive” mismanagement and unable to deliver “effective or efficient services” to residents). The National Capital Revitalization and Self-Government Improvement Act of 1997, Pub. L. No. 105-33, §§ 11000-11723, 111 Stat. 251, 712–87 (1997), strengthened the DCFRA by transferring most of the powers of the Mayor and Council of the District of Columbia to the control board. Together, these acts of Congress effectively ended just over two decades of limited home rule for the District of Columbia.

On November 15, 1996, the control board issued an order creating an Emergency
Thus, as the twentieth century draws to a close, the District remains isolated from the normal practices of representative democracy. It is the glaring "anomaly in our system of government, where the lawmakers are chosen by others than those for whom they make the laws," as President John Tyler put it long ago. I have argued elsewhere that the American polity has been characterized by progressive waves of inclusion and representation, a trend countered by the declining suffrage fortunes of non-citizens. But the trend of suffrage expansion has mostly bypassed citizens living in the District, who have lost much ground since the Republic began.

In both a theoretical and practical sense, the effective disenfranchisement of the District is the paradigm case testing whether all American citizens actually enjoy a right to vote and to be represented on equal terms. This apparently marginal or parochial issue takes on central importance for the meaning of American constitutional democracy.

Transitional Education Board of Trustees and transferred most of the elected D.C. Board of Education's powers to the new body. This order was invalidated by the United States Court of Appeals for the District of Columbia Circuit, which ruled that the control board exceeded its assigned statutory powers by delegating away its authority over the public schools to a third party not the superintendent. See Shook v. District of Columbia Fin. Responsibility & Management Assistance Auth., 132 F.3d 775, 782–83 (D.C. Cir. 1998). This decision represents a small victory in the resistance to attempts by Congress and the Control Board to wrest away from District citizens the last remnants of home rule. See generally Stephen R. Cook, Comment, Tough Love in the District: Management Reform Under the District of Columbia Financial Responsibility and Management Assistance Act, 47 Am. U. L. Rev. 993, 1015–18 (discussing the D.C. Circuit's opinion in Shook and the control board's response).

13 Keeley, supra note 5, at 58.
15 Before Maryland and Virginia ceded land to Congress to create the new District, its inhabitants voted as residents of those states. Even after the cession of the lands to Congress in 1791, residents continued to vote in Maryland or Virginia (depending on where they lived within the District) until 1800 when Congress took the reins of power and passed the first Organic Act. See Peter Raven-Hansen, The Constitutionality of D.C. Statehood, 60 GEO. WASH. L. REV. 160 (1991) [hereinafter Raven-Hansen, D.C. Statehood]. Thus, the original understanding was that District residents were part of what Gerald Neuman has called, in a different context, an "optional electorate." Gerald L. Neuman, "We Are the People": Alien Suffrage in German and American Perspective, 13 MICH. J. INT'L L. 259, 320 (1992). They could be allowed to vote in other states or, theoretically, their voting rights could be allowed to wither on the vine. In practice, by contrast, the District as a community has essentially gone two full centuries without having had a vote for members of Congress.
16 The idea that the current regime is unconstitutional has recently caught on. On July 12, 1998, the District of Columbia Corporation Counsel, John Ferren, submitted a Petition for Redress of Grievances demanding full voting rights with the leadership of both the House of Representatives and the Senate. See Petition for Redress and Grievances from John M. Ferren, District of Columbia Corporation Counsel to Congress (July 12, 1998) (on file with the Harvard Civil Rights-Civil Liberties Law Review). The House reacted by attaching a restriction to the D.C. appropriations bill forbidding the Corporation Counsel to expend any funds advocating or litigating on behalf of the voting rights of its constituents. Pub. L. 105-277. Undaunted, the Corporation Counsel, assisted by the Washington, D.C. law firm of Covington and Burling and this author, filed suit in the U.S. District Court for
The regime of non-representation in the nation's capital depends on the pervasive assumption that disenfranchisement is structurally required or, at the very least, implied by the Constitution. This Article challenges that assumption, which misreads the terms and meanings of our Constitution. In fact, the political arrangements set by Congress for the District violate the essential norms of the Constitution, denying District residents an "equal part in political life" and an "equal stake in government." If the Constitution was ever a political straitjacket that imposed inequality and domination on citizens, the modern Constitution is a freedom charter, the democratic social contract of, by, and for a sovereign people, including the people who live in the District of Columbia.

In Part I, I argue that the people living in the District belong to the constitutional community and that constitutional principles, including equal protection, must apply with full force to their rights.

In Part II, I propose an alternative means of challenging the District's non-representation in Congress: as a violation of the equal protection and due process rights of District citizens. I argue that the current regime violates the Constitution in the following three ways:

1. Denial of representation in Congress burdens the equal protection and due process rights of American citizens in the District to be popularly represented in Congress on the basis of one person–one vote without regard to geographic residence, a right established in *Wesberry v. Sanders* and subsequent voting rights jurisprudence, as well as the correlative right to run for Congress;

2. Denial of representation in Congress burdens the right of American citizens living in the District to be represented in their own state legislature, which is Congress itself, on the basis of one person–one vote without regard to geographic residence, a right established in *Reynolds v. Sims*, as well as their correlative right to run for state legislature;

3. Denial of representation in Congress to the sixty-six-percent-majority–African American population in the District not only suggests a


[T]here can be no democracy, conceived as a joint venture in self-government, unless all citizens are given an opportunity to play an equal part in political life, and that means not only an equal franchise, but an equal voice . . . . [T]here can be no democracy so conceived unless people have, as individuals, an equal stake in the government.

*Id.*


belief in the unfitness of the population to participate equally in national life but creates the kind of "uncomfortable resemblance to political apartheid" that the Supreme Court condemned and invalidated in Shaw v. Reno.\(^{20}\)

Because these propositions allege burdens on fundamental rights, they trigger strict scrutiny. In Part III, therefore, I consider the three kinds of rationales invoked for disenfranchising District residents to see whether they are indeed compelling: (1) those having to do with the distinctive political characteristics of the local population; (2) those having to do with the inherent incompatibility between voting by District residents and the District Clause and other constitutional provisions; and (3) those having to do with the specific federal interest in promoting efficient government in the District.

In Part IV, I consider the justiciability of these claims under the political question and standing doctrines of the Court. I assert that there is no political question here because denial of voting rights is a classically cognizable injury, and the District population's lack of access to political power virtually guarantees that its disenfranchisement will not be cured politically. District residents have standing because they have been concretely injured by congressional decisions and there are plainly remedies available.

Finally, in Part V, I close by arguing that the District's disenfranchisement provides the perfect opportunity for the Court to demonstrate that the progression of equal protection and First Amendment principles in the twentieth century has given us a truly democratic Constitution. Under this remade Constitution, we must read the structural provisions through the lens of democratic self-government that favors the equal voting rights of all people.

I. The Constitution and the Citizenry of the District of Columbia

It is often thought that the Constitution, in full or in part, does not apply to citizens in the District of Columbia since they reside outside of the fifty states. This argument was made explicitly before the Supreme Court as long ago as 1805,\(^{21}\) and it subtly informs much of the current opposition to extending voting rights to people living in the District.\(^{22}\)

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\(^{21}\) See United States v. More, 7 U.S. (3 Cranch) 159, 171 (1805) (argument of counsel) ("When legislating over the district of Columbia, congress are bound by no constitution. If they are, they have violated it, by not giving us a republican form of government."), quoted in Gerald L. Neuman, Anomalous Zones, 48 Stan. L. Rev. 1197, 1226 n.177 (1996).


[I]t appears that the sensible course is to accept the wisdom of the Founders and to maintain the status quo. While Washingtonians may not vote in Congressional
But the assumption that constitutional rights do not apply to the District is utterly wrong. This fallacy flows from the (probably correct) understanding that Congress can impose unwanted government structures and local policies on the District to the same extent that states can impose unwanted local structures and policies on their citizens. As even Judge Mikva, one of the best friends the District ever had on the bench, explained, "when Congress acts in its purely local capacity, courts simply do not possess the tools or the standards to police the congressional action via anything other than the constitutional strictures ordinarily applicable to state legislative action."23

Whatever the merits of this point in the complicated aftermath of Romer v. Evans,24 it is critical to focus on the underlying premise of Judge Mikva's argument: general constitutional norms do apply to congressional treatment of the District's citizenry—no more so than they do to actions of a state towards its own citizens, but also no less so. Congress has the same police powers over the District that a state has over its communities, but these are powers that must be operated consistent with basic constitutional norms. Thus, the vertical supremacy of Congress over the District does not in any way imply the legitimacy, much less the necessity, of the District population's non-representation in Congress. In fact, the Constitution and its Bill of Rights apply with undiminished force in the District.

The Constitution's so-called District Clause grants Congress 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."25 This Clause did not disinherit the people of their constitutional rights even when the Constitution's statement of those rights refers to people of "the states." The Supreme Court has consistently found that the Constitution, including the Bill of Rights, applies with undiminished force to citizens living in the District. The Court made this point emphatically in Callan v. Wilson,26 in which it upheld, under Article III and the Fifth and Sixth Amendments, the right of criminal defendants in the District to a jury trial. Despite the fact that the relevant constitutional text focused exclusively on the "states," the Court found

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24 517 U.S. 620 (1996) (representing the proposition that government may not single out a certain class of citizens for selective or hostile treatment under the law). The case may provide solace to District residents resisting selective or discriminatory laws.
26 127 U.S. 540 (1888).
that "[t]here is nothing in the history of the constitution, or of the original amendments, to justify the assertion that the people of this District may be lawfully deprived of the benefit of any of the constitutional guarantees of life, liberty, and property . . . ."

To be an American citizen living in the District is still to be part of the constitutional "People" of the United States identified in the Preamble and Article I. No one on the Supreme Court has been more eloquent on this point than Justice Sutherland, who explained:

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 cession. Prior thereto its inhabitants were entitled to all the rights, guaranties, and immunities of the Constitution . . . . We think it is not reasonable to assume that the cession stripped them of these rights.

The Court had made the same point in 1901, emphasizing that the creation of the District did not, and could not, subtract constitutional rights from the people who already had them as residents of Maryland and Virginia:

The Constitution had attached to [the District] irrevocably. There are steps which can never be taken backward . . . . 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.

The land of the "District" that is the "Seat of the Government of the United States" originated with the state of Maryland and the people who came to live, and come to live, in the District did not—and cannot—lose their status as equal American citizens.

Some have argued that the Constitution applies generally in the District but that the Fourteenth Amendment Equal Protection Clause, which protects persons against discriminatory action by the "states," has no

27 Id. at 550. Here, the Court found the jury right to apply despite the fact that the Sixth Amendment provides that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . . ." U.S. CONST. amend. VI.
28 O'Donoghue v. United States, 289 U.S. 516, 540 (1933) (finding that, unlike territorial courts, the local courts of the District of Columbia are Article III courts for constitutional purposes).
29 Id. at 541 (quoting Downes v. Bidwell, 182 U.S. 244, 260–61 (1901)).
30 The Virginia portions of the District, then known as the county and town of Alexandria, were retroceded in 1846. See Raven-Hansen, D.C. Statehood, supra note 15, at 169.
force there.\textsuperscript{31} However, the Court has already determined that the Equal Protection Clause protects District residents against actions by Congress. That point was made powerfully in \textit{Bolling v. Sharpe},\textsuperscript{32} the unsung companion case to \textit{Brown v. Board of Education},\textsuperscript{33} in which the Court struck down racial segregation in District of Columbia public schools. Because Congress is not a state covered by the Fourteenth Amendment, \textit{Brown} did not automatically invalidate race segregation in District schools. In \textit{Bolling}, however, the Court adopted a reverse incorporation doctrine by which the most significant equal protection norms embodied in the Fourteenth Amendment come to apply in the District of Columbia through the Fifth Amendment Due Process Clause.\textsuperscript{34} The Court, therefore, applied to the District its long-established "principle ‘that the constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the general government, or by the states, against any citizen because of his race.’"\textsuperscript{35} The Court has continued to assume that Fifth Amendment Due Process Clause assimilates fundamental equal protection principles for the protection of Washingtonians.\textsuperscript{36}

II. How the District’s Disenfranchisement in Congress and by Congress Burdens Fundamental Rights

Popular sovereignty through constitutional channels is the basis of American democracy. Our Declaration of Independence proclaimed the "self-evident Truths" that "all Men are created equal, that they are endowed by their Creator with certain unalienable Rights," and that governments "deriv[e] their just Powers from the consent of the Governed."\textsuperscript{37} When Madison drafted the famous Virginia Resolutions of 1798, he invoked the same spirit, arguing: "The people, not the government, possess the absolute sovereignty."\textsuperscript{38} This constitutional vision was first recognized by the Supreme Court in 1819, when Chief Justice John Marshall

\begin{footnotes}
\item[31] The Fourteenth Amendment provides that "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.
\item[33] 347 U.S. 483 (1954).
\item[34] While the Court noted that Fourteenth Amendment Equal Protection and Fifth Amendment Due Process Clauses are not identical in substantive coverage, they overlap in significant ways: although equal protection and due process are not "always interchangeable phrases . . . discrimination may be so unjustifiable as to be violative of due process." \textit{Id.} at 499.
\item[35] \textit{Id.} (quoting Gibson v. Mississippi, 162 U.S. 565, 591 (1896)).
\item[37] \textit{The Declaration of Independence} para. 2 (U.S. 1776).
\item[38] 4 JONATHAN ELLIOTT, \textit{The Debates in the Several State Conventions on the Adoption of the Federal Constitution} 569 (photo. reprint 1987) (Jonathan Elliot ed., 1888) [hereinafter ELLIOT'S DEBATES].
\end{footnotes}
opined in *McCulloch v. Maryland*: “The government of the union . . . is, emphatically, and truly, a government of the people . . . . Its powers are granted by them, and are to be exercised directly on them, and for their benefit.”\(^{39}\)

To be sure, there has also been the opposite tendency in the American republic to define the nation as a compact of states to which the people themselves are no party.\(^{40}\) But the Civil War and subsequent constitutional changes destroyed the secessionist philosophy that the Constitution is a mere contract among state governments that each may withdraw from at will. The Civil War established that the Constitution was formed not by the states but by “the people.” President Lincoln reasserted the people’s ownership over the Constitution and the nation in the Gettysburg Address, with his poetic rendering of our polity as “government of the people, by the people, for the people.”\(^ {41}\) As Garry Wills reminds us, President Lincoln “was not just praising ‘popular government,’” but rather “was saying that America is a people addressing its great assignment as that was accepted in the Declaration.”\(^ {42}\)

The Reconstruction Amendments brought democratic equality into the heart of the Constitution, replacing the white man’s compact of *Dred Scott v. Sandford*\(^ {43}\) with a document that belongs to all the people, at least all the citizens within the definition of the Fourteenth Amendment. This revolution enabled the Warren Court a century later to tear down racial franchise barriers. The idea of a living democratic constitutionalism in service of popular liberty now pervades the philosophy of the Court. Consider Justice O’Connor’s stirring words from her opinion in *Planned Parenthood v. Casey*:

> Our Constitution is a covenant running from the first generation of Americans to us and then to future generations. It is a coherent succession. Each generation must learn anew that the Constitution’s written terms embody ideas and aspirations that must survive more ages than one. We accept our responsibility not to retreat from interpreting the full meaning of the covenant in light of all of our precedents.\(^ {44}\)

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40 The theory of “compact” was advanced by the seceding states during the Civil War. They argued that the nation was nothing more than a confederation of “sovereign states” bound only by a pact from which each could withdraw at will. See generally GARY WILLS, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA (1992).
41 Id. at 145 (quoting Abraham Lincoln’s Gettysburg Address).
42 Id.
43 60 U.S. (19 How.) 393 (1857).
Because citizenship and its attendant liberties are a birthright under the Constitution, because Congress can make neither slaves nor nobility here, and because "the people" are the sovereign constituting authority, equality of voting rights among citizens is inherent, inalienable and indispensable.

The organizing theme of the following three doctrinal inquiries is that American citizens who live in the District belong to the constitutional community which ratified and, at least hypothetically, continues to renew its consent to our Constitution. Washingtonians have never surrendered their place as members of the constitutional community and must be considered equal members of it. The vast majority of Washingtonians are citizens of the United States, members of the constitutional "people" whose voting rights are not optional but mandatory under the Constitution. In the past, suffrage expansion has occurred following political and military struggle, both through constitutional amendments and as a result of active judicial intervention. Throughout the twentieth century, the Supreme Court has repeatedly removed barriers to enfranchisement, even when these barriers were thought for generations to be perfectly natural or necessary. The Court has invalidated grandfather clauses, exclusionary white primaries, state poll taxes, restrictions on the voting rights of citizens serving in the armed services, unnecessarily long residency requirements, disenfranchisement of citizens living on federal enclaves, prohibitively high candidate filing fees, malapportioned leg-

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45 See U.S. Const. amend. XIV.
48 See U.S. Const. art. IV, § 4 (the Republican Guaranty Clause); amend. V (protecting life, liberty and property against deprivation without due process); amend. IX (stating that enumeration of certain rights does not deny other rights retained by "the people"); amend. XIV (establishing equal protection for all persons); amend. XV (protecting the rights of "citizens" from racial disenfranchisement); amend. XIX (protecting the rights of "citizens" to vote regardless of sex); amend. XXIII (creating a mechanism for District residents to vote in presidential elections); amend. XXIV (prohibiting denial to "citizens" of the right to vote on grounds of failure to pay a poll tax or any other kind of tax); amend XXVI (protecting the right of all "citizens," at least 18 years old, to vote).
49 See Guinn v. United States, 238 U.S. 347 (1915).
islative districts, and gerrymandered districts with majority-minority populations.

These cases are not random or scattershot. They reflect a trajectory of progressive political inclusion that has transformed the original republic of "Christian white men of property." Alexis de Tocqueville saw and understood this dynamic of constant progress toward the ideal of one person—one vote and universal adult suffrage. He wrote that "[t]here is no more invariable rule in the history of society: The further electoral rights are extended, the greater is the need for extending them: for after each concession the strength of democracy increases, and its demands increase with its strength."

However natural, fixed, or structurally determined we may think the regime imposed on the District to be, it is completely contrary to this constitutional dynamic. In the words of Kenneth Karst, "[t]he substantive core of the [fourteenth] amendment, and of the equal protection clause in particular, is a principle of equal citizenship, which presumptively guarantees to each individual the right to be treated by the organized society as a respected, responsible, and participating member."

A. The Denial of Congressional Representatives to the District Burdens its Residents' Right to Be Represented in Congress on the Basis of One Person—One Vote as well as the Right to Run for Congress

The one person—one vote principle is the heart of modern voting rights jurisprudence. The question is whether it extends to citizens living in the District. The original formulation of the doctrine in *Wesberry v. Sanders* in 1964 was that each citizen must have an equal voice in choosing members of the United States House of Representatives without respect to geographic residence. The Court struck down a Georgia statute that malapportioned House districts to such an extent that certain urban districts had up to three times as many voters within them as rural districts and thus one-third of their rightful influence. The logic of this ruling was that representation in Congress is a right that belongs to the people, not the states, and that government may not use political geo-

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61 See *Wesberry*, 376 U.S. at 7–8.
62 See *id.* at 7.
phy or cartography to dilute the representation of the people, much less to rope off an entire community of Americans from the franchise.\textsuperscript{63}

The Court rejected Georgia’s argument that there were no constitutional problems with imbalanced district populations so long as the state itself maintained the proper level of representation in Congress.\textsuperscript{64} It was not Georgia the state which had a right to representation in Congress, but the American citizens living in Georgia. Justice Black, writing for the Court, found that denying citizens not only a vote but an equally potent vote for their representatives contradicted the principle of popular representation:

To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected “by the People” . . . it was population which was to be the basis of the House of Representatives.\textsuperscript{65}

To define “population” as the basis of representation in the House “means that as nearly as is practicable one man’s vote in a congressional election is to be worth as much as another’s.”\textsuperscript{66} Therefore, the Court made it clear that in territorial districting, the Constitution does not tolerate any discrimination against voting rights based on a citizen’s place of residence or geographic location. Describing the Constitutional Convention, Justice Black found that “[o]ne principle was uppermost in the minds of many delegates: that, no matter where he lived, each voter should have a voice equal to that of every other in electing members of Congress.”\textsuperscript{67}

The principle of popular representation on the basis of one person—one vote requires serious attention to the effect of voting arrangements not only on individuals but on political minorities. As the Court put it in \textit{Gomillion v. Lightfoot}, “[t]he [Fifteenth] Amendment nullifies sophisticated as well as simple modes of discrimination.”\textsuperscript{68} In \textit{Davis v. Bandemer}, which involved a challenge by Democrats in Indiana to a Republican gerrymander of state legislative districts, the Court found claims of systematic group vote dilution justiciable and held that an equal protection violation exists “where the electoral system substantially disadvantages certain voters in their opportunity to influence the political process

\textsuperscript{63} See \textit{id.} at 13–14.
\textsuperscript{64} See \textit{id.} at 14 (“The House of Representatives, the [Constitutional] Convention agreed, was to represent the people as individuals, and on the basis of complete equality for each voter.”).
\textsuperscript{65} \textit{Id.} at 8–9 (emphasis added).
\textsuperscript{66} \textit{Id.} at 7–8.
\textsuperscript{67} \textit{Id.} at 10.
\textsuperscript{68} 364 U.S. 339, 342 (1960) (quoting Lane v. Wilson, 307 U.S. 268, 275 (1939)).
effectively."69 Such a violation can be shown by evidence of "effective denial to a minority of voters of a fair chance to influence the political process."70

The central issue is whether the Wesberry principle of political equality, elaborated on behalf of American citizens living in states, should apply to American citizens living in the District. Should District residents be considered part of the sovereign "People of the United States" or "several States" for purposes of representation in the House of Representatives under Article I and, by analogy, in the Senate under the Seventeenth Amendment? Or should District residents be treated like inhabitants of federal territories for Article I purposes? The structure of the American republic, the character of the District and its origins in the states themselves, the radical difference between the District and the territories, and an unbroken line of constitutional authority all argue for treating citizens who live in the District as being rights-bearing members of the same constitutional community as citizens of the fifty states.

1. States, Territories, the District, and Other Federal Enclaves

In the United States, the people, who are the organic source of all constitutional and political power, have designed three kinds of governmental entities through which power is to be exercised: states, territories, and the federal enclaves, such as the District of Columbia.

The states are the basic components of the republic. Article IV, Section 3 gave Congress the power to admit new states "into this Union," and Congress has seen fit since 1787 to admit thirty-seven new states. All of them were former territories or districts of prior states, and all joined the Union on an equal footing with the original thirteen states. Once a former possession becomes a state, it immediately achieves all of the same privileges, rights, and responsibilities that the other states enjoy.71 The most important dynamic in the structural history of the Union is its constant expansion: the number of states has almost quadrupled since the nation was formed.

In the American system, territories are designed to be the principal states-in-training.72 In 1784, Thomas Jefferson, the leading figure in map-

70 Id.
71 The Supreme Court has found that Congress' power to admit new states is limited by the Equal Footing doctrine such that it cannot attach conditions on statehood admissions that would be unconstitutional as applied against any of the existing states. See Coyle v. Oklahoma, 221 U.S. 559 (1911) (invalidating a congressional effort to condition Oklahoma's admission to the Union on its acceptance of the city of Guthrie as its state capital).
72 Other than Texas, which was an independent republic when it was admitted to the Union in 1846, and Vermont, Kentucky, Maine, and West Virginia, which were formed out of other existing states, every other state to join the Union has been a territory. See Breakthrough From Colonialism: An Interdisciplinary Study of Statehood 1215–19
ping out the regime governing the territories, developed a "blueprint for a territorial system" that envisioned the Territories "as vast areas of land to be settled by rugged individualists into autonomous political communities with an ingrained democratic tradition." The idea, embodied in the congressional ordinances of 1784, 1785 and 1787, was to encourage settlement, expand the Union, and proliferate the number of states so as to prevent anyone under the flag from being governed permanently as a subject of the national government instead of as an equal citizen:

The Jeffersonians viewed the territorial system as a scheme of colonization that would temporarily operate in a given area only until it had reached a minimum population and after its inhabitants had experienced a brief tutelage in self-government. During this transitory status, Congress would organize the government through the passage of organic legislation. Once the citizens of that area had learned the ways of democracy, the territory would then be admitted as a full and equal member of the Union.

Under the Jeffersonian conception, the territories are not a kind of imperial real estate acquisition but a national trust held by Congress in the name of the people of the territory who, in matter of course, will either leave the arrangement as the Philippines did or achieve "statehood as a matter of right." Their readiness for admission is to be evidenced by three simple factors: (1) achieving some minimum population threshold (it was set in the Northwest Ordinance of 1787 at 60,000 free male inhabitants); (2) a demonstration of successful experience with democratic self-government; and (3) a showing that a majority of voters in the area earnestly desire statehood.

In the juridical context, the Supreme Court has linked the power to acquire new lands and territories with Congress' power to admit new states. In Dred Scott, Chief Justice Taney proclaimed in the strongest of terms the temporary and transitional nature of colonial governments in the territories, emphasizing the Jeffersonian concept of states-in-waiting:

(1984) [hereinafter BREAKTHROUGH FROM COLONIALISM]. See generally id. at 1207–44.

73 Id. at 1111.
74 Id.
75 See id. at 1115–17.

There is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure; nor to enlarge its territorial limits in any way, except by the admission of new States.

Id. at 446.
The power to expand the territory of the United States by the admission of new States is plainly given; and in the construction of this power by all the departments of the Government, it has been held to authorize the acquisition of territory, not fit for admission at the time, but to be admitted as soon as its population and situation would entitle it to admission. *It is acquired to become a State, and not to be held as a colony and governed by Congress with absolute authority.*

Unlike the territories, which are constitutionally designed as transitory entities, the District is structured as a permanent constitutional feature. The District Clause vests all power in Congress over “*[s]uch 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.*” The purpose of this District is to guarantee federal police power control over the capital city and to liberate the national government from a potentially crippling dependence on the states.

The Supreme Court has been clear that the District inhabits a different constitutional space than the territories. The Court’s position is that the District is not a territorial student of democracy waiting for eventual graduation to statehood but rather the campus of democracy itself, the residential home of the government which models democratic life for the

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78 Id. at 447 (emphasis added). To be sure, there has been a contrasting and minority view of the territories linked with Alexander Hamilton’s “vision of a permanent American colonial empire.” Breakthrough From Colonialism, supra note 72. This vision became ascendant during the period of late-nineteenth century imperial expansionism, which “produced a radical departure from the original design of transient colonialism geared towards the admission of States to an essentially imperialist scheme based on the then existing European model of permanent colonial administration for the economic benefit of the metropolis.” Id. This view denied the inevitability of statehood for possessions. As Senator John C. Spooner of Wisconsin put it: “Never since the foundations of this Government have we in the acquisition of territory paid the slightest attention to the consent of the governed.” Id. at 1122. Although this conception, fortunately, remains submerged in law, it did receive a dubious constitutional endorsement in the so-called Insular Cases, which devised an explicitly racist dichotomy between “incorporated” and “non-incorporated” territories. See Dooley v. United States, 183 U.S. 151 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); De Lima v. Bidwell, 182 U.S. 1 (1901); see also Breakthrough From Colonialism, supra note 72, at 1123 n.153 (providing citations to other Insular Cases). According to these cases, incorporated territories deserve both the right to statehood and the full force of the Constitution, while the unincorporated territories overseas, inhabited by “alien people,” do not. See Breakthrough From Colonialism, supra, at 1123–34. “Thus, a half century after the United States proclaimed the inadmissibility of the ownership of persons, it affirmed its acceptance of the contemporaneous European concept of the ownership of peoples.” Id. at 1124–25 (quoting Jose A. Cabranes, *Citizenship and the American Empire*, 127 U. Pa. L. Rev. 391, 487 (1978)).

79 To say that the District as a constitutional entity is designed to be permanent should not be confused with the argument that the boundaries of the District are fixed and unchangeable. See Raven-Hansen, *D.C. Statehood*, supra note 15, at 167–75 (refuting the typical “fixed form” and “fixed function” arguments against statehood).

80 U.S. Const. art. I, § 8, cl. 17.

81 See discussion *infra* Part III.B.1.
nation's citizenry. In finding that Fifth Amendment due process of law applies to District but not territorial residents, Justice Sutherland went to great pains to separate District residents from inhabitants of a territory, which he defined as "an inchoate state" in a condition "of pupillage at best" and a "mere dependent[ ] of the United States."

Justice Sutherland described the differences between territories and the District, stating that "[t]he District is not an 'ephemeral' subdivision of the 'outlying dominion of the United States,' but the capital—the very heart—of the Union itself, to be maintained as the 'permanent' abiding place of all its supreme departments."

Because the seat of government is thus designed as a permanent and integral aspect of the constitutional structure, it cannot, in its entirety, become a state even if the three Jeffersonian conditions of population, democratic experience, and popular desire are met.

There are two possible answers. One is negative: District residents are like residents of the territories before statehood and simply have no way to vindicate their right to representation short of moving. The other is that District residents are, for all practical and constitutional purposes, more like the residents of the fifty states and simply need Congress to find the appropriate mechanism for their representation.

In fact, District residents share all of the essential characteristics of citizens of the states. Like state residents but unlike territorial residents,

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83 Id. at 538 (quoting Ex parte Morgan, 20 F. 298, 305 (W.D. Ark. 1883)).
84 Id. (quoting Nelson v. United States, 30 F. 112, 115 (C.C.D. Or. 1887)).
85 Id. (quoting Snow v. United States, 85 U.S. (18 Wall.) 317, 320 (1873)).
86 Id. at 539.
87 As statehood advocates argue, Congress could redraw the boundaries of the District and cede the excluded areas to the state of New Columbia. See Jamin B. Raskin, Domination, Democracy, and the District: The Statehood Position, 39 CATH. U. L. REV. 417, 423 (1990); Raven-Hansen, D.C. Statehood, supra note 15. However, the House of Representatives voted such a proposal down by a two to one margin in 1993 and the Senate never even considered it. The structural political obstacles to statehood for New Columbia seem insuperable today. One can imagine the disfavor with which conservative or agrarian states would consider the creation of the most liberal state in the Union—a 100% urban, majority African American state. Meanwhile, larger states would see no reason to dilute their fraction of legislative power any further for a small state; the western states would see nothing in it for them; and so on. In addition, many members of Congress, such as Congresswoman Constance A. Morella of Maryland, take the position that the Constitution effectively forbids creation of a new state out of the District, emphasizing that Washington, D.C., "does not belong to only a few of our residents, but to all of our citizens as the seat of our National Government." 139 CONG. REC. H10,568 (daily ed. Nov. 21, 1993) (statement of Rep. Morella). More to the point, even on a shrunked basis, the District would still have some people living within it, a point pressed hard for other reasons by statehood opponents like Adam Kurland. See Adam H. Kurland, Partisan Rhetoric, Constitutional Reality, and Political Responsibility: The Troubling Constitutional Consequences of Achieving D.C. Statehood by Simple Legislation, 60 GEO. WASH. L. REV. 475 (1992). Whether or not that fact refutes the argument for statehood, it still leaves the problem of disenfranchisement of District residents as a constitutional puzzle that needs to be solved on its own terms.
they pay federal taxes, indeed more per capita than most states. Like state residents but unlike territorial residents, they vote for president and vice-president. District residents are counted in the national census. They are governed by the laws of the United States and were part of the original thirteen states. They fight wars, are drafted into the military, and have lost many men and women in foreign battles. They are treated like residents of the states for federal diversity jurisdiction purposes. The principle of one person—one vote applies within the District to the reapportionment of the District’s Council.

No right is more fundamental than the right to vote, which is the right “preservative of all rights” and the right that establishes people as first-class citizens deserving of public respect and equal membership. But intertwined with the right to vote is the right to run for office as a candidate and, at least theoretically, to serve as a representative. Indeed, the right to vote and the right to run imply one another since the “fundamental principle of our representative democracy” embodied in the Constitution is that “the people should choose whom they please to govern them.” A law that gave women or racial minorities the right to vote but denied them the right to run for office would violate both their right to participate fully and the right of the voters to choose them as representatives.

The citizens of the District cannot be confined to the role of consenting spectators in other people’s political and governmental process. They have the right to become active agents in shaping national public

89 See U.S. CONST. amend. XXIII.
91 “The District of Columbia sustained more casualties during the Vietnam War than 10 States and more killed in action per capita than 47 States . . . more District residents per capita fought in the Persian Gulf War than 46 other States.” 139 CONG. REC. H10,569 (daily ed. Nov. 21, 1993) (statement of Rep. Vento).
93 See D.C. CODE ANN. § 1-1308(c) (1981).
94 Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (“[Voting] is regarded as a fundamental political right, because [it is] preservative of all rights.”).
95 Justice Blackmun observed:

[T]he right to vote is accorded extraordinary treatment because it is in equal protection terms, an extraordinary right: a citizen cannot hope to achieve any meaningful degree of individual political equality if granted an inferior right of participation in the political process. Those denied the vote are relegated, by state fiat, in a most basic way to second-class status.

discourse and debate, a right that includes the possibility of running for Congress and serving. Yet District residents have no meaningful role in Congress’ constitutional functions, such as approving budgets, regulating interstate commerce, ratifying presidential impeachment, and passing on Supreme Court and other judicial nominations. They are, for all practical purposes, not actors in influencing the course of national legislation and public policy.

*U.S. Term Limits v. Thornton*\(^97\) underscores the constitutional importance of the people’s untrammeled right to run for public office. In *U.S. Term Limits*, the Court struck down Arkansas’ effort to limit its House delegation to three terms in office and its U.S. senators to two terms in office by denying affected incumbents a place on the ballot. The Court held that this rule violated the Qualifications Clause, which requires only that House members must be at least twenty-five years old, a U.S. citizen for seven years, and an inhabitant of the state, and that senators be at least thirty years old, a U.S. citizen for nine years, and an inhabitant of the state.\(^98\)

The Court reasoned that Arkansas had placed an extra qualification on congressional candidacy, falsely restricting the field of candidates. The Court invoked against this restriction “an egalitarian ideal—that election to the National Legislature should be open to all people of merit” and found that this ideal “provided a critical foundation for the Constitutional structure.”\(^99\) The Court further found that state-imposed term limits violate the sovereign “right of the people to vote for whom they wish,” a right that “belongs not to the States, but to the people.”\(^100\) In language strikingly relevant to the situation of the District, the Court upheld “the direct link that the Framers found so critical between the National Government and the people of the United States.”\(^101\)

Thus, District residents are part of “the People” who seek, among other things, to “form a more perfect Union, establish Justice” and “secure the Blessings of Liberty to ourselves and our Posterity.”\(^102\) Yet the question remains whether they should be treated functionally as part of “the People of the several States” referred to in Article I. Symmetry of approach would argue for just such an interpretation, but there is a further, more fundamental reason. The provisions of the Constitution must be read together, and all of the relevant provisions and case precedents since the Equal Protection Clause entered the Constitution harmonize on one theme: District residents must be treated with equal respect by government and must enjoy the same federal rights as citizens living in

\(^98\) See *id.* at 779.
\(^99\) *Id.* at 819.
\(^100\) *Id.* at 820, 821.
\(^101\) *Id.* at 822.
\(^102\) U.S. CONST. preamble.
states. Thus, just as it would be unconstitutional for states to strip citizens of their right to vote in congressional elections, it is unconstitutional for Congress to disenfranchise the citizens of Washington.

Because the guarantee of the Equal Protection Clause applies to citizens living in the District, they must receive equal benefit from "the principle solemnly embodied in the Great Compromise—equal representation in the House for equal numbers of people." If the House is the people’s body, constituted on the basis of population without regard to geographic residence, the population of American citizens living in the District must be included in its constituency. If it is true, as Justice Black wrote, that the principle "uppermost in the minds" of the Framers was that "no matter where he lived, each voter should have a voice equal to that of every other in electing members of Congress," then the current regime in the District plainly violates the one person—one vote right to "fair representation."

Hundreds of thousands of American citizens have lost their right to be represented because of the place they live. This arrangement cannot be reconciled with Wesberry’s articulation of a general right of popular representation in national government. Justice Black wrote:

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.

2. Popular Representation in the Senate

The principle of democratic participation also requires representation of District residents in the U.S. Senate, even though that chamber was originally designed, as part of the Great Compromise, to be the body of the representatives of the states rather than the people.

Yet, this original sharp dichotomy between the people’s chamber and the states’ chamber has been muted, if not completely wiped away, by the

\[\text{Wesberry v. Sanders, 376 U.S. 1, 14 (1964).}\]
\[\text{Id. at 10.}\]
\[\text{Id. at 17–18 (emphasis added). Justice Black went on to quote James Madison:}\]

Who are to be the electors of the [F]ederal Representatives? Not the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpertinacious fortune. The electors are to be the great body of the people of the United States.

\[\text{Id. at 18 (quoting THE FEDERALIST NO. 57 (James Madison)).}\]
Seventeenth Amendment. Ratified in 1913, this amendment shifted the mode of selection of senators from designation by the state legislatures, the original method specified by Article I, Section 3, to election by the people of the states. The purpose of this change was to remove the selection of senators from corrupt state legislatures and place it instead in the hands of the citizenry. The Seventeenth Amendment was directly patterned after the mode of popular election of House members provided for in Article I, Section 2. Thus, although senators are still selected statewide, the basis of selection has shifted to the people. As the Supreme Court put it in *U.S. Term Limits*:

[j]ollowing the adoption of the 17th Amendment in 1913, this ideal [of popular government] was extended to elections for the Senate. The Congress of the United States, therefore, is not a confederation of nations in which separate sovereigns are represented by appointed delegates, but is instead a body composed of the representatives of the people.107

The constitutional move to popular election of Senators brings "the people" of the District again within the appropriate electoral community by placing constitutional emphasis on equal participation in national government by all citizens. This point is reinforced by the dual nature of congressional power over the District.108

3. The Unlawfulness of Denying Representation to Citizens Because the District Is Directly Under a Federal Jurisdiction

One might argue that, even if the Equal Protection Clause generally applies to the District, the right to vote does not extend to citizens who have freely chosen to live on a federally governed jurisdiction like the District of Columbia because a citizen's right to vote in state and federal legislative elections depends on his or her choosing to reside on the actual land of a state. But this argument, as a categorical proposition, has already been squarely rejected by the Supreme Court, and the residents or potential residents of literally thousands of federal enclaves, all except for the District, have won the constitutional right to participate in federal elections.109

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106 See U.S. CONST. amend. XVII.
108 See discussion infra Part II.B.
109 See Carl Strass, Note, *Federal Enclaves—Through the Looking Glass—Darkly*, 15 SYRACUSE L. REV. 754, 755 (1964) ("Under [the federal enclave] provision, the federal government has acquired more than 5,000 parcels over which it exercises exclusive jurisdiction. Over forty are bigger than Washington, D.C. Others are only as big as a single building . . . ").
In the watershed case of *Evans v. Cornman*, the Supreme Court struck down Maryland’s disenfranchisement of American citizens living on the grounds of the National Institutes of Health ("NIH"), a federal enclave in Montgomery County, which borders the District of Columbia. The NIH campus was built on land donated to Congress by Maryland in 1953. Citizens living on the NIH grounds continued to vote "apparently without question, for another 15 years" in Maryland, just as residents of the seat of government continued to vote after Maryland and Virginia’s gift of land in 1790. What ended the practice was a decision holding that a resident of a federal enclave was not a "resident of the state" within the meaning of the state constitution. That state case set the stage for NIH residents to make an equal protection challenge to the removal of their names from the voter rolls.

In *Evans*, the Supreme Court considered Article I, Section 8, Clause 17, the provision that enabled Maryland to transfer to Congress both the land used for NIH and the land used for the District of Columbia. Just as this Clause gives Congress power to exercise legislation over the District, it grants "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 . . . ." The Court agreed with Maryland that the NIH federal enclave, like the District of Columbia itself, "is one of the places subject to . . . congressional power."

However, the Court did not agree that the federal character of the NIH enclave obviated Maryland’s obligation to grant citizens living there the constitutional right to vote and be represented. On the contrary, by disenfranchising people living on NIH grounds, Maryland was breaking "the citizen’s link to his laws and government," the connection that "is protective of all fundamental rights and privileges." The Court thus applied strict scrutiny to determine whether the suffrage denial could be sustained.

Maryland asserted that its compelling interest was "to insure that only those citizens . . . interested in or affected by electoral decisions have a voice in making them," a potentially valid interest. It argued that NIH

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110 See id. at 421.
111 Id.
113 In October 1968, the Permanent Board of Registry of Montgomery County announced publicly that persons living on NIH grounds failed to meet the state constitutional residency requirement and would be removed from the county’s voter rolls. See *Evans*, 398 U.S. at 419–20.
114 U.S. CONST. art. I, § 8, cl. 17.
115 *Evans*, 398 U.S. at 420.
116 Id. at 422.
117 See id.
118 Id.
residents were "substantially less interested in Maryland affairs than other residents of the State because the Constitution vests 'exclusive Legislation in all Cases whatsoever' over federal enclaves to Congress." It cited several state supreme court cases that denied suffrage to federal enclave residents on the grounds of the preemptive priority of the "exclusive Legislation" Clause from Article I. But the Supreme Court was not satisfied with this blanket textual appeal to the fact of federal control over the enclave because both the law of voting and the character of federal enclaves had changed over time. It found that "[w]hile it is true that federal enclaves are still subject to exclusive federal jurisdiction . . ., whether [NIH residents] are sufficiently disinterested in electoral decisions that they may be denied the vote depends on their actual interest today . . . ." 

The Court then canvassed the "numerous and vital ways in which NIH residents are affected by electoral decisions," including government policy concerning criminal justice, spending and tax decisions, state unemployment and workers' compensation laws, auto registration, family and probate matters, and public education.

Meanwhile, for differences between NIH residents and state residents, Maryland could point only to the fact that NIH residents did not pay real property taxes that made up a large part of Maryland public school financing, would not have paid county personal taxes if there were any, were exempt from service in the state militia, and were exempt from the state's compulsory education law. The Court considered these differences "far more theoretical than real," and found that they "do not come close to establishing that degree of disinterest in electoral decisions that might justify a total exclusion from the franchise."

In summary, the Court emphasized that the federal enclave residents had the same interests in voting that they had before the land was transferred from Maryland to Congress:

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 . . . .

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120 Id. at 423.
121 See id.
122 Id. at 423–24.
123 See id. at 424.
124 See id. at 424–25, 425 n.5.
125 Id. at 425.
126 Id. at 426.
They are entitled under the Fourteenth Amendment to protect that stake by exercising the equal right to vote.\textsuperscript{127}

With this democratic logic rooted in the "equal stake" of federal enclave residents in public decision making, the Supreme Court invalidated every state law in the country disenfranchising residents of federal enclaves.

Evans obviously has untapped importance for bringing the right to vote to the District. It establishes as a textual and structural matter that Congress' "exclusive Legislation" authority over federal enclave residents does not presumptively destroy the constitutional imperative of voting rights for all citizens. On the contrary, enclave residents presumptively maintain their right to vote in both federal and state elections.

Under Evans, government denial of an enclave resident's voting rights triggers strict scrutiny under the Equal Protection Clause and can only be sustained if there is a compelling interest effectuated by narrowly drawn means. If the government proposes as a compelling interest the necessity of assuring that voters have a real interest in government policy and federal enclave residents categorically lack such an interest, the test of the validity of this proposition is the grounded and fine-grained inquiry into whether the enclave residents have an "actual interest today" in "electoral decisions."\textsuperscript{128}

This is a clarifying framework for analysis. Even though they live in a large federal district, D.C. residents are American citizens who have a general interest in every significant national decision made by Congress and a specific interest in congressional legislation regarding the District. Indeed, because Congress is both their federal and state legislature, they have more of an interest in its deliberations than the people of any of the states.\textsuperscript{129}

Any argument that District residents lack sufficient interest in their "state" or national affairs to be represented in Congress must fail. Indeed, as a much larger population with far more serious challenges, the com-

\textsuperscript{127} Id.

\textsuperscript{128} Id. at 424.

\textsuperscript{129} District residents, who have experienced both crime waves and unparalleled levels of incarceration, have a profound interest in congressional passage of both federal and state criminal laws. The District of Columbia has the highest incarceration rate in the country, four times the national average. The sentences are the longest in the country—three times the national average. See Vincent Schiraldi, This Moral Code Should be Inviolate, Wash. Post, Sept. 14, 1997, at C8. Given that District residents pay more than $2 billion a year in taxes and that both their federal and state budgets are passed by Congress, there is a deep interest in congressional spending and taxing decisions. Because Congress is the state legislature, and does not hesitate to legislate for the District, the people have a powerful interest in being represented when it comes to legislation that affects state unemployment and workers' compensation laws, auto registration, family and probate matters, and public education. Moreover, District residents have all of the federal interests that other American citizens have in congressional representation: interests in economic policy, social legislation, matters of war and peace, and urban policy.
munity of District residents has a stronger argument for regaining the right to vote than the nearby residents of NIH did in 1970. The fact that District residents live not within the political boundaries of a state but within the political boundaries of a federal district is immaterial. The whole trajectory of the one person—one vote cases is to insist that substantive political rights must trump the administrative consequences of governmental line-drawing and classification.

B. Denial of Representation in Congress Burdens the Right of American Citizens to be Represented in Their Own State Legislature

Congress is both a national and a state legislature. Under Article I, it governs the United States as a nation and the District of Columbia as a state. Thus, Congress' banishment of voting representatives from the District effects not only federal disenfranchisement of citizens living in the District but disenfranchisement from their own state legislature.

Congress plainly acts as a state legislature when it governs the District. Courts have always described the relationship in those terms. In 1932, for example, the Court in Atlantic Cleaners & Dyers v. United States\(^{130}\) wrote that Congress possesses over the District "all the powers of legislation which may be exercised by a state in dealing with its affairs, so long as other provisions of the Constitution are not infringed."\(^{131}\)

As the state legislature governing the District, Congress must respect, as best as it can, the principle of one person—one vote in the constitution of its membership. In a sense, the whole people of the United States are the sovereign community which forms this state government, yet all parts of the sovereign community are represented in it except the people of the District. It is as if the representatives of forty-nine states and the District were the state legislature for Delaware but the people of Delaware had no representatives in their own state legislature.

As a general matter, to have the people of the fifty states sending representatives to a fifty-first state's legislature is undoubtedly odd, but this is the inescapable cost of having the federal legislature act also as the state legislature for the District. This anomaly makes it all the more ur-

\(^{130}\) 286 U.S. 427 (1932).

\(^{131}\) Id. at 435; see also Capital Traction v. Hof, 174 U.S. 1, 5 (1899) ("[Congress] may exercise within the District all legislative powers that the legislature of a state might exercise within the state . . . ."); Metropolitan R.R. v. District of Columbia, 132 U.S. 1 (1889).

It is undoubtedly true that the District of Columbia is a separate political community in a certain sense, and in that sense may be called a state; but the sovereign power of this qualified state is not lodged in the corporation of the District of Columbia, but in the government of the United States. Its supreme legislative body is Congress.

Id. at 4.
gent that Congress admit the District's representatives. It is unsuitable to have every American citizen represented in the District's state legislature except American citizens who live there.\textsuperscript{132}

State legislatures are subject to the principle of one person—one vote popular representation. Just a few months after its holding in \textit{Wesberry}, the Court in \textit{Reynolds v. Sims} struck down malapportioned state legislative districts in Alabama.\textsuperscript{133} Chief Justice Warren reaffirmed the principle that citizens may not be deprived of their voting rights based on residency: "Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable."\textsuperscript{134} He elaborated in terms that seem tailor-made for the purpose of breaking the constitutional impasse over the District's voting rights:

\begin{quote}
[T]he weight of a citizen's vote cannot be made to depend on where he lives . . . . This is the clear and strong command of our Constitution's Equal Protection Clause . . . . This is at the heart of Lincoln's vision of "government of the people, by the people, (and) for the people." The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as all races.\textsuperscript{135}
\end{quote}

Chief Justice Warren stated:

"The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications . . . . The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote."\textsuperscript{136}

\textsuperscript{132} The situation is antithetical to the spirit, if not the letter, of the Republican Guaranty Clause, which provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government . . . ." U.S. Const. art. IV, § 4. Although this Clause has never been applied directly to the District, every other Article IV provision is deemed applicable to the District, including Section 1 (the Full Faith and Credit Clause) and Section 2 (Privileges and Immunities Clause and Extradition Clause). However, this point is not raised to argue that this is a justiciable claim, because the Court, since \textit{Luther v. Borden}, 48 U.S. (7 How.) 1, 45 (1849), has ruled that the question of republicanism is a political question for Congress to decide. Nonetheless, the Republican Guaranty Clause is a source of critical democratic norms that inform other constitutional voting principles.

\textsuperscript{133} 377 U.S. 533 (1964).

\textsuperscript{134} Id. at 563.

\textsuperscript{135} Id. at 567–68.

\textsuperscript{136} Id. at 558 (quoting Gray v. Sanders, 372 U.S. 368, 379–81 (1963)).
The project of constitutional interpretation is to take words and ideas worked out in the past and to translate them to new contexts in ways that keep faith with the original and evolving meaning of the concepts.137 Both Westberry and Reynolds established principles of popular representation in federal and state government on the basis of one person–one vote regardless of a citizen’s geographic residence. The rule of geographic nondiscrimination in voting renders congressional disenfranchisement of the District deeply suspect. The current regime works a double representational harm against a community of more than a half-million American citizens, leaving the people without effective representation in their national and state legislative bodies. Moreover, the right to run for, and serve in, one’s state legislature is abolished under the current regime, leaving the residents of the District as the only citizens or subjects of the United States, including not just the states but the territories as well, unrepresented in their own state-level legislature.138

C. Denial of Representation to District Residents Bears an Unconstitutional Resemblance to Political Apartheid

In Shaw v. Reno, the Supreme Court recognized a new Equal Protection cause of action in the political process against congressional reapportionment plans that “bear[ ] an uncomfortable resemblance to political apartheid.”139 In Shaw, the Court cast doubt on, and ultimately invalidated, a North Carolina districting plan that “resemble[d] the most egregious racial gerrymanders of the past.”140 The voting age population of the offending districts in North Carolina were 53.4% African American and 45.5% white, and 53.3% African American and 45.2% white.141 The eight congressional districts found unconstitutional by the Court in the line of cases after Shaw had thin African American majorities like North Carolina’s. Justice Thomas, for example, described the conscious creation of such districts as “an enterprise of segregating the races into political homelands that amounts, in truth, to nothing short of a system of ‘political apartheid.’”142

Which resembles “political apartheid” and “racial segregation”143 more: an oddly drawn majority–African American congressional district

137 See generally Lawrence Lessig, Fidelity as Translation, 65 Fordham L. Rev. 1365 (1997).
138 The people of all 50 states, of course, have their own legislatures and the people of the four territories have territorial legislatures. The District population alone is without representation in its state-level legislature, Congress itself.
140 Id. at 641.
143 See Shaw, 509 U.S. at 630 (referring to redistricting legislation that is so extremely
where *everyone* has the right to vote and run for office or an oddly drawn majority-African American district where *no one* has the right to vote or run for office?

*Shaw* and its progeny have established a new kind of constitutional claim whenever voting rights are subjected to wrongful configurations of political and racial geography. 144 In the *Shaw* cases, the white plaintiff-voters have never alleged that they were denied the right to vote for House candidates or to run as candidates, or that they were denied the opportunity to support or oppose a particular candidate, or that they were the victims of racial vote dilution, or that they were harmed in any concrete or tangible way. Nor were there any findings in any of the cases that such injuries actually occurred; they did not. Rather, the constitutional injury and violation in these cases reside simply in the images and messages of "apartheid" communicated by the racial and political geography of a particular voting regime. As Justice O'Connor put it famously, "re-apportionment is one area in which appearances do matter." 145

*Shaw* validates expressive harms as constitutionally cognizable. 146 O'Connor's opinion is laden with references to the social perceptions, the messages, and the governmental reinforcement of values that the Court believes North Carolina's districting scheme conveys. There is simply no way to make sense of these references, which give the opinion its character and are central to its holding, without rec-

irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting).


145 *Shaw*, 509 U.S. at 647.

146 The leading academic expositors and supporters of the *Shaw* doctrine, Richard H. Pildes and Richard G. Niemi, have done an excellent job of elaborating *Shaw*'s sometimes inscrutable theory of "expressive harms" in the political process. They write:

One can only understand *Shaw* . . . in terms of a view that what we call *expressive* harms are constitutionally cognizable. An expressive harm is one that results from the ideas or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about. On this view, the meaning of a governmental action is just as important as what the action does.

ognizing that the decision is grounded in concern for expressive harms.\footnote{Id. at 508–09.}

The anti-apartheid doctrine of "expressive harms" elaborated in \textit{Shaw} provides a devastating angle of attack on disenfranchisement in the District, which is a system of far more thorough and ongoing symbolic and material injury than anything experienced by voters in the states where majority-minority districts have been struck down by the Court.\footnote{See Abrams v. Johnson, 521 U.S. 74 (1997) (holding that the Georgia legislature acted within its discretion in deciding that the creation of two majority black districts would be an impermissible racial gerrymander); Bush v. Vera, 517 U.S. 952 (1996) (holding that strict scrutiny was triggered in a Texas redistricting plan where the plan was "so extremely irregular on its face that it rationally can be viewed only as an effort to segregate races for the purposes of voting, without regard for traditional districting principles"); Johnson v. De Grandy, 512 U.S. 997 (1994) (finding no violation of the Voting Rights Act even though the Florida redistricting plan diluted Hispanic and black voting strength); Shaw, 509 U.S. 630 (casting doubt on North Carolina's redistricting plan as segregation for the purposes of voting).}

Like the plans invalidated by the \textit{Shaw} line of cases, the District's disenfranchisement bears an uncomfortable resemblance to political apartheid. The District population is more racially lopsided than any of the districts so far invalidated by the Court. According to the 1990 Census, the District population is 65.8\% African American, 27.4\% white, and 2.2\% Hispanic.\footnote{See \textsc{Bureau of the Census, U.S. Dep't of Commerce, 1990 Census of Population and Housing, Population and Housing Unit Counts} (1990).} Unlike citizens in majority-minority congressional districts in the states, all of whom enjoy the right to vote for representatives and senators and state and local officials, the District's population is categorically denied the right to vote for members of the U.S. House and Senate as well as their main local governing bodies.

The District's similarity to "political apartheid" in South Africa goes beyond the similarity exhibited by majority-minority districts in the other states. Actual disenfranchisement of the black majority was the central feature of "political apartheid" in pre-liberation South Africa, where 85\% of the population was denied the right to vote for representatives to Parliament and the National Government. Like the twenty-one million blacks in South Africa previously denied representation in Parliament and on Provincial Councils, the majority-black population in the District of Columbia is without a vote in its national and "state" legislatures.\footnote{See A. Leon Higgonbotham et al., Shaw v. Reno: A Mirage of Good Intentions With Devastating Racial Consequences, 62 \textsc{Fordham L. Rev.} 1593, 1622 (1994) (""The twenty-one million black people enjoy no representation in the central Parliament. Nor are they represented in the Provincial Councils which have limited legislative powers over the provinces."" (quoting \textsc{John Dugard, Human Rights and the South African Legal Order} 6 (1978))).}

The congruence with apartheid becomes even more disturbing when one looks at the District's disenfranchisement in national and local con-
texts. In a nation of fifty majority-white states, the majority–African American population of the District is the only community not represented in federal, state, and most recently, local government. In a familiar historical pattern, the majority-black District’s affairs are controlled at almost every significant turn by representatives of majority-white districts from neighboring and other southern states.151

The background conditions of life in the District only reinforce the impression of apartheid-style political arrangements. The dilapidated and dysfunctional District of Columbia public school system is ninety-six percent minority and only four percent white.152 Only eighteen of 155 public schools have even twenty-five white students.153 On any given day, an astounding half of the District’s young African American men ages eighteen to thirty-five are in jail or prison, on probation or parole, awaiting trial, or being sought on warrant.154 The District has a higher rate of criminal incarceration than any state in the union.155

It is not necessary to claim that Congress has any official purpose or motivation to discriminate against the African American population in the District through disenfranchisement (or any other policy). Shaw did away with the purpose requirement that applies to other kinds of equal

151 The District is sandwiched oddly between Maryland and Virginia, the former 69.6% white and the latter 76% white. White representatives from those two states are—and almost always have been—critical actors in congressional rule over the District. The current chair of the House District Subcommittee of the Government Reform and Oversight Committee is Congressman Tom Davis, who represents the neighboring 11th district in Northern Virginia. The vice-chair is Congresswoman Constance A. Morella, who represents the neighboring 8th district of Maryland.

152 See NINA SHOKRAI ET AL., HERITAGE FOUND. REPORTS, A COMPARISON OF PUBLIC AND PRIVATE EDUCATION IN THE DISTRICT OF COLUMBIA (1997) (stating that the District’s public school student population is 88% African American, 4% white, 7% Hispanic, and 1% Asian).


154 See NATIONAL CTR. ON INSTS. & ALTERNATIVES, HOBBLING A GENERATION: YOUNG AFRICAN AMERICAN MALES IN WASHINGTON, D.C.’S CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER 3 (1997) [hereinafter HOBBLING A GENERATION]; see also id. at 4 (“The number of African Americans in custody in D.C. is 36 times greater than the number of whites, relative to their population. Nationwide the disparity is 7 to 1.”).

155 See Jamin B. Raskin, Imprisoning ‘the Last, the Least, and the Lost,’ LEGAL TIMES, Nov. 28, 1994, at 27. Of every 100,000 persons, the United States imprisons 426 people, Louisiana imprisons 478, and the District imprisons an astounding 1651. Apartheid South Africa incarcerated 333 per 100,000. As part of the recent legislation reclaiming power from the home rule government, Congress passed criminal justice provisions that are expected to substantially lengthen criminal sentences in the District. See HOBBLING A GENERATION, supra note 154, at 8 (discussing recent congressional creation of a federal “Truth-in-Sentencing” Commission whose mandate is to see to it that felons serve at least 85% of their sentences). Prisoners in D.C. in 1994 served 67% of their sentences, which is already higher than the national average of 46% for violent offenders. See id.
protection claims.\textsuperscript{156} It would be similarly irrelevant to allege that disenfranchisement in the District disproportionately harms African Americans (although such an allegation would be easy to make given the demographics of the District).

All that matters from the standpoint of \textit{Shaw} is that Congress, which possesses exclusive legislative power over the District and its forms of government, has arranged the District's voting system in such a way as to produce striking images and symbols of apartheid and segregation. To people who have spent their lives in the District, the racial subtext of political powerlessness in the city is so plain as to not even require elaborate explanation.

Demonstration of a discriminatory purpose \textit{would} be required to sustain a cause of action under the Fifteenth Amendment.\textsuperscript{157} Although it would not be impossible to make this showing, it would probably take a meticulous and as yet-unwritten history of race relations in America and the District to make such a claim convincing.

The conceptual problem is that, except for the first ten years of congressional control, the District has been disenfranchised whether its population is majority-white or majority-black. But during periods of total disenfranchisement, such as the century between the 1870s and the 1970s, the historical record of denial of the ballot in local affairs is replete with expressions of explicit racism. The fact that whites were disenfranchised as well simply reflects the fact that whites in the District have often preferred to be disenfranchised rather than give African Americans the right to vote. In December of 1865, after the Civil War ended, for example, blacks in the District and Republicans in Congress tried to gather support for giving blacks the right to vote in local elections. They were opposed by local whites who prevailed upon the Mayor to call a public referendum on the issue.\textsuperscript{158} “The result was 35 votes for suffrage, and 6591 votes against it in Washington.”\textsuperscript{159} Amazingly, many whites “made representations to Congress that the voters would prefer to [disenfranchise] themselves, and allow the District’s affairs to be administered by a Commission, of three or five members, appointed by the President, than agree to ‘equal suffrage.’”\textsuperscript{160}

The fact that whites are disenfranchised along with African Americans does not categorically preclude a finding of a Fifteenth Amendment

\textsuperscript{156} See, e.g., \textit{Washington v. Davis}, 426 U.S. 229 (1976) (requiring black plaintiff's challenging a police candidate testing system as violative of the Equal Protection Clause to prove a discriminatory purpose).

\textsuperscript{157} See, e.g., \textit{Mobile v. Bolden}, 446 U.S. 55, 65 (1980) (stating that the Fifteenth Amendment “prohibits only purposefully discriminatory denial or abridgement by government of the freedom to vote ‘on account of race, color, or previous condition of servitude’” (quoting U.S. CONST. amend. XIV)).

\textsuperscript{158} See Keeley, \textit{supra} note 5, at 121.

\textsuperscript{159} \textit{Id.} at 121–22.

\textsuperscript{160} \textit{Id.} at 123.
violation. In *Hunter v. Underwood*, for example, the Supreme Court invalidated a provision of the Alabama Constitution designed to disenfranchise blacks even though it stripped some whites of the franchise as well.161 Because the provision, disenfranchising persons convicted of crimes involving moral turpitude, was clearly targeted at African Americans, Justice Rehnquist found that "an additional purpose to discriminate against poor whites would not render nugatory the purpose to discriminate against all blacks . . . ."162

Ultimately, the question of whether the unique disenfranchisement of the District population from congressional representation is racially motivated remains inscrutable. This is why the various incidents that support the idea of deliberate racial disenfranchisement should simply be mobilized to bolster the conclusion that the current regime at the very least creates the appearance of "political apartheid." The same holds true for the theory that disenfranchisement is precisely the kind of "badge[ ] and incident[ ]"163 of slavery that Section 2 of the Thirteenth Amendment gives Congress the power to abolish.164

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162 *Id.* at 232.
164 In addition to these Equal Protection arguments, the effective disenfranchisement of the District is vulnerable to at least two other challenges. First, penalizing residents of the District by denying voting rights burdens the right to travel within the United States. In *Shapiro v. Thompson*, the Supreme Court struck down a class of public welfare statutes that denied assistance to anyone who had not resided within the relevant jurisdiction for at least one year because the statutes effectively penalized Americans for moving. *See* 394 U.S. 618, 634 (1969) (emphasizing that "in moving from State to State or to the District . . . appellants were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional"). Moreover, the Court has already invoked the right to travel against a governmental restriction on voting less severe than the one in place in the District. *See* Dunn v. Blumstein, 405 U.S. 330, 339 (striking down a requirement that "force[s] a person who wishes to travel and change residences to choose between travel and the basic right to vote"). United States citizens who move abroad have the right to vote in federal elections through the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. § 1973ff-6 (1994), while those who move to the District do not. Second, denying citizens who move to the District the right to vote violates *Romer v. Evans*, 517 U.S. 620, 631 (1996). In *Romer*, the Supreme Court struck down a Colorado state constitutional amendment that denied municipalities the right to pass civil rights legislation protecting gays and lesbians as a class because it imposed a "special disability" on one group, leaving them vulnerable in the political process by requiring them to amend the state constitution to obtain protection against discrimination. *See* *Romer*, 517 U.S. at 631. Like the provision condemned in Colorado, the discriminatory treatment of the District residents offends the central "principle that government and each of its parts remain open on impartial terms to all who seek its assistance. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *See* *Romer*, 517 U.S. at 633 (citations omitted).
III. Strict Scrutiny

The Court must apply "strict review of statutes distributing the franchise" because they "constitute the foundation of our representative society." Thus, the question raised by the equal protection claims is whether Congress possesses a compelling interest in disenfranchising the District population. Three general categories of interest present themselves: (1) interests that relate to some characteristics of the District population that are allegedly disqualifying; (2) an interest in complying with the structural provisions of the Constitution that allegedly require disenfranchisement and do not permit Congress to extend the vote in congressional elections to District residents; (3) an interest in maintaining federal control over the seat of government and vindicating specific federal interests in the capital city. In this section, I conclude that the first kind of interest is categorically impermissible; that the second is spurious; and that the third is real and arguably compelling with respect to voting in local elections if narrowly tailored, but wholly unconvincing as a reason for disenfranchisement from Congress.

A. Is there a Valid Interest in Disenfranchising the District Population?

The first type of interest offered to justify disenfranchisement in the District relates to some allegedly disqualifying characteristic of the population. The offending characteristic may be dressed up in sophisticated terms, but in 1970, Senator Edward Kennedy plainly observed that "opposition to congressional representation for the District [is] based on the conviction that it is 'too liberal, too urban, too black, or too Democratic.'" Of course, the first and fourth adjectives represent nakedly political and ideologically biased efforts to "fence[e] out" a "sector of the population because of the way they may vote," a kind of political discrimination condemned by the Supreme Court. The "too urban" argument has no justification in the Constitution and seems to cut directly against the Court's statement that "[l]egislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests." The idea that the District population is "too black" to be represented is the very antithesis of everything the Fourteenth and Fifteenth Amendments are designed to accomplish.

167 Carrington v. Rash, 380 U.S. 89, 94 (1965) (striking down Texas' disenfranchise-ment of members of the armed forces).
There are, however, slightly elevated forms of this kind of argument. It has been suggested that the District population is too politically and economically dependent on the federal government,\(^{169}\) or that it lacks sufficient political diversity. It is worth briefly parsing these arguments.

The association of some substantial part of the District's citizenry and economy with the federal government cannot be legitimate grounds for disenfranchising the District’s citizens. This rationale is both radically underinclusive and radically overinclusive. It leaves out the millions of federal government employees who live and work in other states; indeed, the vast majority of federal government employees do not live in the District.\(^{170}\) Why should certain federal government employees be disenfranchised but not others? Is it really worse to work at and live near the Department of Justice in the District than to work at and live near the Pentagon in Virginia or the National Institutes of Health in Maryland? And why not disenfranchise state and local government employees? Obviously, a statute that simply disenfranchised all employees of the government would be flagrantly unconstitutional. Government employees retain their essential political and free speech rights, and cannot be disenfranchised even if their domicile in a state is based only on assignment to a military base.\(^{171}\)

This rationale is also fatally overinclusive because hundreds of thousands of Washingtonians—an outright majority—do not work for the federal government and do not depend on it for their livelihoods. They become voting rights victims by virtue of a congressionally imposed form of guilt by association.

Finally, the suggestion that the District, which is overwhelmingly Democratic in voter registration,\(^ {172}\) is not of sufficient political diversity to merit voting rights suffers from the same flaws. Many jurisdictions are as similarly lopsided as the District. For example, Idaho's entire congressional delegation is Republican,\(^ {173}\) and Massachusetts' is entirely Demo-

\(^{169}\) See Judith Best, National Representation for the District of Columbia 3–4 (1984), cited in Neuman, supra note 21, at n.133 ("The District is ineligible for statehood because its populace is too closely associated with the interests of the federal government.").

\(^{170}\) As of December 31, 1994, approximately 2,903,000 civilian federal employees lived and worked in the United States, but only 204,000, or roughly seven percent, worked in the District. See Bureau of the Census, U.S. Dept. of Commerce, Statistical Abstract of the United States 1997, at 350 tbl. 539 (1997).

\(^{171}\) See, e.g., Pickering v. Board of Educ., 391 U.S. 563 (1968) (finding that public employees do not generally relinquish First Amendment rights simply by accepting public employment); Carrington, 380 U.S. 89 (striking down state law forbidding voting by military personnel stationed in Texas).

\(^{172}\) In the District's 1994 general election, 79.1% of registered voters were Democratic, 7.1% Republican, 12.6% Independent, and 1.2% Statehood Party. See Rene Sanchez, Voter Sign-Up Makes Ward 8 a Match for 3; Gains East of Anacostia Push Registration to All-Time High, Wash. Post, Oct. 28, 1994, at D1.

\(^{173}\) See Barone & Ujifusa, supra note 5, at 450–62.
The complaint that the District lacks sufficient political diversity is a camouflage reformulation of the impermissibly viewpoint-specific complaint that it is too Democratic or too liberal.

B. Does the Constitution Actually Compel Congress to Disenfranchise the District?

The assumption that the Constitution compels congressional disenfranchisement of District residents has long permeated legal and popular consciousness. Even many proponents of statehood and greater home rule accept on face value the ubiquitous claim that the non-voting regime flows necessarily from the architecture of the Constitution. But the relevant structural provisions of the Constitution—Article I, Section 8, Clause 17; Article I, Section 2, Clause 1; the Seventeenth Amendment; and the Twenty-third Amendment—contain nothing explicitly or implicitly compelling disenfranchisement.

1. The District Clause Fallacy

Article I vests in Congress the power to "exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may . . . become the Seat of the Government of the United States." It is often argued that this Clause requires disenfranchisement of the population of the District in congressional elections. According to this conception, because Congress is the governmental authority for the District, residents cannot constitutionally be given the right to vote for members of Congress who share in actual Article I powers. However, this interpretation is not supported by the text, structure, history, or purposes of the District Clause, much less the conception of political sovereignty that underlies the Constitution as a whole.

Nothing in the text of the District Clause explicitly requires Congress to disenfranchise Washingtonians. Indeed, the language of the District Clause makes clear that its purpose is administrative in nature, and

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174 See id. at 684–720.

175 As long ago as 1803, St. George Tucker wrote of the disenfranchisement: "An amendment of the constitution seems to be the only means of remedying this oversight." ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES 1: APP. D 278 (1803). Modern observers speak in the same voice. See Peter Franchino, The Constitutionality of Home Rule and National Representation for the District of Columbia, 46 GEO. L.J. 377, 407 (1958) ("It would appear that constitutional amendment is the sole method of providing national franchise for District citizens . . . ."). In an important article more than two decades ago, however, Peter Raven-Hansen argued that the Constitution allows, although it does not compel, Congress to grant District residents representation in Congress by treating the District as a "state" within the meaning of Article I. See Peter Raven-Hansen, Congressional Representation for the District of Columbia: Constitutional Analysis, 12 HARV. J. ON LEGIS. 167 (1975) [hereinafter Raven-Hansen, Congressional Representation].

176 U.S. CONST. art. I, § 8, cl. 17.
that Congress' authority over the District is "for the Erection of Forts, Magazines, arsenals, dock-Yards and other needful Buildings . . . ." 177

If in a self-executing way the Clause independently forces District residents to forfeit the right to vote, it must be because it causes them to lose all of the constitutional rights that citizens of the fifty states enjoy. On this theory, the District Clause establishes unrestrained congressional power over everything that happens within its jurisdiction, unbounded by the Bill of Rights and other constitutional principles.

But this reading is terribly strained. In fact, the Clause gives Congress the same kind of exclusive legislative power that states enjoy over the populace within their geographic domains. The Supreme Court has always understood the District Clause to create a structural analogy between the powers of Congress over the residents of the District and the powers of the states over their residents. 178

Thus, Congress has the powers over citizens within its jurisdiction that states have over theirs. But these powers are in no sense unconstrained. It is the premise of our Constitution that governmental power must coexist with citizens' constitutional rights without infringing upon them. 179

Interpreting the District Clause, Justice Sutherland asserted that District residents may not be treated as second-class citizens. 180 He emphasized that the District Clause and the creation of the District out of Maryland and Virginia land had not subtracted constitutional rights from people who already had them as citizens of states. 181 Neither the text, structure, nor interpretive history of the District Clause compels Congress to disenfranchise citizens living in the District of Columbia.

Specific inquiry into the intent behind the District Clause reveals that its original purpose was not to render American citizens voteless, but to assure Congress complete police power over the seat of government. Congress wanted to guarantee that it could maintain military control and physical security over the Capitol, the other federal buildings, and the capital city. 182

177 Id.
178 See discussion supra Part II.B.
179 The "very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).
181 See supra note 29 and accompanying text, discussing O'Donoghue, 289 U.S. at 541 (quoting Downes v. Bidwell, 182 U.S. 244, 260–61 (1901)).
182 As a lesser concern, the Framers also thought that carving out a separate jurisdiction for the national government would dampen the intense sectional rivalries that had been unleashed by the peripatetic Congress' search for a permanent home in the 18th century. See 3 Elliot's Debates, supra note 38, at 432–33. For expressions of this sectionalism, see id. at 430–31, 433 (statement of Mr. Grayson) and see id. at 440 (statement of Mr. Pendleton). This additional motivation, however, in no way conflicts with the constitutional imperative of voting by capital residents.
A major reason the Framers consistently argued for giving members of Congress control over the city in which they met was “to preserve the police of the place and their own personal independence, that they may not be overawed or insulted, and of course to preserve them in opposition to any attempt by the state where it shall be.” The critical event giving impetus to this pervasive rationale was a rowdy public demonstration at the Pennsylvania State House building in Philadelphia on June 21, 1783, while the United States Congress was meeting there. According to historian Kenneth Bowling, thirty former Revolutionary War soldiers, mostly from Pennsylvania, prepared to mount an assault on the building. The target of their wrath was not Congress, which had recessed over the weekend, but Pennsylvania’s Executive Council, which was in session on the second floor of the building. The soldiers had come to the State House to demand their overdue pay from the Executive Council.

As the demonstration grew larger and rowdier, the congressmen appealed to the Executive Council to summon the Pennsylvania militia. The Council refused, arguing that absent an authentic emergency the militia would never take up arms against the men who had fought for American independence. The Executive Council finally agreed to accept the soldiers’ petition and meet with a group of officers, but not before the soldiers and gathered crowd had insulted and intimidated the congressmen in the building.

According to Bowling, Alexander Hamilton and his Federalist allies exploited the flare-up over wages precisely to win support in their effort to constitutionalize their vision of a magnificent federal capital directly under congressional control. In addition, Bowling suggests that “Hamilton and his centralist allies deemed it inappropriate that continental soldiers be allowed to settle their claims against Congress with a state government.” In an emergency session held the night of the demonstration, Congress passed several secret resolutions, mainly written by Hamilton, protesting the insult experienced by members of Congress, authorizing Hamilton to seek assurances from Pennsylvania that it would in the future ensure the “dignity of the federal government,” and ordering George Washington to march a group of loyal federal soldiers to Philadelphia to

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183 Id. at 439–40 (statements of Mr. Pendleton); cf. id. at 89 (statement of Mr. Madison) (warning that a state with legislative power over the seat of government could threaten and control Congress).
185 See id. at 30.
186 See id.
187 See id. at 32.
188 See id.
189 See id. at 32–33.
190 Id. at 31. Centralists sought stability for the new country, and most wanted the federal government to be supreme over the states. See id. at 24.
quell the gathering insurrection.\textsuperscript{191} Congress also passed, and soon acted upon, a clandestine measure authorizing the President of Congress to reconvene Congress in New Jersey “in order that further and more effectual measures may be taken for suppressing the present revolt, and maintaining the dignity and authority of the United States.”\textsuperscript{192}

Whether these events reflected Congress’ authentic anxiety about its physical security or an elaborate political ruse, the Philadelphia controversy clearly “led for the first time to public proposals that Congress should exercise exclusive jurisdiction over the place where it met.”\textsuperscript{193} During the debates a few years later over the content and then ratification of the Constitution, “the Philadelphia incident became a key exhibit in support of the need for exclusive federal jurisdiction over . . . the seat of the federal government.”\textsuperscript{194}

In a review of the controversy over the District Clause in state ratification debates, Professor Peter Raven-Hansen noted that “the memory of the mutiny scare and the need for full federal authority at the national capital motivated the drafting and acceptance of the ‘exclusive legislation’ Clause.”\textsuperscript{195} Indeed, it was taken for granted at the Virginia ratifying convention, even among skeptical delegates, that what “originated the idea of the exclusive legislation was, some insurrection in Pennsylvania, whereby Congress was insulted—on account of which, it is supposed, they left the state.”\textsuperscript{196}

Madison referred to the “disgraceful” affront to federal authority that took place in Philadelphia, arguing that “[i]f any state had the power of legislation over the place where Congress should fix the general government, this would impair the dignity, and hazard the safety, of Congress . . . . Gentlemen cannot have forgotten the disgraceful insult which Congress received some years ago.”\textsuperscript{197} Madison then made the classic argument that the federal government could not be guarded “from the undue influence of particular states, or from insults, without such exclusive power.”\textsuperscript{198} “If this commonwealth depended, for the freedom of deliberation, on the laws of any state where it might be necessary to sit,” he asked, “would it not be liable to attacks of that nature (and with more indignity) which have already been offered to Congress?”\textsuperscript{199}

Other state ratification debates reveal the same conception of the purposes behind “exclusive legislation.” In the North Carolina Conven-
tion, Delegate Iredell asked about the "consequence" of locating the capital "in the power of any one particular state . . . ."200 "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 Congress?"201

Thus, the historical record is plain that the overriding purpose of the District Clause was to guarantee that Congress would not be forced to depend on a state government that could compromise or obstruct its actions for parochial reasons. Congress did not intend to disenfranchise citizens within the capital city. The importance of this understanding is that vindicating Congress' control over the capital does not conflict with the equally compelling constitutional imperative of extending suffrage rights to citizens of the capital. Congress can govern the capital city exclusively and in jealous pursuit of its own interests without disenfranchising the local population in federal elections. Congress feared a threat to its power and dignity from a sovereign state government controlling the police and legislative power in the capital city. If the District were given direct representation in the Senate and House, the District Clause would not be offended so long as Congress continued to act as the supreme legislative power over District affairs. Even if the District's two senators and representative were to seek some legislative result incompatible with a valid federal interest as perceived by other members of Congress, they could be outvoted 100-2 and 435-1.

There is not a shred of historical evidence that it was the purpose or design of any of the Framers or ratifiers of the District Clause to disenfranchise American citizens. It is true that a few early republican skeptics of the District Clause seemed to anticipate that without a Bill of Rights to restrain them, members of Congress would end up disenfranchising residents.202 But there is no evidence that any Framer believed that communal disenfranchisement at the seat of government was necessary to maintain congressional police power jurisdiction over the area. In fact, as District of Columbia Court of Appeals Judge Gladys Mack has forcefully argued:

An examination of the circumstances surrounding the adoption of Clause 17 [the District Clause] demonstrates that the Framers

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200 4 ELLIOT'S DEBATES, supra note 38, at 219.
201 Id. at 219–20.
202 For example, Thomas Tredwell, a delegate to the New York ratifying convention, argued that "subjecting the inhabitants of that district to the exclusive legislation of Congress . . . 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, supra note 38, at 402. Still, it is hard to infer from such statements that the purpose of the District Clause was disenfranchisement. First, Tredwell was speaking about a District Clause without any accompanying Bill of Rights to inform it. Second, as a critic of central power, Tredwell was making a prediction about what Congress would actually do with respect to local voting rights rather than what it had to do as a matter of constitutional law.
never contemplated that Congress would be permitted to use cession to strip away the rights accorded to all state citizens by the Constitution, rights that "attached to [District residents] irrevocably" when the District was a part of the ceding states. [citation omitted] . . . As state citizens prior to cession, D.C. residents were entitled to participate in the election of the President via the electoral college under Article II, § 1 . . . [and] to elect representatives to the House of Representatives, Article I § 2 cl.1.203

In fact, during the period of constitutional formation, there was precious little discussion of voting in the capital city. The Supreme Court has observed the failure of the Founders to deal cleanly with the problem of how to treat District residents for the purposes of federal diversity jurisdiction: "There is no evidence that the Founders, pressed by more general and immediate anxieties, thought of the special problems of the District of Columbia . . . This is not strange, for the District was then only a contemplated entity."204

Raven-Hansen has attributed the Framers' inattention to the voting issue to several factors.205 First, because the Framers' focus was on assuring federal independence from states and control over its local meeting place, the problem of suffrage was not on anyone's mind. The geographic site for the District had not yet been located, and thus the Framers were dealing with a complete future abstraction. It was perfectly conceivable that the District would be located on virtually empty land, and indeed when it was sited on the Potomac and the federal government finally opened up shop in 1800, it had fewer than 15,000 year-round residents, much less than the target population of 50,000 that Congress had set for the admission of new states in the Northwest Ordinance of 1787.206 Second, "it was widely assumed that the land-donating states would make appropriate provision in their acts of cession to protect the residents of the ceded land."207 On this theory, voting was not a matter of

203 Gary v. United States, 499 A.2d 815, 855 (D.C. 1985) (Mack, J., dissenting in part and concurring in part) (quoting Downes v. Bidwell, 182 U.S. 244 (1901)). In this luminous opinion invalidating the one-house veto provision in the D.C. Home Rule charter, Judge Mack notes that: "As state citizens prior to cession, D.C. residents were entitled to participate in the election of the President via the electoral college under Article II, § 1 . . . [and] to elect representatives to the House of Representatives, Article I § 2 cl. 1." Id. at 855. She states that: "The right to a national voice in Congress, which was never voluntarily relinquished, in my view should be speedily restored." Id. at 855–56. "There is nothing inherent in the Constitution that prevents District residents from electing national representatives." Id. n.10 at 856.


205 See Raven-Hansen, Congressional Representation, supra note 175.

206 See id. at 177.

207 Id. at 172 (citing 3 Elliott's Debates, supra note 38, at 433 (statements of James Madison)).
constitutional concern—recall that at the time there was no federal constitutional protection of the right to vote—because the ceding states would work the matter out politically with Congress during cession negotiations. Delegate Iredell in the North Carolina ratification debate pointed out that a ceding state “may stipulate the conditions of the cession. Will not such state take care of the liberties of its own people?”

Finally, Raven-Hansen argued that representation of District residents was not an issue because “it was assumed that the residents of the District would have acquiesced in the cession to federal authority.” The most explicit statement by one of the Framers on this point was Madison’s observation that:

> the [ceding] State will no doubt provide in the compact for the rights, and the consent of the citizens inhabiting it . . . 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 . . .

Madison’s statement that District residents “will have had their voice” in the election of Congress is, of course, studiously ambiguous. It might simply mean, as Raven-Hansen seems to believe, that Madison recognized that District residents, as former residents of states, will have had their chance at some point in the past to cast votes for representatives to Congress, now their exclusive legislator. Alternatively, it might mean that Madison anticipated the arrangement that actually prevailed for the first decade after cession by Maryland and Virginia in which District residents continued to vote for members of Congress from their states of former domicile. At any rate, it is hard to read Madison’s language as manifesting anything like an intention to permanently disenfranchise the capital population. On the contrary, his words evince a most democratic spirit, antithetical to the idea of constitutionally engineered disenfranchisement, and a specific commitment to a “municipal legislature . . . derived from their own suffrages.”

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208 4 Elliott’s Debates, supra note 38, at 219.
209 Raven-Hansen, Congressional Representation, supra note 175, at 172.
210 The Federalist No. 43, at 280 (James Madison) (Earle ed. 1937). However, Raven-Hansen considered Madison’s words “doubtful authority” for the proposition that Madison anticipated direct District representation in Congress. He especially objected to a misreading of Madison’s statement by proponents of District representation in which the future perfect tense is altered to read “they will have their voice in the election of the government.” See Raven-Hansen, supra note 175, at 172–73 n.24. (citing Hearings on H.J. Res. 396 Before the House Comm. on the Judiciary, 90th Cong. 43 (1967) (statement of Citizens’ Joint Committee on National Representation)).
211 The Federalist No. 43, supra note 210, at 280.
2. The "People of the States" Fallacy

The argument that the Constitution itself disenfranchises the District also relies on language describing senators as "chosen . . . by the People of the several States" and as coming "from each State." The theory is that the constitutional vernacular of "states" reflects an intention to exclude District residents categorically from representation in Congress. This claim is not simply that the District community, as a distinct political entity, is barred from sending representatives directly to the House and Senate, but that District residents themselves are constitutionally forbidden to vote for representatives to Congress, even if from other states.

This overly literal reading does not do justice to the historical context or the case law. When Article I was written, of course, no one lived in the seat of government because it had not yet been designated, much less populated. Thus, when the Framers described representation as relating to "the People of the several States," they were not at the time excluding the citizens who lived in the parts of Maryland and Virginia area that would later become Washington, D.C., but rather including them in the constitutional community of voting citizens.

The history bears out this interpretation in the most vivid way. During the first Congress, it was clearly understood that the Constitution did not disenfranchise citizens living in the District. When Congress took possession from Maryland and Virginia in 1790, residents of the land ceded to Congress continued to vote in federal elections in Maryland and Virginia for the first decade after cession. Although the local population was brought under the "Exclusive Legislation" of Congress "in all cases whatsoever" in 1790, Congress set the first Monday in December of 1800 as the official day for removing the federal government to the District, and so provided that District residents could continue to vote in Maryland and Virginia for members of Congress and that Maryland and Virginia law would continue to operate within the District until further notice. There is no recorded challenge to this practice, and indeed the first

212 U.S. Const. art. I, § 2.
213 U.S. Const. amend. XVII.
214 Raven-Hansen seems to embrace the idea that exclusive legislative authority vested in Congress in 1800. See Raven-Hansen, Congressional Representation, supra note 175, at 174 (citing United States v. Hammond, 26 F. Cas. 96 (C.C.D.C. 1801) (No. 15,293)). But I would argue that the event of constitutional dimension took place in 1791 when Congress accepted the lands from Maryland and Virginia. The Constitution requires Congress 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 . . ." U.S. Const. art. I, § 8, cl. 17 (emphasis added). Thus, the cession, the acceptance, and the creation of the District all took place in 1791 despite the fact that Congress chose not to occupy the District or govern it directly until 1800. Congress' decision to continue Maryland and Virginia jurisdiction during the interval period was wholly within its discretion, and it could just as well have appointed commissioners or
Congress itself must have thought it perfectly unobjectionable, a fact pregnant with constitutional meaning.\textsuperscript{215}

Moreover, when Congress in 1800 debated a bill providing that it would control District law in the future, the issue of voting came up in an illuminating way. The bill’s proponents understood that the exercise of direct control by Congress would cause District residents to “cease to be the subject of State taxation, [and that] it could not be expected that the States would permit them, without being taxed, to be represented.”\textsuperscript{216}

The opponents of the bill argued for keeping the status quo: District residents would be governed by the evolving state laws of Maryland and Virginia and could keep voting in the states, despite the fact of exclusive legislative authority by Congress. As Raven-Hansen puts it, “[t]he premise underlying their opposition to the bill—a premise never challenged in the congressional debates which ensued—was that . . . the lodging of exclusive legislative authority over the District in Congress [was] consistent with continued representation of District residents in Congress.”\textsuperscript{217}

Even more striking, there were members of the House of Representatives from both Maryland and Virginia whose residences were within the boundaries of the District, both before and after 1800. Daniel Carroll served in both the Continental Congress and the first United States Congress from March 4, 1789, to March 3, 1791, as a Representative from Maryland, yet lived in Rock Creek Park.\textsuperscript{218} After 1800, John Love, a resident of Alexandria, which was then part of the District, served as a Representative from Virginia.\textsuperscript{219}

The foundational experience of District residents voting for, and serving as, congressional representatives is not an isolated event in American history. Through at least the middle of the twentieth century, many states allowed District residents who had gone to work in the federal government to vote back home. Indeed, the practical vision of a capital city as a transient home to citizens who retain their basic political loyalties to their states continues to mark life in the District. Hundreds, if not thousands, of permanent year-round District residents are registered and vote in other states, even if this peculiar arrangement is nowhere em-

\textsuperscript{215} The constitutional Understandings of the first Congress are given special weight because many of the members of the first Congress, including Madison himself, were also Framers of the Constitution. See Marsh v. Chambers, 463 U.S. 783, 790 (1983) (“An act ‘passed by the first Congress assembled under the Constitution, many of whose members had taken part in the framing of that instrument . . . is contemporaneous and weighty evidence of its true meaning.’” (quoting Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 297 (1888))).

\textsuperscript{216} Raven-Hansen, supra note 175, at 175 (quoting 10 ANNALS OF CONG. 869 (1800) (statements of Rep. Nicholas)).

\textsuperscript{217} Id. at 176.

\textsuperscript{218} See WASHINGTON PAST AND PRESENT: A HISTORY (John Clagett Proctor ed., 1930).

bodied in law. To take the most prominent example, President and Mrs. Clinton are full-time residents of the District of Columbia (in public housing no less!) but continue to vote in Arkansas. The same holds true for a large portion of the 535 members of Congress, and their spouses and families, who maintain voter registration in their home states but live on Capitol Hill, or in Georgetown, Cleveland Park, or the Watergate apartments. These VIP Washingtonians and their families take it for granted that the constitutional structure is not a political straitjacket that requires them to be unrepresented in Congress simply because they live in the District. There is no constitutional law to contradict their practice or to invalidate their votes.

If it is an accepted practice for high-level Washingtonians to escape nonrepresentation by voting in the states, then surely it must be permissible for Congress to enfranchise all Washingtonians in the same way (if not some other, more direct method). To be sure, one might say that the right of elected legislative and executive branch officials living in the seat of government to vote in their home states is implied by the various provisions of Article I, but that would not explain why the spouses and children and staff members of the President and members of Congress should be able to live permanently in the District but vote in the states. Finally, two significant extant practices confirm that Article I does not disenfranchise citizens who are domiciled in the District. The first practice is the decision by Congress to grant the District a delegate in the House of Representatives. At first blush, the conventional understanding of the "non-voting" delegate position might seem to bolster the proposition that Washingtonians may not have voting representation in Congress. However, closer examination reveals that the delegate already exercises some actual fraction of the overall constitutionally created legislative power.

Article I of the Constitution vests all legislative powers in the "Congress of the United States."220 Thus, as the D.C. Circuit has emphasized, "[n]o one congressman or senator exercises Article I 'legislative power.'"221 Rather, the "legislative power" rests with the bicameral legislature itself. As a matter of political reality and constitutional understanding, however, each of the 535 members of the two bodies exercises some fraction of the overall constitutional essence we call "legislative power." Some of them, chairs of major committees with great seniority, for example, end up exercising more of that power than others, such as freshman members of the minority party in the House. But it also seems clear that each of the five delegates—from the District of Columbia and the four territories—exercises a real, if tiny, fraction of the national legislative power. The delegates have regular office space in the House office buildings. They have the right to speak on the floor of the House as well as in standing

committees. Most significantly, however, delegates enjoy the right to vote in committee and in subcommittee, and for a brief period even voted in the Committee of the Whole on the floor of the House.

There is no doubt that real legislative power generated by the Constitution attends to the delegate position. A delegate's vote can make the difference in whether a bill or an amendment passes a committee or subcommittee vote and is sent to the floor. Although a discharge petition procedure is always available to prevent a delegate's vote from ultimately controlling a piece of legislation, as a matter of political reality, a vote in committee is a precious piece of the overall legislative power. Indeed, as part of the normal process of legislative logrolling, a delegate can trade his or her vote in committee or subcommittee on a bill for a member's vote on the floor on another bill. Moreover, the right to speak in committee and on the floor of the House implies the power to persuade and convince other Members of one's position, an opportunity that other American citizens who are not members of the House obviously do not enjoy.

Indeed, if we assume, as I think we safely can, that Congress would have no authority to enact a statute that turned prominent private citizens or mayors of large cities (to use the Michel court's example) into delegates to the House, then we have explicitly recognized both the District and the territories as distinctive and legitimate legislative actors within the constitutional regime. That these entities are awarded a fragment of the overall legislative power again refutes the claim that Article I denies the District population the right to vote for representatives in Congress.

A second practice suggesting that the statelessness of District residents does not compel them to be perpetually unrepresented is Congress' decision to enfranchise citizens who have moved abroad temporarily or permanently. Through the Uniformed and Overseas Citizens Absentee Voting Act, first enacted in 1986, Congress requires that each state "permit absent uniformed services voters and overseas voters to use absentee registration procedures and to vote by absentee ballot in general, special, primary, and runoff elections for Federal office." With this Act, Cone...
gress also compels the states to accept and process, with respect to any Federal election, any otherwise valid voter registration application from an absent uniformed services voter or overseas voter, if the application is received not less than thirty days before the election. 225

With this provision Congress essentially forces the states to accept voter registration by citizens who otherwise would not be qualified to register for lack of proper residence or domicile in the state. Indeed, there appears to be no requirement that the voters have even lived in the state in which they register. Congress has thus successfully used its enforcement powers under Section 5 of the Fourteenth Amendment to secure the right of Americans living abroad to vote in federal elections by making their enfranchisement a kind of collective responsibility on the part of the states. The District population is in an analogous situation to Americans living abroad: unless Congress acts to vindicate their right to be represented in federal elections, District residents will continue to go without this most fundamental right of citizenship.

3. The Twenty-Third Amendment Fallacy

Another part of the argument that the Constitution must disenfranchise citizens living in the District in congressional elections may be based on the Twenty-third Amendment, which provides the District with electoral college votes in presidential elections. 226 The Amendment seems to reinforce the distinction between the District and the states and arguably constitutionalizes a principle of political inequality between them by limiting the District's voting power in the electoral college to that of the least populous State. 227 Moreover, the Amendment says nothing about congressional representation, leaving the negative inference that District residents are, and must remain, disenfranchised in Congress.

There are many problems with this line of attack on the application of one person–one vote to the District. First, it seems deeply ironic to use a constitutional amendment that was enacted in order to vindicate voting rights in presidential elections as the reason to negate voting rights in congressional elections. Given the constitutional preference for representation, the Twenty-third Amendment ought to be viewed as rejecting any implication that District residents are unfit for participation in federal elections. Indeed, if the adoption of the Twenty-third Amendment in 1961 foreclosed all substantive enfranchisement of the District population in Congress, it would have been unconstitutional for Congress to

225 See id.
226 See U.S. CONST. amend. XXIII, § 1 (stating that the District "shall appoint . . . electors of President and Vice President . . . 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 . . . ").
227 See id.
create the office of delegate from the District of Columbia a decade later.\textsuperscript{228}

Reading the Twenty-third Amendment to preclude a constitutional claim for voting representation in Congress offends the dynamic of democratic enlargement that defines the Constitution. Consider for example the Twenty-fourth Amendment, added to the Constitution in 1964 to ban all poll taxes in federal elections. During the enactment and ratification debates, there was much discussion about whether the Amendment should extend to poll taxes in state elections as well,\textsuperscript{229} and a deliberate decision was made to limit the Amendment’s scope. Just two years later, in \textit{Harper v. Virginia Board of Elections}, the Supreme Court found that Virginia’s state election poll tax violated the Equal Protection Clause,\textsuperscript{230} although such a claim had been regarded as ridiculous by those who understood the Twenty-fourth Amendment’s silence on the subject to imply that state poll taxes remained valid. This holding prompted angry dissenting opinions from Justices Black and Harlan, who argued that the Court was betraying “the original meaning of the Constitution,”\textsuperscript{231} and ignoring the fact that poll taxes “have been a traditional part of our political structure.”\textsuperscript{232} The majority determined, however, that “[n]otions of what constitutes equal treatment for the purposes of the Equal Protection Clause do change.”\textsuperscript{233} These words seem custom-made for the situation of the District of Columbia.

Those who argue that the Twenty-third Amendment and the subsequent failure of the D.C. Voting Rights Amendment freeze the political rights of District citizens also ignore the ways in which equal protection doctrine has often done the work intended by failed constitutional amendments. For example, the failure to pass the Equal Rights Amendment did not foreclose the evolution of equal protection principles to vindicate the equal rights of women under heightened scrutiny. It would have been possible to argue that the Nineteenth Amendment, ratified in 1920 and conferring on women the right to vote, impliedly foreclosed the use of Equal Protection to protect against gender discrimination, for if the Equal Protection Clause applied, why would the Nineteenth Amendment have been necessary? Nonetheless, the Court has forcefully brought women under the umbrella of equal protection jurisprudence, a process

\textsuperscript{228} See 2 U.S.C. § 25(a) (1994).
\textsuperscript{229} See, e.g., 108 Cong. Rec. 17,660 (1962) (statement of Rep. Lindsay of New York) (“Mr. Speaker, if we are going to amend the Constitution, the amendment ought to be meaningful ... such an amendment should abolish impediments to voting in local elections as well as state elections. It should not be confined to Members of Congress.”).
\textsuperscript{230} 383 U.S. 663 (1966).
\textsuperscript{231} Id. at 677 (Black, J., dissenting).
\textsuperscript{232} Id. at 684 (Harlan, J., dissenting).
\textsuperscript{233} Id. at 669 (emphasis in original).
that culminated in the Court's landmark decision in *United States v. Virginia*.234

C. Does Congress Have a Compelling Interest in Maintaining its Control over the Federal District?

The above analysis of the District Clause makes it clear that Congress has a compelling interest in maintaining control over the seat of government and assuring effective operation of the federal government. Thus, if it could be shown that giving Washingtonians representation in Congress actually interfered with this interest, then it might be a sufficiently compelling reason for disenfranchisement.

This proof cannot be made. The vast majority of issues dealt with by Congress do not relate specially or uniquely to the District but rather to the nation as a whole. Moreover, if District representatives' views of proper policy governing the District under the District Clause clashed with those of all other members of Congress, they could be easily outvoted. Let us assume, for example, that the representatives and the people of Washington wanted to keep Pennsylvania Avenue open for public traffic, but everyone else in Congress, along with the President, believed that for security reasons it should be closed.235 If it came to a vote, the District's representatives would lose in the House by a vote of 435 to 2, with similar margins in the Senate. The point is that there is very little chance that representation for District residents will impede Congress' rightful role over the seat of government.

IV. The Justiciability of the District's Disenfranchisement

However compelling, this argument will have nowhere to go if the various causes of action are ruled non-justiciable. Article III of the Constitution confines the federal judicial role to the adjudication of actual "cases" and "controversies."236 As the Court observed in *Allen v. Wright*,

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236 U.S. CONST. art. III, § 2.
“several doctrines” have grown up “to elaborate that requirement;” two of them are crucial in testing the justiciability of the claims outlined above: the political question doctrine and standing. This Part argues first that a federal suit addressing the representational rights of District residents would present no “political question” outside the competence of the judiciary. The District’s disenfranchisement is a perfectly redressable violation of voting rights like the ones dealt with in one person–one vote or majority-minority district cases. Second, several hundred thousand people who are concretely and palpably injured by this regime have standing to challenge their disenfranchisement.

A. Is This a Political Question?

These claims will confront, before anything else, the assertion that they raise a non-justiciable political question. A political question is one “where there is ‘a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.’” These are the two principal factors for analysis.

First, the question of voting rights in the District is not textually committed to the political arena. The text of the Constitution mentions neither congressional representation of District residents nor the specific nature of their voting rights. The District Clause provides that Congress shall “exercise exclusive Legislation” over the District, but this is the same kind of power that states exercise over cities and towns, a kind of power that does not include authority to disenfranchise citizens in federal elections.

The general grant of power in the District Clause relates to the congressional interest in maintaining police power over the federal district, and has never prevented courts from examining the constitutionality of congressional treatment of the District. On the contrary, the Bill of Rights applies with full force in the District, and just as Congress may not establish a church or shut down the Washington Post, it may not violate the voting and representational rights of District residents. Congress could not, for example, create a local city council in the District with malapportioned or racially gerrymandered districts; nor could it (any longer) create a school board with fixed seats for members of different races. Thus, it is wrong to believe that the District Clause makes congressional regulation of voting rights in the District non-reviewable.

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239 U.S. CONST. art. I, § 8, cl. 17.
It might be plausible to argue that Article I, Section 5 reflects a "textually demonstrable commitment of the issue" of District voting rights to Congress. That Section states that "[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . ."240 In *Powell v. McCormack*,241 however, the Supreme Court held that this provision was not a textual commitment of unreviewable authority to Congress, since the Qualifications Clause specifies the requirements for membership in the House.242 The Court held that the House could not simply add to these qualifications by excluding a duly elected member, Harlem Congressman Adam Clayton Powell, on the grounds that he was facing criminal charges.243 Invoking Article I, Section 5 here fails for the same reason: the Qualifications Clause cannot be made to require that a candidate live outside the District of Columbia.244 Again, there have been Congressmen from Maryland and Virginia who lived exclusively within the geographic boundaries of the District, and a great many U.S. House and Senate candidates today—almost all of them incumbents—do live in the District of Columbia.245

Second, the Court is competent to adjudicate cases respecting voting rights in congressional elections. The Supreme Court since *Baker v. Carr*246 has rejected all claims that voting rights cases raise intractable or unmanageable political questions. In *Baker*, the Court differentiated "political questions" from "political cases," noting that courts "cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority."247

The Court has accordingly found justiciable attacks on practices that are alleged to dilute or cancel out votes, such as malapportioned legislative districts248 and gerrymandered districts with majority-minority populations.249 The fact that the Supreme Court, ultimately, would be reviewing actions of Congress rather than the states does not change the analysis. In *Powell v. McCormack*,250 the Court found justiciable the seating of a

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240 U.S. Const. art. I, § 5.
244 It might be said that the Qualifications Clause itself implies disenfranchisement of the District since a District resident cannot be an inhabitant of a state. But District residents can be, and frequently are, treated as residents of states for both constitutional and statutory purposes.
247 Id. at 217.
Congressman allegedly denied his rightful seat in the House. In United States Department of Commerce v. Montana,251 a case closely analogous to the District’s, the Court considered the question of whether Congress’ preferred method of apportioning House districts among the states (the so-called “method of equal proportions”) violated the principle of one person—one vote developed in Wesberry v. Sanders.252 The Court rejected the United States’ argument that the case presented a nonjusticiiable political question.

Acknowledging that the one person—one vote challenge to federal reapportionment “raises an issue of great importance to the political branches,”253 the Montana Court nonetheless found that the “controversy . . . turns on the proper interpretation of the relevant constitutional provisions. As our previous rejection of the political question doctrine in this context should make clear, the interpretation of the apportionment provisions of the Constitution is well within the competence of the Judiciary.”254

It did not bother the Court that it was reviewing the actions of Congress directly because although respect for Congress raises special concerns, “those concerns relate to the merits of the controversy rather than to our power to resolve it. As the issue is properly raised in a case otherwise unquestionably within our jurisdiction, we must determine whether Congress exercised its apportionment authority within the limits dictated by the Constitution.”255 Thus, it would not be a political question to review whether Congress’ present reapportionment method unconstitutionally excludes American citizens living in the District from being counted for the purposes of apportioning members of the House.

Additionally, the 1994 Michel v. Anderson decision found that a Republican Article I challenge to a House of Representatives’ rule, which allowed the delegate from the District of Columbia and the four territorial delegates to vote in the Committee of the Whole, presented no political question.256 The court’s theory was that the alleged practice of bestowing voting privileges on non-members of the House would indeed violate the constitutional provision that members of the House be “chosen by the People of the Several States” and therefore both voters and members of the House would have the right to challenge it.

By the same token, there must be justiciability when voters in the District and their non-voting House delegate allege that they are being wrongfully denied their voting and representational rights as citizens and as a representative under Article I. Of course, the claims would still have

252 Id. at 446.
253 Id. at 458.
254 Id.
255 Id. at 459.
256 14 F.3d 623 (D.C. Cir. 1994) (upholding the voting policy).
to prevail on the merits, but as a threshold matter, the allegation that Congress is denying fundamental voting rights must be heard.

The political question doctrine cannot block judicial review of a basic disconnect in the framework of representative democracy. Indeed, judicial review is at its zenith of legitimacy when it is applied to the voting rights of people who have no other effective way in the political process to satisfy their claims. As John Hart Ely has written, "unblocking stoppages in the democratic process is what judicial review ought pre-eminentely to be about, and denial of the vote seems the quintessential stoppage."\textsuperscript{257}

B. Is There Standing?

To prove standing, a plaintiff must allege: (1) a personal injury that, (2) is fairly traceable to the defendant’s allegedly unlawful conduct, and (3) is likely to be redressed by the plaintiff’s requested relief.\textsuperscript{258}

Before analyzing these three dimensions of standing, it is important to observe that traditional standing doctrine may no longer apply to all complaints about unconstitutional arrangements in the electoral system. In \textit{Shaw v. Reno}\textsuperscript{259} and \textit{Miller v. Johnson},\textsuperscript{260} the Court took up and affirmed challenges to certain majority-minority districts despite the fact that the plaintiffs never alleged that they had been personally, directly or concretely harmed in any way by virtue of living in the districts. If the Court simply assumed that the intersection of race and voting rights claims triggered a kind of threshold super-strict scrutiny that allowed plaintiffs to waive showing of injury, then plaintiffs claiming that systematic disenfranchisement of a majority-minority jurisdiction creates the unlawful impression of "political apartheid" would also be permitted to proceed directly to the merits.

Even following the three standard elements of \textit{Allen v. Wright}, however, standing clearly exists to bring these claims. First, Supreme Court jurisprudence demands a "distinct and palpable" constitutional injury.\textsuperscript{261} All of the Court’s voting rights precedents make or assume the basic point that denial of voting rights is just such an injury. In a democratic society, there are few per se injuries of a grosser nature than stripping a citizen of his or her right to vote.

Furthermore, when congressional representation is denied, other injuries follow, such as the inability to obtain equal services and a fair share of federal resources. This is surely empirically provable, but it is sufficient that District residents, by virtue of their lack of political repre-

\textsuperscript{257} John Hart Ely, Democracy and Distrust 117 (1980).
\textsuperscript{259} 509 U.S. 630 (1993).
\textsuperscript{261} Warth v. Seldin, 422 U.S. 490, 501 (1975).
sentation, have a lesser *opportunity to compete* for federal resources in Congress. We know this point from *Regents of the University of California v. Bakke*[^262] and *Associated General Contractors of America v. Jacksonville*,[^263] in which standing to challenge affirmative action policies did not require proof that the challengers would have received the benefits had the policies not been in place. It was sufficient to allege as injury that applicants were denied a fair chance to compete.[^264]

Second, the disenfranchisement of District residents is "fairly traceable"[^265] to congressional action and inaction. Congress has the constitutional responsibility to enfranchise American citizens on a one person–one vote basis,[^266] but it has failed to live up to this responsibility, granting District residents only a non-voting delegate in the House of Representatives and no representation in the Senate. Congress is the only government entity that can bring the vote to Washington and it has refused to do so.

One might object that the Constitution itself causes the harm, but Part III has shown that this is not the case. The constitutional "exclusive legislator" for the District is Congress, and so it is the body with dirty hands.

The fact that the District’s disenfranchisement may be characterized as a result of congressional inaction rather than an affirmative, explicit statute does not destroy standing. In the years leading to *Bolling v. Sharpe*,[^267] Congress had never passed a statute explicitly dictating "that dual, segregated schools should be maintained; but the progression of school legislation enacted during those years did very clearly rest on a congressional assumption that segregation would continue."[^268] The *Bolling* Court assumed that Congress was at fault because it was structurally responsible for the District.

Finally, the injury to voting rights is likely to be redressable by judicial relief. Indeed, judicial relief is the *only* way that this matter will be resolved, for the proposed D.C. Voting Rights amendment has failed, statehood has been rejected, and Congress refuses to explore seriously other alternatives. Change will arrive only when a court declares the current regime unconstitutional and orders Congress to reapportion itself

[^264]: See *Bakke*, 438 U.S. at 280 n.14; *Associated*, 508 U.S. at 666 ("The ‘injury in fact’ in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of [a barrier that makes it more difficult for members of a group to obtain a benefit], not the ultimate inability to obtain the benefit.").
[^266]: See discussion supra Part II.
according to the principle of one person—one vote and respect the other constitutional rights currently being abridged.

But what might Congress do? What range of remedies could the Court even suggest that Congress might choose from? Among the major possibilities available to Congress are two that would not involve structural changes in Congress’ relationship to the District.

1. Direct Statutory Enfranchisement

Congress could pass a statute treating the District as though it were a state and directly confer senators and proportionate House representation on it by statute.\textsuperscript{269} The constitutional basis of Congress’ power to act in this way would be its awesome delegated powers under the District Clause to “exercise exclusive Legislation in all Cases whatsoever” and the implied federal corollary to Section 5 of the Fourteenth Amendment. If the District Clause is as all-encompassing as opponents of District voting rights say it is, and if the Supreme Court’s recent decision in \textit{City of Boerne v. Flores}\textsuperscript{270} is to be credited, then Congress must have the power to redress centuries of political discrimination and exclusion by granting full voting rights to the District’s residents right now.

To be sure, this solution requires a structural and functional reading of Article I, which refers to representatives of the “states.” But there is ample precedent from other contexts for Congress to use its powers under the District Clause to treat the District as though it were a state for both statutory and constitutional purposes. Hundreds of statutes provide that “[f]or the purposes of this legislation, the term ‘State’ shall include the District of Columbia.”\textsuperscript{271} If Congress does not have the constitutional

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\textsuperscript{269} District residents could be enfranchised in Congress by way of a Constitutional amendment embodying the same provisions. But such an amendment was actually proposed by Congress and failed to win ratification in the states, when only 16 of the requisite 38 states ratified it. \textit{See} Markman, \textit{supra} note 22, at 3 n.1 (1988). Moreover, Article V does not allow for court-ordered constitutional amendments and, of course, the states would be implicated by this mechanism as well.

\textsuperscript{270} 117 S. Ct. 2157, 2163 (1997) (restating the authority of Congress to act affirmatively to secure voting rights under its Equal Protection powers to remedy and prevent discrimination and voting rights violations).

power from the District Clause to treat the District as though it were a state, then these laws must be unconstitutional.

Moreover, as Peter Raven-Hansen has argued, the Court has been willing to see—and to allow Congress to treat—the District as though it were a state for numerous constitutional purposes as well.²⁷² Raven-Hansen identified three cases where the Court had specifically upheld legislation treating the District like "states" within the meaning of the Constitution. In Loughborough v. Blake,²⁷³ Chief Justice Marshall found that Congress could impose a direct tax on residents of the District despite the fact that Article I, Section 2 specifically provides that direct taxes need to be apportioned "among the several states which may be included within this union."²⁷⁴ He reasoned that this phraseology established a "standard" for apportionment in the laying of direct taxes that could be applied to the District. But if Loughborough "does not treat the District as a state, for what purposes is the 'standard' applicable?"²⁷⁵

Second, in its somewhat convoluted holding in National Mutual Insurance Co. v. Tidewater Transfer Co.,²⁷⁶ the Court affirmed the constitutionality of a federal statute that gave federal courts diversity jurisdiction over lawsuits between District and state residents despite the fact that Article III, Section 2, creates diversity jurisdiction in federal court only between citizens of different states.²⁷⁷

Third, the Court in District of Columbia v. Carter²⁷⁸ more generally "recognized nominal statehood as a commonplace of constitutional construction."²⁷⁹ Justice Brennan wrote for the Court: "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 special provision involved."²⁸⁰

Because there are few constitutional purposes more important in a democracy than equal citizenship and participation, both the District Clause and the Equal Protection Clause should be read to empower Congress to enfranchise the District. As Raven-Hansen argued, enactment of

²⁷² See Raven-Hansen, Congressional Representation, supra note 175, at 179–84. Raven-Hansen here introduces and elaborates the "theory of nominal statehood" which he argues can and should be used to make political representation available to District residents.
²⁷⁴ Id. at 319.
²⁷⁵ Raven-Hansen, Congressional Representation, supra note 175, at 179–81.
²⁷⁶ 337 U.S. 582 (1949).
²⁷⁷ See Raven-Hansen, Congressional Representation, supra note 175, at 183. This holding, however, can be only one element of an argument for the treatment of the District as a state. As Raven-Hansen noted, "Tidewater effectively recognized the District's nominal statehood only for purposes of construing the federal judicial power, and not for the purposes of representation." Id.
²⁷⁹ Raven-Hansen, Congressional Representation, supra note 175, at 184.
²⁸⁰ Carter, 409 U.S. at 420.
such a statute "would correct the historical accident by which D.C. residents lost the shelter of state representation without gaining separate participation in the national legislature."\textsuperscript{281}

This proposition raises issues of further constitutional complexity that have been addressed by Raven-Hansen and Lawrence M. Frankel in extraordinary and exhaustive detail.\textsuperscript{282} Both have concluded that the theory of "nominal statehood" would justify direct congressional disfranchisement of the District population.\textsuperscript{283}

2. \textit{Treating District Residents Like Citizens Living Abroad}

Congress could also use its powers under Section 5 of the Fourteenth Amendment and the District Clause to pass a statute giving residents the right to vote and run for office in their states of former domicile or, if they are native Washingtonians, in Maryland or, perhaps, the state of their choice. This statutory solution is parallel to the approach Congress crafted in the Uniformed and Overseas Citizens Absentee Voting Act.\textsuperscript{284} It is also roughly similar to the District's original voting regime. This system could be implemented immediately by way of a simple statute but is far less preferable from a democratic perspective because it breaks up the political coherence of the community of citizens living in the District. It is even possible that such an electoral diaspora would run afoul of \textit{Shaw v. Reno} and the other cases disfavoring bizarre and disjointed political geography. Nothing would be stranger in our political and constitutional experience than having citizens from one geographic community vote in fifty different states, so this solution is both theoretically and constitutionally disfavored.

3. \textit{A Structural Revision: Statehood}

Congress could change course and decide to pass a statehood bill that reduces the size of the federal district, cedes the residential lands to the state of New Columbia, approves New Columbia's petition for admission, and then admits the fifty-first state to the Union. Of course, this disposition could not be ordered and is in no sense a constitutional requirement: under Article IV, Section 3, Congress has essentially unreviewable powers to admit new states. But it is one way that Congress

\textsuperscript{281} Raven-Hansen, \textit{Congressional Representation}, supra note 175, at 185.


could live up to the command of equal protection for citizens now caught in the undemocratic arrangements in the District.\textsuperscript{285}

4. Another Structural Revision: Reunion with Maryland

Just as Congress returned Alexandria and Arlington to Virginia in 1846, it could return most of the present District to Maryland, thus giving Washingtonians their political rights presently being denied. Maryland would have to consent to this retrocession of its former lands since Article IV, Section 3 provides that "no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be 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."\textsuperscript{286} It does not presently appear that the political will exists in Maryland or in Congress to make this happen, but it remains a theoretical possibility.

Surely it was more difficult for Congress to attempt to build a system of integrated public schools in the District after two centuries of exclusion and segregation than it would be for Congress simply to find a way to give District residents the right to vote. It would not require constant supervision and intervention by the federal district court for Congress to accomplish this goal. In sum, the District's citizenry has standing to pursue its rights because it can show a concrete and severe injury caused by Congress that is redressable by the courts.

V. Conclusion

It is an unremarked but powerful fact of American history that the District of Columbia has been a crucial pivot point in the development of the processes and values of constitutional democracy. Perhaps the most famous Supreme Court case in history, Marbury v. Madison, which proclaimed the doctrine of judicial review, was a District case dealing with a dispute over the presidential appointment of a Georgetown businessman to the local bench as a justice of the peace.\textsuperscript{287} In 1862, the District became the first place where Congress abolished slavery, a full year before the Emancipation Proclamation; after the Civil War, Congress gave black men in the District the right to vote as a dress rehearsal for the Fifteenth Amendment.\textsuperscript{288} The right of equal protection against invasion by the federal government (as opposed to the states) and the right to travel were both established by court cases that originated in the District.\textsuperscript{289} Now the

\textsuperscript{285} See Raskin, supra note 87, at 423; Raven-Hansen, D.C. Statehood, supra note 15.

\textsuperscript{286} U.S. Const. art. IV, § 3.

\textsuperscript{287} 5 U.S. (1 Cranch) 137 (1803).

\textsuperscript{288} See Eric Foner, Reconstruction: America's Unfinished Revolution 1863–1877, at 6, 272 (1988).

\textsuperscript{289} See Shapiro v. Thompson, 394 U.S. 618 (1969); Bolling v. Sharpe, 347 U.S. 497
time has come for another case; this one to test whether equal protection for District citizens extends to the right to vote and to be represented in Congress.

A resilient truth about equal protection jurisprudence is that historical practice is no guarantee of present-day constitutionality, for "[n]otions of what constitutes equal treatment for the purposes of the Equal Protection Clause do change." Radical reversals of obsolescent arrangements are to be expected because "the Equal Protection Clause is not shackled to the political theory of a particular era." The equal protection principle will destabilize every settled form of political inequality and force the managers of exclusionary regimes to justify themselves.

Congress has a great deal of explaining to do when it comes to the District population, which it has treated for centuries like an unwanted step-child or, shifting metaphors, like the unseen inhabitants of a piece of real estate picked up accidentally in a foreign war.

The Supreme Court has generally done better by the District. Although it has systematically rejected attempts to escape taxation by frustrated non-voters in the District, it has also made clear that the Bill of Rights is still operative for District residents. Despite its "exclusive legislation" powers, Congress under current doctrine cannot establish an official church in the District, shut down the newspapers, deprive residents of a right to jury trial, force defendants to testify against themselves, or take the property of residents without just compensation.

Separately, the Court has also found that the "right to vote" is a fundamental right of the highest importance which it has repeatedly enforced over structural objections like separation of powers, federalism and the political question doctrine.

The Court must connect the general idea that American citizens in the District are members of the constitutional polity protected by the Bill of Rights with the specific idea that American citizens have to be represented in their federal, state and local governments and must have the right to vote for representatives.

It is true that even overwhelming authority in the voting rights field could not overcome a textual ban in the Constitution on voting by residents of the District. Yet no such ban exists. Nothing in the language of the District Clause disenfranchises Washingtonians, and there is no evidence that its original intent or meaning was to effect disenfranchisement. In the final analysis, the Court will again have to address the question of whether the Constitution is simply a contract among the states or a national popular covenant according to which the people have committed themselves to the ideals of equality and liberty proclaimed in the

(1954).

201 Id.
Declaration of Independence and now embodied in the Fifth, Thirteenth, Fourteenth and Fifteenth Amendments.

This question was settled as long ago as McCullough v. Maryland, in which Chief Justice John Marshall declared that "[t]he Government of the Union . . . is emphatically and truly, a government of the people. In form and substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."292 The Constitution begins by making the source of political power clear: "We the people . . . ."

The idea that Congress may constitutionally disenfranchise the District reflects the most conservative and statist constitutionalism. It is conservative because it works to conserve traditional political, social and racial arrangements. It is statist because it promotes a vision of the Constitution that privileges governmental power over political freedom. It is also statist, in an equally resonant sense, because it imagines the Constitution to be a social compact among the states rather than a social contract or covenant among the people.

The right of Washingtonians to be represented in Congress follows inexorably from the logic of all of our constitutional understandings. It is now time for the Courts and for Congress to take this appreciation from the level of insight to the level of action.

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