

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

LOIS E. ADAMS, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civ. No. 98–1665 (LFO, MBG, CKK)
	)	
WILLIAM JEFFERSON CLINTON,	)	
<i>et al.</i> ,	)	
	)	
Defendants.	)	
_____	)	
	)	
CLIFFORD ALEXANDER, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civ. No. 98–2187 (LFO, MBG, CKK)
	)	
WILLIAM M. DALEY, <i>et al.</i> ,	)	
	)	
Defendants.	)	
_____	)	

**MEMORANDUM OPINION**

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

*Per Curiam* opinion for the Court filed by *Judges* GARLAND and KOLLAR-KOTELLY, in which *Judge* OBERDORFER joins as to Parts I, II, and III.

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

PER CURIAM: In these consolidated lawsuits, seventy-five residents of the District of Columbia, along with the District of Columbia itself, challenge as unconstitutional the denial of their right to elect representatives to the Congress of the United States. Plaintiffs argue that their exclusion from

representation is unjust. They note that the citizens of the District pay federal taxes and defend the United States in times of war, yet are denied any vote in the Congress that levies those taxes and declares those wars. This, they continue, contravenes a central tenet of our nation's ideals: that governments "deriv[e] their just powers from the consent of the governed." THE DECLARATION OF INDEPENDENCE para. 2.

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

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

## I

On June 30, 1998, D.C. resident Lois Adams and nineteen co-plaintiffs filed suit in *Adams v. Clinton*. Their complaint alleges that the failure to apportion congressional representatives to the District, and to permit District residents to vote in House and Senate elections, violates their constitutional rights to equal protection of the laws and to a republican form of government. They further contend that those same rights are violated by Congress's exercise of exclusive jurisdiction over the District, and by its denial to plaintiffs of "a state government, insulated from Congressional interference in matters of local concern." *Adams* Compl. ¶ 109. In connection with the latter claim, they seek an injunction directing the District of Columbia Financial Responsibility and Management

Assistance Authority, commonly known as the “Control Board,”<sup>1</sup> to “take no further action” and to “disband itself.” *Id.* at 28. The *Adams* complaint names as defendants President William Jefferson Clinton, the Clerk and the Sergeant at Arms of the House of Representatives, and the Control Board.

On September 14, 1998, District of Columbia resident Clifford Alexander, fifty-six other residents of the District, and the District itself filed suit in *Alexander v. Daley*.

Like their counterparts in *Adams*, the *Alexander* plaintiffs allege that their inability to vote for representatives and senators violates their rights to equal protection and to a republican form of government. The *Alexander* plaintiffs also allege that the denial of congressional representation violates their right to due process and abridges their privileges and immunities as citizens of the United States. Finally, they contend that the denial of their right to vote violates Article I and the Seventeenth Amendment of the Constitution, which provide that the members of the House shall be chosen by “the People of the several States” and that senators shall come “from each State, elected by the people thereof.” U.S. CONST. art. I, § 2, cl. 1; *id.* amend. XVII, cl. 1. The *Alexander* complaint names as defendants Secretary of Commerce William M. Daley; the Clerk, the Sergeant at Arms, and the Chief Administrative Officer of the House of Representatives; the Secretary and the Doorkeeper/Sergeant at Arms of the Senate; and the United States.

On November 3, 1998, a single-judge district court consolidated the two lawsuits. *See Adams v. Clinton*, Civ. No. 98–1665 (D.D.C. Nov. 3, 1998) (Oberdorfer, J.). On November 6,

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

that court granted motions by both sets of plaintiffs to appoint a three-judge district court pursuant to 28 U.S.C. § 2284(a), which provides that “[a] district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts.” *See Adams v. Clinton*, 26 F. Supp.2d 156, 160 (D.D.C. 1998) (Oberdorfer, J.). This court subsequently convened, disposed of certain preliminary motions, *see Adams v. Clinton*, 40 F. Supp.2d 1, 5 (D.D.C. 1999), and heard oral argument.

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

## II

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

Not only do the aforementioned claims fall outside the scope of section 2284(a), but they are also not the type of claims over which three-judge courts commonly assert supplemental jurisdiction. *See generally Allee v. Medrano*, 416 U.S. 802, 812 (1974) (indicating that three-judge courts may assert ancillary jurisdiction over certain non-three-judge claims); *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 504 n.5 (1972) (same). For example, it is not necessary to resolve the Senate and Control Board claims in order to provide a "final and authoritative decision of the

controversy” among the parties involved in the apportionment claims. *Public Serv. Comm’n*, 312 U.S. at 625 n.5; *see also Allee*, 416 U.S. at 812 n.8. Nor is this a case in which resolution of the non-three-judge claims would allow us to dispose of the claims that provide the basis for our jurisdiction. *See Allee*, 416 U.S. at 812 n.8; *United States v. Georgia Pub. Serv. Comm’n*, 371 U.S. 285, 287-88 (1963) (“Once [a three-judge court has been] convened the case can be disposed of below or here on any ground, whether or not it would have justified the calling of a three-judge court.”); *see also Rosado v. Wyman*, 397 U.S. 397, 402 (1970) (stating that three-judge court must decide non-constitutional claims “in preference to deciding the original constitutional claim” for which court convened).

Because the claims that do not directly challenge the apportionment of representatives do not implicate the concerns that have traditionally caused three-judge courts to exercise supplemental jurisdiction, it may be improper for us to exercise such jurisdiction over them. *Cf. Perez v. Ledesma*, 401 U.S. 82, 86-87 (1971) (holding that three-judge court convened to hear challenges to certain state laws did not have jurisdiction over related attack on similar local ordinance). Even if our jurisdiction over those claims were proper, however, we would retain the discretion not to exercise it. *See Turner Broad. Sys., Inc. v. FCC*, 810 F. Supp. 1308, 1314 (D.D.C. 1992) (three-judge court). As we noted at an earlier stage in these proceedings, the Supreme Court has indicated that “even when [a] three-judge court has jurisdiction over [an] ancillary claim, ‘the most appropriate course’ may be to remand it to [a] single district judge.” *Adams*, 40 F. Supp.2d at 5 (quoting *Hagans v. Lavine*, 415 U.S. 528, 544 (1974)); *see also Diven v. Amalgamated Transit Union Int’l & Local 689*, 38 F.3d 598, 601 (D.C. Cir. 1994).

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

### III

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

### A

The defendant House officials contend that this case presents a nonjusticiable political question because there is “a textually demonstrable constitutional commitment of the issue to a coordinate political department.” *Baker v. Carr*, 369 U.S. 186, 217 (1962). Specifically, they assert that because Article I of the Constitution limits voting to residents of the fifty states, only congressional legislation or constitutional amendment can remedy plaintiffs’ exclusion from the franchise.

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

## B

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

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

*Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (footnote, citations, and internal quotations omitted). For the purposes of standing analysis, we “assume the validity of a plaintiff’s

substantive claim.” *Catholic Soc. Serv. v. Shalala*, 12 F.3d 1123, 1126 (D.C. Cir. 1994); accord *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (“[S]tanding in no way depends on the merits of the plaintiff’s contention that particular conduct is illegal . . . .”); *Claybrook v. Slater*, 111 F.3d 904, 907 (D.C. Cir. 1997); *United States House of Representatives v. United States Dep’t of Commerce*, 11 F. Supp.2d 76, 83 (D.D.C. 1998) (three-judge court), *appeal dismissed*, 119 S. Ct. 765 (1999).

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

Defendants focus instead on the second and third prerequisites of standing: the requirements of causation and redressability. That analysis in turn, focuses on the statutory process for apportionment of congressional districts. The Secretary of Commerce is required, within nine months of completing

the decennial census, to report to the President the total population of each state for purposes of congressional apportionment. *See* 13 U.S.C. § 141(b).<sup>2</sup> Upon receiving the report, the President must transmit to Congress “a statement showing the whole number of persons in each State . . . and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives.” 2 U.S.C. § 2a(a). “Each State shall be entitled . . . to the number of Representatives shown” in the President’s statement, and within fifteen days of receiving that statement, the Clerk of the House must “send to the executive of each State a certificate of the number of Representatives to which such State is entitled . . . .” *Id.* § 2a(b); *see Franklin*, 505 U.S. at 792. The Secretary concedes that he has not included, and does not plan to include, a separate entry for the District of Columbia in his report to the President. Nor has he included, nor does he plan to include, the District’s population within that of any state.

With respect to causation, the Secretary of Commerce and the Clerk of the House contend that they bear no individual responsibility for the exclusion of the District from the apportionment process because they are merely carrying out the constitutional requirement (repeated *in haec verba* in the statute) that representatives be apportioned “among the several States,”<sup>3</sup> and because the District of Columbia is not a state. This argument once again assumes that plaintiffs will not prevail on the merits.

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<sup>2</sup> The statute provides:

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

13 U.S.C. § 141(b).

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

We, however, must assume here that plaintiffs will prevail, and hence that the District *is* a “state” for apportionment purposes and that the Constitution is not the cause of their electoral disability.

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

We are guided in our resolution of this issue by the Supreme Court’s resolution of a similar dispute in *Franklin v. Massachusetts*, which arose out of a three-judge court proceeding pursuant to the same jurisdictional statute at issue here. *See* 505 U.S. at 788. In that case, Massachusetts and two of its residents challenged the method used by the then-Secretary of Commerce for allocating overseas military personnel among the states for apportionment purposes -- a method that resulted in

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<sup>4</sup> *See Franklin*, 505 U.S. at 802 (plurality opinion of O’Connor, J.) (noting that “injunctive relief against executive officials like the Secretary of Commerce is within the courts’ power”).

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

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

Massachusetts losing a seat in the House. *See id.* at 790. The plaintiffs sued the President, the Secretary of Commerce, the Clerk of the House, and Census Bureau officials for violating the Administrative Procedure Act (APA) and the Constitution. As in this case, the defendants contended that the court could not grant injunctive relief against the President, and that absent such relief, a judgment against the remaining defendants would fail to redress the plaintiffs' injury. *See id.* at 802-03.

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

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

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

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

Deriving a governing principle from the opinions of a fragmented Court is always problematic.<sup>9</sup>

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

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

<sup>9</sup> In this case, for example, although the four Justices just cited found the President to have nothing more than a ministerial responsibility with respect to the Secretary’s report, a majority of the Court (including the four Justices who found standing) held that the Secretary’s decision did not constitute final agency action under the APA because “[the President] is not expressly required to adhere to the policy decisions reflected in the Secretary’s report. . . . [I]t is the President’s personal transmittal of the report to Congress that settles the apportionment . . . .” *Franklin*, 505 U.S. at 799. The same majority noted that Congress had intended to make the reapportionment process “virtually self-executing, so that the number of Representatives per State would be determined by the Secretary

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

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

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of Commerce and the President without any action by Congress.” *Id.* at 792.

<sup>10</sup> See House Opp’n to Pls.’ Mot. for Summ. J. at 5-6 (“Were District residents determined to have the right to elect congressional representatives, there is no doubt that the District would be included in the apportionment process.”).

<sup>11</sup> An alternative ground for finding redressability, again without resolving the question of the President’s amenability to suit, is contained in the D.C. Circuit’s opinion in *Swan v. Clinton*, 100 F.3d 973 (D.C. Cir. 1996). There, the court held that even if “the President has the power, if he so

The distinction the Executive Branch defendants draw between the two cases is not significant. They contend that unlike *Franklin*, which involved the Secretary’s policy decision regarding how the census should count military personnel living abroad, here the Secretary is merely carrying out what he perceives the Constitution to require. As defendants point out, the plurality opinion in *Franklin* observed that “[t]he Secretary certainly has an interest in defending her policy determinations concerning the census” and therefore “has an interest in litigating” the accuracy of reapportionment. *Franklin*, 505 U.S. at 803 (plurality opinion of O’Connor, J.). Because in this case Secretary Daley is not defending one of his own policy decisions, defendants contend that we cannot find he has sufficient stake in the outcome of these suits.

Defendants’ argument amounts to a claim that the parties lack the “concrete adverseness” necessary to assure that there is an actual “case” or “controversy” within the meaning of Article III of the Constitution. *See Gollust v. Mendell*, 501 U.S. 115, 125-26 (1991) (quoting *Baker*, 369 U.S. at 204); *Diamond v. Charles*, 476 U.S. 54, 61-62 (1986). That claim is not persuasive. Nothing in *Franklin* suggested that its standing analysis turned on the fact that the Secretary’s decision was based on her view of policy rather than law. Although Secretary Daley’s decision to exclude District residents is based on his interpretation of what the Constitution (and the statute that follows it verbatim)

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chose, to undercut . . . relief” in the form of an injunction against a subordinate official, the “partial relief [plaintiff] can obtain against subordinate executive officials is sufficient for redressability.” *Id.* at 980-81. This, the court said, “simply recogniz[es] that such partial relief is sufficient for standing purposes when determining whether we can order more complete relief would require us to delve into complicated and exceptionally difficult questions regarding the constitutional relationship between the judiciary and the executive branch.” *Id.* at 981.

requires, his interest in and responsibility for defending that interpretation is at least as substantial as his interest in defending his policy judgments. *See* U.S. CONST. art. VI, cl. 3 (“[A]ll executive and judicial Officers, both of the United States and the several States, shall be bound by Oath or Affirmation, to support this Constitution . . .”). And as we have already concluded that plaintiffs have suffered constitutional “injury in fact” from the denial of their right to vote, the fact that the injury arises out of a dispute of law rather than policy does not deprive them of standing to sue.

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

Finally, we must address the question of whether the failure of both complaints to include Maryland election officials as defendants poses an insuperable obstacle to redressability, given that one proposed remedy is to permit plaintiffs to vote for representatives as if they were citizens of Maryland. Although there is no guarantee that Maryland officials would permit District residents to vote there even

if we directed the Secretary to count them as Maryland citizens for purposes of apportionment, the fact that officials who are not parties to these cases are in a position to thwart one of many potential remedies does not defeat our jurisdiction. *See id.* at 980-81. Moreover, plaintiffs point out that if we were to find them to be Maryland citizens for purposes of congressional voting, a remedy could be crafted that would not necessarily rely on Maryland’s electoral machinery. *See Alexander Pls.’ Consolidated Mem. in Opp’n to Defs.’ Mots. to Dismiss* at 35 n.18 [hereinafter *Alexander Pls.’ Opp’n*] (suggesting that votes of District residents be counted separately and added to Maryland totals); *Tr. of Mot. Hr’g* at 114-15.

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

#### IV

We now turn to the merits of plaintiffs’ claims. In this Part, we consider the *Alexander* plaintiffs’ contention that their right to vote in congressional elections is guaranteed by Article I of the Constitution, as well as defendants’ opposing argument that the same Article precludes such a right. In Part V, we consider additional arguments, raised by both groups of plaintiffs, premised on other

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

provisions of the Constitution.

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

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

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

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<sup>13</sup> *See Igartua de la Rosa v. United States*, 32 F.3d 8 (1st Cir. 1994) (holding that United States citizens in Puerto Rico are not entitled to vote in presidential elections); *Attorney Gen. of Guam v. United States*, 738 F.2d 1017 (9th Cir. 1984) (holding that United States citizens in Guam are not entitled to vote in presidential and vice-presidential elections); Jon M. Van Dyke, *The Evolving Legal Relationships Between the United States and Its U.S.-Flag Islands*, U.

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

## A

The *Alexander* plaintiffs’ first theory is that “the District itself may be treated as the ‘state’ through which its citizens may vote” under Article I. Mem. in Supp. of Mot. of Pls. *Alexander et al.* for Summ. J. at 48 [hereinafter *Alexander Pls.’ Summ. J. Mem.*]. As plaintiffs correctly note, the Supreme Court has on occasion interpreted the constitutional term “state” to include the District. *See Loughran v. Loughran*, 292 U.S. 216, 228 (1934) (holding that Full Faith and Credit clause binds “courts of the District . . . equally with courts of the States”); *cf. Callan v. Wilson*, 127 U.S. 540, 550 (1888) (holding that right to trial by jury extends to residents of District).<sup>14</sup> As they concede,

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HAW. L. REV. 445, 512 (1992); *Alexander Pls.’ Opp’n* at 5-6.

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

however, the Court also has interpreted the term “state” to exclude the District. *See, e.g., Hepburn & Dundas v. Ellzey*, 6 U.S. (2 Cranch) 445, 452 (1805) (holding that diversity jurisdiction provision of Article III, section 2 does not cover cases in which one party is resident of District, because “the members of the American confederacy only are the states contemplated in the constitution”).

The measure of “[w]hether the District of Columbia constitutes a ‘State or Territory’ within the meaning of any particular . . . constitutional provision depends upon the character and aim of the specific provision involved.”<sup>15</sup> *District of Columbia v. Carter*, 409 U.S. 418, 420 (1973).<sup>16</sup> The cases plaintiffs cite do not involve Article I, nor do they involve constitutional rights that textually appear to require citizenship (or residence) in a state.<sup>17</sup> Defendants argue that, by contrast, when dictating the composition of Congress, the Constitution leaves no doubt that only the residents of actual states are entitled to representation. An examination of the Constitution’s language and history, and of the

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

<sup>16</sup> In *Carter*, the Court held that the District of Columbia is not a “State or Territory” within the meaning of 42 U.S.C. § 1983, but rather “is truly *sui generis* in our governmental structure.” *Carter*, 409 U.S. at 432; *accord Palmore v. United States*, 411 U.S. 389, 395 (1973) (“The District of Columbia is constitutionally distinct from the States . . . .”) (citing *Hepburn & Dundas*, 6 U.S. (2 Cranch) at 445).

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

relevant judicial precedents, persuades us that defendants are correct and that the District-as-state theory is untenable.

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

As previously noted, besides stating that the House shall be composed of members chosen by the people of the several states, clause 1 of Article I, section 2 requires that voters ("Electors") in House elections "have the Qualifications requisite for the Electors of the most numerous branch of *the State Legislature.*" U.S. CONST. art. I, § 2, cl. 1 (emphasis added).<sup>18</sup> If the District were regarded as a state for purposes of this provision, what could the reference to "State Legislature[s]" mean? The thirteen original states all had such legislatures, as do each of the present fifty. But for most of its history, the District of Columbia has had nothing that could even roughly be characterized as a legislature for the entire District.<sup>19</sup> Although plaintiffs point to the existence of the current elected city

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

<sup>19</sup> For the first 70 years, there were separate local governmental structures for Washington, Georgetown, and -- until the retrocession of the Virginia portion of the District in 1846 -- Alexandria. *See, e.g.,* An Act to Incorporate the Inhabitants of the City of Washington, in the District of Columbia, 2 Stat. 195, ch. 53, § 2 (1802). *See generally* WILLIAM TINDALL, ORIGIN AND GOVERNMENT OF THE DISTRICT OF COLUMBIA 14-29 (1909). In 1871, Congress established a territorial form of government for the District, *see* An Act To Provide a Government for the District of Columbia, 16 Stat. 419, ch. 62 (1871), which was replaced by a commission system in 1874, *see* An Act for the Government of the District of Columbia, and for Other Purposes, 18 Stat. 116, ch. 337 (1874). As modified in 1878, the District's governing body was a three-person commission appointed by the

council, *see Alexander Pls.’ Opp’n* at 24, Congress did not pass the “home rule” statute creating that entity until 1973, and the Court of Appeals for this Circuit has indicated that such a body is not constitutionally required.<sup>20</sup> A right to vote that depends upon the existence of such an occasional institution can hardly have been what the Framers contemplated.

Moreover, and more important, it is clear that the ultimate legislature the Constitution envisions for the District is not a city council, but rather Congress itself. The District Clause expressly grants Congress the power to “exercise exclusive Legislation in all Cases whatsoever” over the district that would become the seat of government. U.S. CONST. art. I, § 8, cl. 17. Plaintiffs themselves argue that in the “absence” of a city council, Congress should be considered the state legislature for purposes of Article I. *See Alexander Pls.’ Opp’n* at 24. But Congress cannot be characterized as a “state legislature” without doing violence to the meaning of that term. Indeed, to characterize it as such would turn the Qualifications Clause into a circle without beginning or end. Under section 2, clause 1, House

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

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

voters must have the qualifications requisite for voters of the most numerous branch of the state legislature. If that legislature were Congress itself, with the House as its most numerous branch, then the clause would say no more than that voters for the House must have the qualifications requisite for voters for the House -- a tautology without constitutional content.

Including the District within the definition of “state” is also inconsistent with the provisions of clause 3 of Article I, section 2, the clause that directly addresses the issue of congressional apportionment. That clause provides that “Representatives . . . shall be apportioned among *the several States which may be included within this Union*, according to their respective numbers.” U.S. CONST. art. I, § 2, cl. 3 (emphasis added).<sup>21</sup>

That provision plainly contemplates true states and not the District, which neither was one of the original states nor has been “admitted by the Congress into this Union.” *Id.* art. IV, § 3, cl. 1. Indeed, the “Seat of Government” contemplated by the Constitution is subsequently described in Article I as a “District,” in contrast to the “particular States” whose cessions of territory were expected to create it.<sup>22</sup> And, as if to remove any doubt, clause 3 goes on to identify specifically those thirteen entities it regards as the immediate post-ratification states, and to assign each an initial apportionment of representatives until an “actual Enumeration” of “each State[’s]” “respective Numbers” can be accomplished. *Id.* art.

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

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

I, § 2, cl. 3.<sup>23</sup> The District is not included within that initial apportionment.<sup>24</sup>

The effort to define the District as a state generates still further incongruities with respect to the next clause of Article I, section 2. Clause 4 provides: “When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.” *Id.* art. I, § 2, cl. 4. But who or what is “the Executive Authority” of the District? Plaintiffs offer the current home-rule mayor as that authority, *see Alexander Pls.’ Opp’n* at 24, but we again are confronted by the relative recency of that position. *See supra* note 19. And we also again have the problem that it is Congress that is the ultimate executive authority for the District. *See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 76 (1982) (“Congress’ power

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<sup>23</sup> The clause reads:

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

U.S. CONST. art. I, § 2, cl. 3.

<sup>24</sup> Plaintiffs suggest that the District may not have been included because the site of the seat of government had not yet been chosen when the Constitution was drafted, and because no one knew what its population would be. While it is true that the District did not exist at the time the Constitution was drafted, provision had been made for its creation, *see* U.S. CONST. art. I, § 8, cl. 17, and it was possible that it would be established prior to the first enumeration (i.e., the first census). It is also true that the original population of the District was small. *Compare* TINDALL, *supra* note 19, at 15 (estimating 1800 population at 14,093), *with* 2 BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES 26 (bicentennial ed. 1975) (listing 1800 census count at 8,000). The Framers, however, assumed that the population would grow substantially. L’Enfant’s original plan provided for a city of 800,000, which at the time was the size of Paris. *See Home Rule: Hearings Before Subcomm. No. 6 of the Comm. on the District of Columbia*, 88th Cong. 347 (1964) (statement of Robert F. Kennedy, Attorney General).

over the District of Columbia encompasses the full authority of government, and thus, necessarily, the Executive and Judicial powers as well as the Legislative.”). The possibility that the Framers intended Congress to fill its own vacancies seems far too much of a stretch, even if the constitutional fabric were more flexible than it appears to be.

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

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

It is, of course, not surprising to conclude that the Framers did not contemplate allocating two senators to the District of Columbia. The Senate was expressly viewed as representing the states

themselves, *see* THE FEDERALIST NOS. 10, 39, 58, 62 (James Madison) (Jacob E. Cooke ed., 1961), and the guarantee of two senators for each was an important element of the Great Compromise between the smaller and larger states that ensured ratification of the Constitution: the smaller states were guaranteed equal representation notwithstanding their smaller populations. *See Reynolds v. Sims*, 377 U.S. 533, 574 (1964); *Wesberry*, 376 U.S. at 12-13; *see also INS v. Chadha*, 462 U.S. 919, 950 (1983). But reaching this conclusion with respect to the Senate requires reaching a similar conclusion with respect to the House. The House provisions, after all, were “the other side of the compromise”: to satisfy the larger states, the House was to be popularly elected, and “in allocating Congressmen the number assigned to *each State* should be determined solely by the number of the State’s inhabitants.” *Wesberry*, 376 U.S. at 13 (emphasis added). Treating the Senate and House differently with respect to the District would unhitch half that compromise from its historical and constitutional moorings.

In 1913, the Seventeenth Amendment granted the people of “each State,” rather than their legislatures, the right to choose senators. U.S. CONST. amend. XVII, cl. 1. After that change, the provisions concerning qualifications and vacancies for the Senate essentially parallel those for the House. *See id.* (providing that “electors . . . shall have the qualifications requisite for electors of the most numerous branch of the State legislatures”); *id.* cl. 2 (“When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments . . .”). *But see id.* cl. 1 (providing that senators shall be elected by people of “each State,” rather than “of the several states” as in provision for representatives

in Article I, section 2, clause 1). Accordingly, no separate discussion of those provisions is necessary.

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

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

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<sup>25</sup> There is general agreement that the District Clause was adopted in response to an incident in Philadelphia in 1783, in which a crowd of disbanded Revolutionary War soldiers, angry at not having been paid, gathered to protest in front of the building in which the Continental Congress was meeting under the Articles of Confederation. *See, e.g.*, KENNETH R. BOWLING, *THE CREATION OF WASHINGTON, D.C.* 30-34 (1991); *THE FEDERALIST* NO. 43, *supra*, at 289; JOSEPH STORY, 3 *COMMENTARIES ON THE CONSTITUTION* §§ 1213 (1833). Despite requests from the Congress, the Pennsylvania state government declined to call out its militia to respond to the threat, and the Congress had to adjourn abruptly to New Jersey. The episode, viewed as an affront to the weak national government, led to the widespread belief that exclusive federal control over the national capital was necessary. "Without it," Madison wrote, "not only the public authority might be insulted and its

Such evidence as does exist, however, indicates a contemporary understanding that residents of the District would not have a vote in the national Congress. At the New York ratifying convention,<sup>26</sup> for example, Thomas Tredwell argued that “[t]he plan of the *federal city*, sir, departs from every principle of freedom . . . subjecting the inhabitants of that district to the exclusive legislation of Congress, in whose appointment they have no share or vote.” 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 402 (Jonathan Elliot ed., 2d ed. 1888), *reprinted in* 3 THE FOUNDERS’ CONSTITUTION 225 (Philip B. Kurland & Ralph Lerner eds.,

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proceedings be interrupted, with impunity; but a dependence of the members of the general Government, on the State comprehending the seat of the Government for protection in the exercise of their duty, might bring on the national councils an imputation of awe or influence, equally dishonorable to the Government, and dissatisfactory to the other members of the confederacy.” THE FEDERALIST NO. 43, *supra*, at 289; *see also* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 220 (Jonathan Elliot ed., 2d ed. 1888), *reprinted in* 3 THE FOUNDERS’ CONSTITUTION 225 (Philip B. Kurland & Ralph Lerner eds., 1987) (“Do we not all remember that, in the year 1783, a band of soldiers went and insulted Congress? . . . . It is to be hoped that such a disgraceful scene will never happen again; but that, for the future, the national government will be able to protect itself.”) (North Carolina ratifying convention, remarks of Mr. Iredell).

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

<sup>26</sup> *Cf. U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 791-92 (1995) (noting that Court has used ratification debates to confirm Framers’ understanding of Article I) (citing *Powell v. McCormack*, 395 U.S. 486 (1969)).

1987).<sup>27</sup> On the same day at that convention, Alexander Hamilton proposed that the Constitution be amended to provide: “When the Number of Persons in the District or Territory to be laid out for the Seat of the Government of the United States . . . amount to \_\_\_ [an unspecified number] . . . Provision shall be made by Congress for having a District representation in that Body.” 5 THE PAPERS OF ALEXANDER HAMILTON 189-90 (Harold C. Syrett & Jacob E. Cooke eds., 1962). The proposed amendment failed. *See id.*

Considerably more evidence of the contemporary understanding emerges from examination of the period immediately surrounding Congress’ assumption of exclusive jurisdiction over the land ceded for the District by Maryland and Virginia.<sup>28</sup> During that period, some residents of the District sought to dissuade Congress from passing the Organic Act of 1801, 2 Stat. 103 (1801), through which jurisdiction was to be assumed. They believed that, under the Constitution, once Congress assumed jurisdiction they would necessarily lose their vote and be “reduced to the mortifying situation, of being subject to laws made, or to be made, by we know not whom; by agents, not of our choice, in no

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

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

<sup>28</sup> *Cf. U.S. Term Limits, Inc.*, 514 U.S. at 816 (examining 1807 congressional debates as “further evidence of the general consensus” regarding meaning of Article I, section 2, clause 2).

degree responsible to us.” ENQUIRIES INTO THE NECESSITY OR EXPEDIENCY OF ASSUMING EXCLUSIVE LEGISLATION OVER THE DISTRICT OF COLUMBIA 15 (1800) [hereinafter ENQUIRIES INTO THE NECESSITY] (available in Rare Book/Special Collections Reading Room, Library of Congress).<sup>29</sup> Members of Congress opposed to the Organic Act made the same argument. *See, e.g.*, 10 ANNALS OF CONG. 992 (1801) (remarks of Rep. Smilie) (arguing that upon assumption of congressional jurisdiction, “the people of the District would be reduced to the state of subjects, and deprived of their political rights”). Even those who supported the Act appeared to agree that, under the Constitution, once Congress assumed jurisdiction the residents would automatically lose their right to vote. *See, e.g., id.* at 996 (remarks of Rep. Bird) (noting that although “the people [of the District] could not be represented in the General Government,” the “blame” was not “to the men who made the act of cession; not to those who accepted it,” but “to the men who framed the Constitutional provision,

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

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

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

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

*Id.* at 18-19.

who peculiarly set apart this as a District under the national safeguard and Government”).<sup>30</sup>

Others saw a constitutional amendment -- rather than blocking Congress' assumption of jurisdiction -- as the best way to preserve the franchise for the District's residents. *See, e.g.*, 10 ANNALS OF CONG. 998-99 (1801) (remarks of Rep. Dennis) (“[I]f it should be necessary, the Constitution might be so altered as to give them a delegate to the General Legislature, when their numbers should become sufficient.”). In 1801, Augustus Woodward, a prominent lawyer who practiced in the District of Columbia, published a pamphlet decrying the area's lack of congressional representation, calling it a violation of “an original principle of republicanism, to deny that all who are governed by the laws ought to participate in the formation of them.” AUGUSTUS WOODWARD, CONSIDERATIONS ON THE TERRITORY OF COLUMBIA 5-6 (1801) (available in Rare Book/Special Collections Reading Room, Library of Congress).<sup>31</sup> Woodward called for representation of the District

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

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

in the Senate and the House, but recognized that “[i]t will require an amendment to the Constitution of the United States.” *Id.* at 6. Accordingly, he proposed one. *See id.* at 15.<sup>32</sup>

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

Although the foregoing represents positive evidence of a contemporary understanding that District residents would not (and did not) have the right to vote in Congress, perhaps more important is the absence of evidence to the contrary. No political leaders, for example, assured the residents that

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

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

they would have representation even without constitutional amendment or defeat of the Organic Act. Nor is there any indication that the residents of the new District were surprised when they found themselves without the vote after Congress assumed exclusive jurisdiction in 1801. Indeed, had it been understood that the former citizens of Maryland and Virginia had a right to continue voting for Congress, one would have expected a flood of newspaper articles and lawsuits decrying their unlawful disenfranchisement. Such a reaction, however, is not visible in the historical record.<sup>34</sup>

3. Finally, we note that every other court to have considered the question -- whether in dictum or in holding -- has concluded that residents of the District do not have the right to vote for members of Congress. The early Supreme Court decisions are particularly relevant here, not only because they are binding upon us, but because they reflect the historical understanding of Chief Justice

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

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

Marshall, who “wrote from close personal knowledge of the Founders and the foundation of our constitutional structure.” *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 587 (1949) [hereinafter *Tidewater*] (plurality opinion of Jackson, J.).

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

Marshall was not unaware of the unfairness his conclusion would engender. He felt constrained to reach it, however, notwithstanding that it was “extraordinary that the courts of the United States, which are open to aliens, and to the citizens of every state in the union,” should be closed to citizens of the United States who reside in the District. *Id.* at 453. Sixteen years later, Marshall reaffirmed

*Hepburn & Dundas's* conclusion in *Corporation of New Orleans v. Winter*, 14 U.S. (1 Wheat.) 91 (1816).

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

In 1820, Marshall reviewed a claim that, because District residents were unrepresented in Congress, the national legislature lacked the power to impose a direct tax upon the District. *See Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317 (1820). If there were a Justice who would have been particularly sensitive to this reprise of the Revolutionary War battle cry of "no taxation without representation," surely it would have been Marshall -- who served as a company commander at Valley Forge. *See* JEAN EDWARD SMITH, *JOHN MARSHALL: DEFINER OF A NATION* 62-65 (1996). Nonetheless, speaking for a unanimous Court, Marshall held that Congress had the power to tax

residents of the District of Columbia despite their lack of representation. *See Loughborough*, 18 U.S. (5 Wheat.) at 317. The District, he said, “relinquished the right of representation, and has adopted the whole body of Congress for its legitimate government.” *Id.* at 324. “Although in theory it might be more congenial to the spirit of our institutions to admit a representative from the district,” he declared, “certainly the Constitution does not consider their want of a representative in Congress as exempting it from equal taxation.” *Id.* at 324-25.

The opinions do not end with those of Chief Justice Marshall. In *Heald v. District of Columbia*, Justice Brandeis also faced a claim that a congressional tax on the District was unconstitutional “because it subjects the residents of the District to taxation without representation.” 259 U.S. 114, 124 (1922). Like Marshall, Brandeis recognized that “[r]esidents of the district lack the suffrage and have politically no voice in the expenditure of the money raised by taxation.” *Id.* Nonetheless, he concluded that “[t]here is no constitutional provision which so limits the power of Congress that taxes can be imposed only upon those who have political representation.” *Id.*; *see also Palmore v. United States*, 411 U.S. 389, 395 (1973) (citing, with approval, *Hepburn & Dundas*, 6 U.S. (2 Cranch) at 445).

The cry of “no taxation without representation” has reached the courts of this circuit as well. In *Breakefield v. District of Columbia*, the Court of Appeals considered a challenge to Congress’ imposition of an income tax upon District residents “notwithstanding that they then had and now have no elected representative in the Congress.” 442 F.2d 1227, 1228 (D.C. Cir. 1970). Petitioner acknowledged the existence of contrary precedent, namely the Supreme Court’s decisions in *Loughborough* and *Heald*, but “question[ed] both the original soundness” of those decisions “and

their continuing vitality in the light of later Supreme Court pronouncements.” *Id.* at 1229. “[Petitioner] presents those contentions in the wrong forum,” the court said. “[I]t is for the Supreme Court, not us, to proclaim error in its past rulings, or their erosion by its adjudications since.” *Id.* at 1229-30. We are of the same view.

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

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

This, however, is not a case where “[t]he ‘exclusio’ is . . . the result of inadvertence or accident.” *Ford v. United States*, 273 U.S. 593, 612 (1927) (internal quotation omitted). As we have discussed above, the overlapping and interconnected use of the term “state” in the relevant provisions of Article I, the historical evidence of contemporary understandings, and the opinions of our judicial forebears all reinforce how deeply Congressional representation is tied to the structure of

statehood.<sup>35</sup> The Constitution's repeated references to states cannot be understood, as the dissent urges, as merely the most practical method then available for holding elections. Rather, they are reflections of the Great Compromise forged to ensure the Constitution's ratification. There is simply no evidence that the Framers intended that not only citizens of states, but unspecified others as well, would share in the congressional franchise.

## B

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

Although in the end we find that we cannot draw the same conclusion plaintiffs do from the historical record, we must begin by noting that there is a much greater obstacle to plaintiffs' success on this theory: it has already been rejected in a decision binding upon this court. In *Albaugh v. Tawes*, a three-judge district court considered a suit seeking a declaratory judgment "that the District of Columbia is a part of the State of Maryland for purposes of United States Senator elections." 233 F. Supp. 576, 576 (D. Md. 1964). Plaintiff's arguments were "based upon the fact that . . . during the

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

period between 1790 and the ‘Organic Act of 1801,’ residents of the territory ceded by the State of Maryland may have been allowed to vote as residents” of that state. *Id.* at 578. The court rejected plaintiffs’ claims, noting the Supreme Court’s decision in *Reily v. Lamar* that former residents of Maryland lost their state citizenship upon “the separation of the District of Columbia from the State of Maryland.” *Id.* (quoting *Reily v. Lamar*, 6 U.S. (2 Cranch) 344, 356-57 (1805)). *Albaugh* concluded that “residents of the District of Columbia have no right to vote in Maryland elections generally, and specifically, in the selection of United States Senators.” *Id.* at 577.

The Supreme Court affirmed the decision of the three-judge court. *See Albaugh v. Tawes*, 379 U.S. 27 (1964) (per curiam). Although the Supreme Court’s affirmance was summary, the Court has reminded the lower courts that we are bound by such affirmances “until such time as the Court informs [us] that [we] are not.” *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975) (quoting *Doe v. Hodgson*, 478 F.2d 537, 539 (2d Cir. 1973)). The jurisdictional statement submitted to the Supreme Court in *Albaugh* raised the principal theories we consider in this Part, and also raised the “privileges or immunities” claim considered in Part V.<sup>36</sup> *Cf.* ROBERT L. STERN ET AL., SUPREME COURT

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<sup>36</sup> The jurisdictional statement attacked the lower court opinion for failing to accept the significance of the fact that, through the effective date of the 1801 Organic Act, Maryland continued to designate its District lands as part of the state’s federal congressional districts. *See* Jurisdictional Statement at 4-5, *Albaugh v. Tawes*, 379 U.S. 27 (1964) (No. 481) [hereinafter *Albaugh* Jurisdictional Statement]; *cf. infra* Part IV.B.2. It further argued that since “[t]he District of Columbia territory, like the rest of the State of Maryland, was a charter member of the United States,” its citizens “have always been citizens of the State of Maryland and under the perpetual protection of the . . . ‘equal privileges’ clause.” *Albaugh* Jurisdictional Statement at 7 (citing U.S. CONST. art. IV, § 2, cl. 1). This meant, plaintiff said, that the right of District citizens to vote could not constitutionally be denied. *See id.*; *cf. infra* Part IV.B.3; *infra* Part V.B. The jurisdictional statement also raised the claim, made by amicus here, that the Organic Act was not intended to “repeal[] the existing Maryland Congressional election regulations which defined the District of Columbia as a part of the State of

PRACTICE 219-20 (7th ed. 1993) (noting importance of evaluating issues raised in appeal papers); *see also Illinois State Bd. v. Socialist Workers Party*, 440 U.S. 173, 182-83 (1979); *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). Accordingly, the decision in *Albaugh* forecloses the conclusion that District residents may be allowed to vote in congressional elections through the State of Maryland. The Fourth Circuit has recently reached the same determination, in a case raising the same basic claim.<sup>37</sup>

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

1. The District Clause gave Congress the power to exercise exclusive legislation “over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of Government of the United States.” U.S. CONST. art. I, § 8, cl. 17. In 1788, the General Assembly of Maryland had authorized and required its

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Maryland,” since it provided “that the laws of the State of Maryland, as they now exist, shall be and continue in force.” *Albaugh* Jurisdictional Statement at 6 (quoting 2 Stat. 103, §1); *cf. infra* note 46.

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

representatives to cede any district in the state for the national capital; Virginia did the same.<sup>38</sup> After protracted debate over sites offered by several states, Congress agreed upon a tract along the Potomac River; Maryland agreed to cede land along the eastern bank while Virginia agreed to cede land along the western.<sup>39</sup> Congress accepted the cessions by the Act of July 16, 1790, and established the first Monday of December 1800 as the date for the removal of the government to the District.<sup>40</sup> In 1791, Maryland ratified the cession, stating that “all that part of the said territory called Columbia which lies within the limits of this State shall be . . . forever ceded and relinquished to the Congress and Government of the United States, and full and absolute right and exclusive jurisdiction, as well of soil as

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

<sup>39</sup> See generally BOWLING, *supra* note 25, at 127-207.

<sup>40</sup> See An Act for Establishing the Temporary and Permanent Seat of the Government of the United States, 1 Stat. 130 (1790). The Act stated:

SECTION 1. . . . That a district of territory, not exceeding ten miles square, to be located as hereafter directed on the river Potomac, at some place between the mouths of the Eastern Branch and Connogochegue, be, and the same is hereby accepted for the permanent seat of the government of the United States. *Provided nevertheless*, That the operation of the laws of the state within such district shall not be affected by this acceptance, until the time fixed for the removal of the government thereto, and until Congress shall otherwise by law provide.

. . . .

SEC. 6. . . . That on the said first Monday in December, in the year one thousand eight hundred, the seat of the government of the United States shall, by virtue of this act, be transferred to the district and place aforesaid.

*Id.*

of persons residing or to reside thereon.”<sup>41</sup>

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

There is evidence that during the period prior to the transfer of the seat of government to the District, the residents of the area continued to vote for Congress in Maryland and Virginia. *See* WILLIAM TINDALL, ORIGIN AND GOVERNMENT OF THE DISTRICT OF COLUMBIA 17 (1909); Raven-Hansen, *supra*, at 173-74. When the laws of those states ceased having force in the District, however, the states ceased treating District citizens as state citizens eligible to vote in their elections --

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

an event that occurred no later than February of 1801. *See Alexander* Am. Compl. ¶ 97; TINDALL, *supra*, at 17; Raven-Hansen, *supra*, at 174. Since that date, District residents have been unable to vote in either Maryland or Virginia.

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

We are unable to draw this conclusion from the history recounted above. Contrary to plaintiffs' suggestion, the fact that residents of the Virginia and Maryland lands voted in those states into 1800 did not reflect an understanding that they would continue to do so after the District became the seat of government. Rather, it reflected the fact that during this period those lands were not yet the seat of government (Philadelphia was), but instead remained part of the ceding states. As the Circuit Court for the District of Columbia held in 1801, "Virginia did not part with her jurisdiction until congress could exercise it, which, by the [District Clause of the] constitution, could not be until the district became the seat of government." *United States v. Hammond*, 26 F. Cas. 96, 96 (C.C.D.C. 1801). That, the

court held, occurred on “the first Monday of December, 1800” by virtue of the Act of 1790. *Id.*<sup>42</sup> In *Reily v. Lamar*, Chief Justice Marshall reached a similar conclusion with respect to Maryland, although for the purposes of that case he found it “not material to inquire, whether the inhabitants of the city of Washington ceased to be citizens of Maryland on the 27th day of February 1801,” when the Organic Act took effect, “or on the first Monday of December 1800.” 6 U.S. (2 Cranch) 344, 357 (1805); *see also Young v. Bank of Alexandria*, 8 U.S. (4 Cranch) 384, 396 (1808) (Marshall, C.J.) (“[U]nder the terms of the cession and acceptance of the district, . . . the power of legislation remained in Virginia until it was exercised by congress.”). The precise date is likewise immaterial for our purposes.<sup>43</sup>

In sum, during the interim period, the territory’s residents continued to vote not as “residual” citizens of Maryland, but as actual citizens of that state.<sup>44</sup> Only thereafter did they lose their state

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

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

<sup>44</sup> In *Hammond*, 26 F. Cas. at 99, the court held that “[b]y the constitution, congress could not exercise exclusive legislation over the district until it had become the seat of government.” Even if we were to assume to the contrary that Congress acquired the authority to exercise exclusive control over the District in 1790, that would not change the analysis. Whatever Congress’ *authority* may have been during the interim period, it left control of the area to Maryland and Virginia. Since 1801, however, Congress has continuously exercised exclusive authority over the District. It is thus unnecessary for us to consider whether District residents would be able to vote had Congress never

citizenship, and with it their right to vote. *See* Raven-Hansen, *supra*, at 174 (“District residents did not lose state citizenship until December, 1800”).<sup>45</sup> We thus conclude, in accord with the academic authority upon whom plaintiffs otherwise heavily rely, that this “decade of voting and representation provided no precedent for the representation of District citizens.” *Id.*<sup>46</sup>

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exercised its authority, or had it subsequently ceded partial authority back to the state. *See* discussion of *Evans v. Cornman*, 398 U.S. 419 (1970), *infra* Part IV.B.4.

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

<sup>46</sup> The Committee for the Capital City, appearing as *amicus curiae*, contends that District residents retain their right to vote in Maryland because Maryland’s laws were never effectively terminated in the District. *See* Br. of the Committee for the Capital City at 1-2. It notes that in accepting the ceded territory in 1790, Congress stated that “the laws of the state within such district shall not be affected . . . until Congress shall otherwise by law provide.” *Id.* at 11 (quoting 1 Stat. 130, § 1). Congress never did “otherwise provide,” the Committee argues, because the Organic Act of 1801 merely stated that “the laws of the state of Maryland, as they now exist, shall be and continue in force.” *Id.* at 10 (quoting 2 Stat. 195, § 1). Hence, it contends, “Congress has never enacted legislation that repealed or superseded those Maryland laws, and therefore they still apply -- by the express terms of the Act of 1801 establishing the District’s local governance -- to those persons living in that portion of the State of Maryland that was ceded to the federal government.” *Id.* at 11-12.

This is simply a misinterpretation of the 1801 statute. By continuing the authority of Maryland’s laws “as they now exist,” Congress did nothing more than fix them (as they stood as of that date) as a part of the common law *of the District*; without such a provision the new District would have had no laws upon which to build. It did not, however, provide any continuing governmental or regulatory authority to Maryland. *See generally Brooks v. Laws*, 208 F.2d 18, 25 (D.C. Cir. 1953); *Hammond*, 26 F. Cas. at 98; *see also Reily*, 6 U.S. (2 Cranch) at 356-57. Indeed, Maryland had renounced any such authority. *See* 1791 Md. Acts ch. 45, § 2. In any event, in 1901 Congress expressly repealed the applicability to the District of acts of the Maryland Assembly, retaining only the common law and the British statutes in force in Maryland on February 27, 1801 (where consistent with

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

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provisions of the D.C. Code). *See* Act of March 3, 1901, ch. 854, 31 Stat. 1189, 1434. *See generally Brooks*, 208 F.2d at 25; *Williams v. United States*, 569 A.2d 97, 99 (D.C. 1989).

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

<sup>48</sup> *See supra* Part IV.A.2; *see also* ENQUIRIES INTO THE NECESSITY, *supra*, at 15-16 (warning that effect of assumption of jurisdiction by Congress would be that “the Territory of Columbia

vote, altogether missing from the public record is any outpouring of complaints that the franchise was being unlawfully withheld. *See supra* note 34 and accompanying text.

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

We cannot accept the argument that current residents of the District retain residual rights because other people, living 200 years earlier in the same place, had such rights. In the United States, personal rights generally do not "run with the land." Even if it could be argued that the right to vote was a privilege that irrevocably vested from "the moment the United States Constitution was ratified" in "every citizen living in what were then the thirteen states of the union," including the portions of Maryland and Virginia that would later become the District, Br. of the Committee for the Capital City at 1, the argument would not extend to the present plaintiffs. By virtue of the passage of 200 years, all of

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[would] cease[] to be component parts of the states respectively, to which it formerly belonged," and that residents would thereby lose their "share in electing the members of congress").

the plaintiffs -- whether by birth or a combination of birth and their ancestors' migration -- arrived on the scene after the land already had become a district whose residents, by constitutional contemplation, lacked a vote in the national Congress. Whatever rights the original residents of the area may have had, none of them are alive to press them before this court.

Moreover, upon close examination, this argument is not independent of the constitutional intent argument rejected above. At bottom, plaintiffs do not argue that notwithstanding the intent of the Constitution, the right to vote could not have been taken from District residents. They do not make that argument because their ultimate appeal is to the Constitution itself: they cannot argue both that the denial of their right to vote is unconstitutional, and that it is irrelevant whether the Constitution recognizes such a right.

Instead, plaintiffs argue that the Constitution gave them the right to vote upon its ratification in 1789, and that it was the Organic Act of 1801 -- not the Constitution -- that purportedly took it away. As one group of amici put it, "It was . . . the exercise of federal jurisdiction over the District -- and not the text or intent of the Constitution itself -- that denied D.C. residents their right to popular representation in the federal legislature." Mem. Amici Curiae for Professors James D.A. Boyle et al. at 16.

This, however, merely returns us to ground previously plowed. We have already concluded that it *is* the Constitution itself that is the source of plaintiffs' voting disability. Under Article I, voters for the House of Representatives must "have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. CONST. art. I, § 2, cl. 1. Because those who live in the District lack state residency, they cannot qualify to vote in Maryland's (or any other state's)

elections, and hence cannot vote for its representatives in the House. *See* MD. CONST. art. I, § 1.<sup>49</sup>

Thus, it was not the Organic Act or any other cession-related legislation that excluded District residents from the franchise, something we agree could not have been done by legislation alone. *Cf. Lucas v. Colorado*, 377 U.S. 713, 736 (1964) (holding that “an individual’s constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a State’s electorate”).<sup>50</sup>

Rather, exclusion was the consequence of the completion of the cession transaction -- which transformed the territory from being part of a state, whose residents were entitled to vote under Article I, to being part of the seat of government, whose residents were not. Although Congress’ exercise of jurisdiction over the District through passage of the Organic Act was the last step in that process, it was a step expressly contemplated by the Constitution. *See* U.S. CONST. art. I, § 8, cl. 17.<sup>51</sup>

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<sup>49</sup> Although the Equal Protection Clause “restrains the States from fixing voter qualifications which invidiously discriminate,” *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966) (declaring Virginia poll tax unconstitutional), the Court has not questioned “the power of a State to impose reasonable residence restrictions on the availability of the ballot,” *id.* at 666. *See Carrington v. Rash*, 380 U.S. 89, 96 (1965) (emphasizing that states are “free to take reasonable and adequate steps . . . to see that all applicants for the vote actually fulfill the requirements of bona fide residence”); *see also Saenz v. Roe*, 119 S. Ct. 1518, 1528 (1999) (noting that “Citizenship Clause of the Fourteenth Amendment expressly equates citizenship with residence”).

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

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

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

The Court began its analysis by noting that:

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

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

The Supreme Court rejected the state's argument, noting that "the relationship between federal enclaves and the States in which they are located" had "changed considerably" over the years. *Evans*,

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

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

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

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

shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings . . . .’).<sup>52</sup>

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

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<sup>52</sup> Although the constitutional text indicates that Congress has “like Authority” over both the District and the enclaves, the text does refer to them differently. The District is described as being created by “Cession” of particular states, a word which indicates that thereafter the District would no longer be part of those states. Enclaves, on the other hand, are areas purchased with the consent of the legislature of the state “in which the Same shall be,” which may explain why *Evans* viewed enclaves as remaining parts of the states from which they were created. We need not resolve the significance of this difference in constitutional language, however, because the difference in the way in which Congress has exercised its authority over enclaves and the District distinguishes this case from *Evans* in any event. See discussion *infra* pp. 59-60.

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

<sup>54</sup> We disagree with the dissent’s suggestion that Congress’ delegation of authority to the District government puts the District’s situation on a par with that of the NIH enclave in *Evans*. In the

Plaintiffs do not dispute this distinction, and as a consequence do not contend that they have a right to vote in elections for the Maryland state legislature. Instead, they argue that while the absence of the exercise of Maryland authority over District residents might mean they have an insufficient interest in elections to Maryland's own legislature, "District citizens have an equally vital stake in elections to Congress" as other Maryland residents. *Alexander* Pls.' Summ. J. Mem. at 27. Finding District residents qualified to vote for Congress but not for the Maryland legislature, however, would turn Article I on its head. As we have noted, Article I, section 2 states that "the [congressional] Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. CONST. art. I, § 2, cl. 1. Plaintiffs' enclave theory, by contrast, would permit residents of the District to vote in Maryland's congressional elections notwithstanding that they lack -- even under an *Evans* theory -- precisely those qualifications.

Finally, and most important, adopting plaintiffs' argument would require us to ignore the result in *Albaugh*, which barred District residents from voting in Maryland's elections for the United States Senate. *See* discussion *supra* pp. 43-45. We do not have the authority to do so. Although there may be tension between *Evans* and *Albaugh*,<sup>55</sup> it is a tension that arises only if *Evans* is extended

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latter circumstance, Congress delegated authority to another sovereign (Maryland), and the Court held that sovereign could not treat two classes of residents (those within and without the enclave) differently. Here, by contrast, Congress has merely delegated some of its power to its own creature, the District government. The governmental structure through which Congress chooses to exercise its authority over the District -- provided it does not delegate that authority to another sovereign -- cannot be determinative of the voting rights of District residents.

<sup>55</sup> There appear to have been two steps to the *Evans* analysis. First, in rejecting the "fiction of a state within a state," the court rejected the suggestion that the NIH grounds ceased to be part of Maryland when the enclave was created. *See Evans*, 398 U.S. at 421. The rationale for this declaration was unstated, other than by reference to the Court's prior similar statement in *Howard*.

beyond its own holding in two ways: to a situation in which the ceding state no longer asserts any jurisdiction, and to a remedy limited to the right to vote in federal elections. *Albaugh*, on the other hand, is directly on point here without any extensions: it directly and expressly denies District residents a right to vote in Maryland's federal elections.

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

5. Plaintiffs rightly note that the cession of the lands of Virginia and Maryland "did not take away any of the individual constitutional rights guaranteed to District citizens." *Alexander Pls.*' Summ. J. Mem. at 46. As the Supreme Court declared in *O'Donoghue v. United States*, "[t]he mere cession of the District of Columbia to the Federal government relinquished the authority of the states, but it did not take it out of the United States or from under the aegis of the Constitution." 289

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Standing alone, this declaration would appear to be in tension with the affirmance in *Albaugh*, although a difference in the constitutional language describing the District and the enclaves could explain it. *See supra* note 52. As discussed above, however, the Court did not rest its decision on this first step, but instead went on to consider whether enclave residents had a stake in the elections equal to that of other Maryland residents. *See Evans*, 398 U.S. at 426.

U.S. 516, 541 (1933) (quoting *Downes v. Bidwell*, 182 U.S. 244, 260-61 (1901)).<sup>56</sup> Yet, as the same opinion also noted, “when a provision of the Constitution is invoked, the question which arises is, not whether the Constitution is operative” in the District or territories, “but whether the provision relied on is applicable.” *Id.* at 542 (quoting *Downes*, 182 U.S. at 292). For the reasons set forth above, we conclude that the constitutional provisions plaintiffs rely upon here -- the clauses of Article I that provide for congressional voting -- are not applicable to residents of the District of Columbia.

## V

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

## A

We first address the contention of the plaintiffs (and of our dissenting colleague) that the District’s lack of representation in the House deprives its residents of the equal protection of the laws. *See Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (applying equal protection analysis to federal government under Fifth Amendment’s Due Process Clause); *see also Buckley v. Valeo*, 424 U.S.

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

1, 93 (1976) (“Equal protection analysis in the Fifth Amendment is the same as that under the Fourteenth Amendment.”). The plaintiffs allege that the lack of representation renders them unequal to the residents of the fifty states and of the federal enclaves.<sup>57</sup> And they further contend that because the right to vote is fundamental, such unequal treatment cannot be upheld unless it satisfies strict scrutiny -- that is, unless it is “narrowly tailored to serve a compelling” government interest. *Alexander Pls.’* Summ. J. Mem. at 56 (quoting *Washington v. Glucksberg*, 117 S. Ct. 2258, 2268 (1997)). Because there is no compelling interest in denying District residents the vote, plaintiffs contend that the denial cannot satisfy strict scrutiny and hence must fall.<sup>58</sup>

We do not disagree that defendants have failed to offer a compelling justification for denying District residents the right to vote in Congress. As the dissent argues, denial of the franchise is not necessary for the effective functioning of the seat of government.<sup>59</sup> The problem, however, is that strict scrutiny does not apply in this case. Although equal protection analysis scrutinizes the validity of classifications drawn by executive and legislative authorities, *see, e.g., Parham v. Hughes*, 441 U.S. 347, 358 (1979), the classification complained of here is not the product of presidential, congressional, or state action. Instead, as we have just concluded, the voting qualification of which plaintiffs complain

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

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

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

is one drawn by the Constitution itself. The Equal Protection Clause does not protect the right of all citizens to vote, but rather the right “of all *qualified* citizens to vote.” *Reynolds v. Sims*, 377 U.S. 533, 554 (1964) (emphasis added). “[T]he right to vote in federal elections is conferred by Art. I, § 2, of the Constitution,” *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966), and the right to equal protection cannot overcome the line explicitly drawn by that Article. For that reason, even the absence of a compelling ground for denying District citizens the right to vote cannot result in the judicial grant thereof.

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

But the one person, one vote cases themselves make clear that the structural provisions of the Constitution necessarily limit the principle’s application in federal elections. In *Reynolds v. Sims*, for example, the Court recognized that the allocation “to each of the 50 States, regardless of population” of two senators and at least one representative was inconsistent with one person, one vote. 377 U.S. at 571-72. Nonetheless, the Court said, “The system of representation in the two Houses of the Federal Congress is one ingrained in our Constitution, as part of the law of the land.” *Id.* at 574. Moreover,

and particularly relevant here, the Court declared that “[t]he developing history and growth of our republic cannot cloud the fact that, at the time of the inception of the system of representation in the Federal Congress, a compromise between the larger and smaller states on this matter averted a deadlock in the Constitutional Convention which had threatened to abort the birth of our Nation.” *Id.* This, the Court said, rendered the composition of the House and Senate constitutionally compelled, and thus “inapposite and irrelevant to state legislative districting schemes.” *Id.* at 573.

In *Gray v. Sanders*, the Court had previously reached the same conclusion regarding the electoral college system used in presidential elections, which does not allocate voting strength in strict proportion to population, but which is nonetheless mandated by Article II, section 1 and the Twelfth Amendment. *See* 372 U.S. at 378.<sup>60</sup> And subsequently, in *Department of Commerce v. Montana*, 503 U.S. 442 (1992), the Court noted two additional (and one of the same) limitations upon the one person, one vote principle. That “general admonition,” the Court said, “is constrained by three requirements. The number of Representatives shall not exceed one for every 30,000 persons; each State shall have at least one Representative; and the district boundaries may not cross state lines.” *Id.* at 447-48<sup>61</sup>; *see also Wisconsin v. City of New York*, 517 U.S. 1, 14-15 (1996) (“[T]he Constitution itself, by guaranteeing a minimum of one representative for each State, made it virtually

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<sup>60</sup> “The inclusion of the electoral college in the Constitution, as the result of specific historical concerns,” the Court said, “validated the collegiate principle despite its inherent numerical inequality . . . .” *Gray*, 372 U.S. at 378.

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

impossible in interstate apportionment to achieve the [one person, one vote] standard imposed by *Wesberry*.”).

In sum, notwithstanding the force of the one person, one vote principle in our constitutional jurisprudence, that doctrine cannot serve as a vehicle for challenging the structure the Constitution itself imposes upon the Congress. *See Breakefield v. District of Columbia*, 442 F.2d 1227, 1228 & n. 4 (D.C. Cir. 1970) (rejecting contention that lack of representation rendered congressional tax on District unlawful under “one-man one-vote” decision in *Wesberry*). This analysis also forecloses plaintiffs’ contention that the disparity between their treatment and that of enclave residents violates equal protection.<sup>62</sup> As we held in Part IV.A, the inability of District residents to vote is a consequence of Article I. Similarly, as we discussed in Part IV.B.4, the contrasting ability of enclave residents to vote is not the consequence of legislative line drawing, but rather of the Supreme Court’s decision in *Evans* that enclave residents have a constitutional right to vote – a holding we are unable to extend to District residents both because of distinctions between the manner in which Congress has exercised its authority over the enclaves and the District, and because of the Supreme Court’s decision in *Albaugh*. *See* discussion *supra* Part IV.B.4. Hence, the differing treatment is the consequence not of legislative

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

determinations but of constitutional distinctions. This court is without authority to scrutinize those distinctions to determine whether they are irrational, compelling, or anything in between.<sup>63</sup>

## B

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

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<sup>63</sup> One of the claims in the *Adams* complaint does challenge a species of legislative action: Congress' continued exercise of exclusive federal authority over the District -- or at least over the private residential portions of the District outside of the National Capital Service Area (the part of the District containing the principal federal buildings and offices). The *Adams* plaintiffs contend that Congress' decision to exercise exclusive authority over the District in local matters, yet to cede similar authority to the states in the federal enclaves, violates equal protection. This claim, however, challenges Congress' continuing authority over the District *regardless* of whether District residents may vote for Congress. *See Adams* Pls.' Opp'n at 72 n.41 (stating that even if District residents had representatives in Congress, Congress' exercise of authority over local District matters would be unconstitutional as long as representatives from places other than District are members of that body). It thus does not come within our jurisdictional mandate to decide apportionment challenges, and we therefore remand it to the single-judge district court. *See* discussion *supra* Part II.

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

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

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

citizenship in violation of the Constitution.

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

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<sup>67</sup> See also *U.S. Term Limits, Inc.*, 514 U.S. at 805 (noting that “[w]hile, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states,” in fact it “was a new right, arising from the Constitution itself”) (quoting *United States v. Classic*, 313 U.S. 299, 314-15 (1941)); *id.* at 820-21 (noting “that the right to choose representatives belongs not to the States, but to the people”).

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

Rather, it is precisely because it is Article I that confers the federal right to vote that we must look to that Article to provide its content and define its boundaries. Article I grants that right only to those who “have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.” U.S. CONST. art. I, § 2, cl. 1.<sup>69</sup> Furthermore, it apportions representatives only “among the several States which may be included within this Union.” *Id.* art. I, § 2, cl. 3. Thus, in Justice Kennedy’s own words, the “Constitution uses state boundaries to fix the size of congressional delegations.” *U.S. Term Limits, Inc.*, 514 U.S. at 841 (Kennedy, J., concurring).<sup>70</sup> Because we

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

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

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

have previously concluded that the District cannot be characterized as a state for these purposes, and because therefore the constitutional provision that creates the federal right to vote does not include District residents within its terms, denial of the vote to those residents does not abridge their national privileges or immunities.

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

For two reasons, *U.S. Term Limits* has no application to the instant controversy. First, the congressional Qualifications Clauses at issue in that case are the structural opposites of the voter Qualifications Clause at issue here. The former set forth specific lists of qualifications that members of

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<sup>71</sup> The Qualifications Clause for the House of Representatives reads: “No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.” U.S. CONST. art. I, § 2, cl. 2. The analogous clause for the Senate reads: “No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.” *Id.* art. I, § 3, cl. 3.

Congress must satisfy. *See supra* note 71. The Court held those lists to be exclusive, striking down Arkansas' term limits on the ground that the state was without authority to add to them. *See U.S. Term Limits, Inc.*, 514 U.S. at 806. By contrast, the voter Qualifications Clause, U.S. CONST. art. I, § 2, cl. 1, contains no such list, but rather merely incorporates the relevant state's own set of voter qualifications. *See U.S. Term Limits, Inc.*, 514 U.S. at 806 (noting "explicit[] contrast[]" between "state control over the qualifications of electors [and] the lack of state control over the qualifications of the elected").

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

## C

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

Like the privileges or immunities argument, this contention founders upon its underlying assumption: that District residents have a right to vote in congressional elections. As we have repeatedly stated above, the Constitution does not grant that right except to individuals who qualify

under Article I -- which District residents do not. Nor can the Due Process Clause, any more than the Equal Protection Clause, be used to change elements of the composition of Congress that are dictated by the Constitution itself. *Cf. Carliner v. Commissioner*, 412 F.2d 1090, 1090 (D.C. Cir. 1969) (rejecting argument that Due Process Clause rendered District’s mayor-commissioner and city council unlawful “because the citizens of the District have not been given the opportunity by popular vote to elect” them).<sup>72</sup>

## D

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

As the Supreme Court has noted, “[i]n most of the cases in which the Court has been asked to apply the [Guarantee] Clause, the Court has found the claims presented to be nonjusticiable under the ‘political question’ doctrine.” *New York v. United States*, 505 U.S. 144, 184 (1992); *accord*

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<sup>72</sup> The Supreme Court has also held that the “procedural component of the Due Process Clause does not ‘impose a constitutional limitation on the [legislative] power of Congress . . . .’” *Atkins v. Parker*, 472 U.S. 115, 129 (1985) (quoting *Richardson v. Belcher*, 404 U.S. 78, 81 (1971)).

*Baker v. Carr*, 369 U.S. 186, 218-27 (1962). But even if plaintiffs’ claim is justiciable,<sup>73</sup> it does not present a substantial federal question.<sup>74</sup> While we cannot be certain precisely what the Framers thought constituted a “Republican Form of Government,” we do know that they intended the District to be subject to the exclusive control of Congress, *see* U.S. CONST. art. I, § 8, cl. 17; that they reserved the power to elect congressional representatives exclusively to those qualified to vote in state elections, *see id.* art. I, § 2, cl. 1; and that District residents are not so qualified, *see* discussion *supra* Part IV. Accordingly, we cannot adopt plaintiffs’ Republican Guarantee argument without concluding that Article IV of the Constitution was intended to repeal the provisions of Article I. That, of course, we cannot do.

## E

Plaintiffs argue that, even if we cannot find that Article I guarantees their right to vote in congressional elections, we should harmonize that Article with the other provisions discussed in this Part, which, they contend, do protect such a right. We do not disagree that we should strive to read the Constitution in a way that harmonizes its various provisions. We believe, however, that we have done so in the only way the words and historical interpretation of that document permit. Although the

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<sup>73</sup> *Cf. New York*, 505 U.S. at 185 (suggesting, without deciding, that “perhaps not all claims under the Guarantee Clause present nonjusticiable political questions”).

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

provisions considered in this Part protect rights guaranteed by the Constitution, our reading of Article I precludes the conclusion that the right plaintiffs seek to vindicate is one of those. Because the provisions of the Constitution that set forth the composition of Congress do not contemplate representation for District residents, we conclude that the denial of representation does not deny them equal protection, abridge their privileges or immunities, deprive them of liberty without due process, or violate the guarantee of a republican form of government.

## VI

As we have noted, many courts have found a contradiction between the democratic ideals upon which this country was founded and the exclusion of District residents from congressional representation. All, however, have concluded that it is the Constitution and judicial precedent that create the contradiction.<sup>75</sup> Moreover, that precedent is of particularly strong pedigree. As Justice Jackson said in following Chief

Justice Marshall's opinion that the District was not a state within the meaning of

Article III:

Among his contemporaries at least, Chief Justice Marshall was not generally censured for undue literalness in interpreting the language of the Constitution to deny federal power and he wrote from close personal knowledge of the Founders and the

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

foundation of our constitutional structure. Nor did he underestimate the equitable claims which his decision denied to residents of the District . . . .

*Tidewater*, 337 U.S. at 586-87 (plurality opinion of Jackson, J.) (citing *Hepburn & Dundas*, 6 U.S. (2 Cranch) at 453).

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

An order accompanies this memorandum.

March \_\_\_\_, 2000.

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MERRICK B. GARLAND  
United States Circuit Judge

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COLLEEN KOLLAR-KOTELLY  
United States District Judge