The District of Columbia and the First Amendment

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The Constitution of the United States was ratified on the condition that it would include a Bill of Rights that curbs the overreach of power in the Constitution's text. In *West Virginia State Board of Education v. Barnette*, for example, the Court explained, "Without promise of a limiting Bill of Rights, it is doubtful if our Constitution could have mustered enough strength to enable its ratification."[2] In *McDonald v. City of Chicago*, the Court explained, "those who were fearful that the new Federal Government would infringe traditional rights such as the right to keep

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[2] West Virginia State Board of Education v. Barnette, 63 S. Ct. 1178 (1943), 636-637.

[3] West Virginia State Board of Education v. Barnette, 63 S. Ct. 1178 (1943), 636-637.

and bear arms insisted on the adoption of the Bill of Rights as a condition for ratification of the Constitution."[3] Chief Justice Rehnquist, in his dissent in *Wallace v. Jaffree*, explained that the Constitution was successfully ratified on the condition that it be accompanied by a Bill of Rights because of the belief of several states that, "without a Bill of Rights guaranteeing individual liberty the new general Government [proposed in the Constitution] carried with it a potential for tyranny."[4]

The implication of this condition is that the Bill of Rights was created based on a founding suspicion that the Constitution's main text may have had provisions that might be interpreted and/or implemented in unforeseen ways that may result in the loss of individual liberties. The sole purpose of conditioning the ratification of the Constitution on the passage of a Bill of Rights was to provide a check on such unforeseen overreaches of government policies found in the constitutional text.

Even with the Bill of Rights, there were initially few considerations regarding how best to determine when the Congress had overreached its powers by imposing on the individual liberties of citizens. For example, the First Amendment stated that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." If Congress "shall make no law" and Congress was the only body to interpret whether it had overreached its power, then what check would there be against Congress interpreting for itself that it had not overreached its authority? The answer to that question came in the landmark 1803 case of *Marbury*

[3] McDonald v. City of Chicago, 130 S. Ct. 3020 (2010), 769.
[4] Wallace v. Jaffree, 105, S. Ct. 2479 (1985), 92-93.

v. Madison when the Court ruled, "It is emphatically the duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret the rule. If two laws conflict with each other, the Court must decide on the operation of each."[5]

Of course, the significance of *Marbury v. Madison* is well understood in our American governance. However, there is little consideration given to those policies instituted by the Congress prior to judicial review. Between the adoption of the Bill of Rights in 1791 and the Supreme Court's 1803 ruling that instituted judicial review, Congress merely decided for itself whether it had violated the provisions of the Bill of Rights. Many of the laws passed during that time period have been presumed as constitutional, privileging a view of the legislative acts that measures their constitutionality based on the Constitution's main text rather than fundamental conditions that would be placed on that text—the Bill of Rights.

The purpose of this essay is to highlight the significance of the Bill of Rights as a constraint on both the Constitution, and a constraint on the presumption of congressional authority to decide for itself (prior to *Marbury*) whether it violates the rights enshrined in the Bill of Rights. Specifically, this essay uses a case study method by examining the intersection between the First Amendment and the residents of Washington, D.C. The case of Washington, D.C. is particularly illustrative of the complexities of the Bill of Rights as a condition to the Constitution for two reasons: (1) Much of the rationale for determining the rights of D.C. residents is rooted in the Constitution's main text, and the Bill of Rights may function as a check.

[5] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), 177.

Specifically, Article 1, Section 8, Clause 17 of the Constitution states that Congress shall have power "To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, 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 Building." The First Amendment conditions the "legislation" clause of Article 1, Section 8—though Congress has the power to exercise "exclusive legislation," "Congress shall make no law . . . abridging the freedom of speech." (2) Judicial review requires heightened scrutiny for legislative acts where fundamental rights are concerned, scrutiny that has largely remained unconsidered when it comes to legislative acts between 1791 and 1803. For Washington, D.C., this matter is significant because of the Organic Act of 1801. The Organic Act is often cited in cases like *Adams v. Clinton* (affirmed by the Supreme Court),[6] but has not itself undergone judicial review with the kind of

[6] See, for example, the U.S. District Court for D.C.'s privileging of the Constitution's main text (without considering the Bill of Rights), "Although Congress' exercise of jurisdiction over the District through the passage of the Organic Act was the last step in that process, it was a step expressly contemplated by the Constitution." Adams v. Clinton, 90 F. Supp. 2d 35 (2000), 62 (affirmed by Supreme Court). Moreover, the Adams court began with the premise that "the dictates of the Constitution and the decisions of the Supreme Court bar us from providing the relief plaintiffs seek" (37). The subject of the current essay questions the conditions that have not been determined by either the Constitution nor the Supreme Court: To what extent are the "dictates of the Constitution" conditioned by the main text rather than the Bill of Rights and the subsequent First Amendment rights of the residents of D.C.? To what extent has the Supreme Court considered the First Amendment considerations of the Organic Act? Does the Organic Act withstand First Amendment scrutiny (i.e., strict scrutiny)? Strict scrutiny may not apply specifically

scrutiny required by the Court's tests for certain provisions in the Bill of Rights—including the First Amendment as the subject of this essay.

In this essay, I explore and review some of the intersections between the First Amendment and the residents of the District of Columbia. Specifically, this essay is divided into three sections. First, I begin by examining the significance of the evolution of judicial review when it comes to considering the details of the broad framework established in America's constitutional origins. Second, I explore the significance of strict judicial review for policies enacted by Congress in early American history, specifically examining the current era as one that is inherently equipped for narrow tailoring of policies like the Organic Act of 1801. Third, I explore seven areas pertaining to the First Amendment and the District of Columbia. The areas may intersect, overlap, and may at times be independent from each other: (1) Relationship between voting and symbolic speech, (2) Prior restraint and the doctrine of unconstitutional conditions, (3) Viewpoint discrimination, (4) Corporate free speech and the District, (5) The freedom of government speech, (6) Freedom of speech in House/Senate debates, (7) Future possibility: Assisted suicide restrictions and the District. Third, the essay shares some conclusions regarding the District of Columbia, the Bill of Rights, and the First Amendment.

I. Evolution of Judicial Review and the District of Columbia: From a General Framework to the Consideration of Relatively Minor (But Significant) Matters.

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to the case of Adams because First Amendment considerations were not entertained. The First Amendment does require strict scrutiny analysis.

Between the time of 1791 when the Bill of Rights was ratified and 1803 when the Supreme Court began judicial review of congressional policies, legislative acts were enacted with relatively broad brush strokes. The broad nature of legislation in the founding era meant that so many of the tests of legal thought that are in place today were not considered at the time. For example, it took 12 years for the Supreme Court to even be established as the site where the review of congressional policy would even be considered in terms of its constitutionality in *Marbury*. This is because the era consisted of matters about the broadest considerations of the day. Some of the largest projects at the time where establishing the First Bank of the United States, adding the States of Vermont, Kentucky, and Tennessee, securing the freedom of navigation on the Mississippi River, fighting a quasi-war with France, passing the Alien and Sedition Acts (Virginia adopted the Report of 1800 to argue the Alien and Sedition Acts violated the Constitution), establishing the Library of Congress, and just after *Marbury*, completing the Louisiana Purchase, and making Ohio the 17th State.

This is significant to the size and scope of decisions about the District of Columbia. The Founders' decisions about the District of Columbia were made based on the necessity of making general decisions about the workings of the federal government, and most importantly, its location, its security, its needed infrastructure (building, ports, etc.)—these first decisions were relatively larger decisions without the luxuries of considering relatively minor details that could be worked out later.

To make this point further, we can consider the proportion of the relative populations. The population of the District of Columbia from 1790-1800 was roughly 14,000[7] and the total population of America was roughly 5 million people.[8] Making an agreement for a union affecting 5 million people is no simple task—it is a task that usually requires a general framework; a framework that may need subsequent tinkering in order to work for all the people involved.

If you add today's population of Wyoming (585,501),[9] Vermont (624,594),[10] North Dakota (757,952),[11] Alaska (741,894),[12] South Dakota (865,454),[13] and Delaware (952,065),[14] the total population is 4,527,460. If these six states were to act like the original colonies to establish an agreement in broad terms, they would likely not hold up such an agreement based on what they would view as possible minor objections of Rawlins City, WY (est. population 9,040).[15] Rawlins City is important, significant, and is a beautiful place. Still, the people of Rawlins City might be considered a relatively minor detail to work out later so that the six states can

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[7] Department of Commerce: U.S. Bureau of the Census, Population Division. Compiled and Edited by Richard L. Forstall. *Population of State and Counties of the United States: 1790-1990*. March, 1996.

[8] *Id.*

[9] 2016 state population totals from the U.S. Census Bureau. Table 1—"Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2016." *State Population Totals Tables: 2010-2016.* Available at https://www.census.gov/data/tables/2016/demo/popest/state-total.html.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] Population estimates range from 9,040 in 2015 to 9,259 in 2010. Estimates for 2016 are not available from the Census Bureau. *QuickFacts: Rawlins City, Wyoming*. U.S. Census Bureau. Available at https://www.census.gov/quickfacts/table/PST045216/5663900,00.

conduct their business of establishing a capital. The relative population of Rawlins City today in this example is the same as the relative population of the District of Columbia at the time of the nation's founding. The Founders of America's Constitution foresaw that the citizens of a place like Rawlins City might have their rights violated, and thus conditioned the Constitution on a Bill of Rights in the event that the Constitution would be found to be too overreaching. This is not a trivial matter in the nation's founding. Given the "big" things the founders were up to at the time, the relatively minor detail of how to best consider the individual rights of those in the District of Columbia could be worked out in time (with, for example, the judicial review established by *Marbury*). Since the larger project of establishing the District of Columbia has long been accomplished, we have the ability to consider the relationship between the Constitution, the Bill of Rights, and the District of Columbia today. In what follows, I begin such an exploration with First Amendment considerations.

II. The Requirement of Strict Scrutiny for Bill of Rights Violations Pre-1803: Congress Deciding Individual Rights Violations for Itself?

The Organic Act of 1801 is significant to citizens in the District of Columbia. Johnny Barnes explained, "On November 21, 1800, Congress convened for the first time in the District of Columbia. Interestingly, two weeks earlier, on November 11, 1800 the residents of the District of Columbia cast ballots in congressional elections. A few days later, President Adams instructed Congress to immediately exercise the authority granted to them by the District Clause. By the end of the following February, the Organic Act of 1801 was signed into law. The implications of the

Organic Act would be significant, as it had the effect of robbing the residents of the sovereignty they enjoyed as citizens of Maryland and Virginia."[16] In other words, the Constitution, the Bill of Rights, and the provisions of the respective state constitutions protected citizens in the District of Columbia prior to 1801. Then, in 1801, the governments passed the Organic Act that allowed the reversal of those rights—even though the Organic Act was not a constitutional amendment embedded into any of the constitutions (Virginia, Maryland, or U.S.), the Act was allowed to have presumptive force over the rights protected in those constitutions.

This is where the idea of strict scrutiny is most important. Richard Fallon, Jr. explained the significance of strict scrutiny as a "judicially crafted formula for implementing constitutional values" that "ranks among the most important doctrinal elements in constitutional law."[17] Where fundamental rights are concerned, the doctrinal principle in constitutional law since at least the 1960s is that government should attempt to narrowly tailor laws to meet compelling government interests.[18] The language of tailoring is appropriate in the current context. Between the period of 1790 and 1801, there was nothing to tailor. To narrowly "tailor" something implies there is something to tailor in the first place. In late Latin, "taliare" meant "to cut," which became in Anglo-Norman French "taillour"

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[16] Johnny Barnes, *Towards Equal Footing: Responding to the Perceived Constitutional, Legal and Practical Impediments to Statehood for the District of Columbia*, 13 U. OF DISTRICT OF COLUMBIA L. REV. 1, 13 (2010).
[17] Richard H. Fallon, Jr., *Strict Judicial* Scrutiny, 54 UCLA L. REV. 1267, 1268 (2007).
[18] *Id.*

meaning "cutter," which became in Middle English "tailor."[19] Strict scrutiny emerged only after the initial making of the "fabric" of American government (e.g., "cutting out" a space for the capitol, and acquiring "fabric" by expansion of states, Louisiana purchase, and war).

This idea is consistent with Fallon's observation (drawing on Duncan Kennedy's work) regarding the evolution of the Court's role from "classical legal thought" to the modern era where boundaries between government interests and individual liberties are increasingly contested. Fallon noted, for example,

> Before the collapse of the Lochner era in the late 1930s, the Supreme Court appears not to have understood constitutional adjudication as requiring standards of review in the modern sense. Through most of constitutional history, the Court conceived its task as marking the conceptual boundaries that defined spheres of state and congressional power on the one hand and of private rights on the other. Within 'Classical legal thought,' as Duncan Kennedy has termed it, these spheres did not overlap; the Court did not view itself as weighing or accommodating competing public and private interests, but instead as applying boundary-defining techniques that rendered its analysis 'an objective, quasi-scientific one.' Insofar as the Court was engaged in conceptual or quasi-scientific analysis for which the judiciary possessed a special competence, its assumptions afforded no justification for greater of

[19] Oxford English Dictionary and the Online Etymology Dictionary. Available respectively at https://en.oxforddictionaries.com/definition/tailor and http://www.etymonline.com/index.php?term=tailor.

> lesser degrees of deference to other institutions' judgments concerning where the boundaries lay.[20]

In other words, before there can be narrowly tailored laws in such a context of "classical legal thought" of the Court prior to the 1930s, there has to be something to tailor. The Organic Act of 1801 was part of establishing the fabric in broad terms, and we now have the ability to narrowly tailor the Act by applying strict judicial review.

When fundamental rights are at stake, strict scrutiny requires that laws be narrowly tailored to advance a compelling government interest. The application of strict scrutiny is by no means an objective test. For as Fallon pointed out, "The Supreme Court has never squarely confronted, much less solved, the conundrum of the level of generality at which to specify compelling government interests. Neither has the Court noted the ambiguities built into the narrow tailoring requirement."[21] At the same time, there is a core principle that undergirds the Court's use of strict scrutiny. Namely the principle is this: policies are often written that may have unintended and unforeseen consequences to individual liberties when they are enacted—the Court's role is to review those particularities through case law in order to determine whether the policy is able to meet the intended objective by cutting, trimming, and/or slimming (i.e., tailoring) the policy to meet both the objective and preserve the individual liberty. In short, the principle undergirding strict scrutiny is to fundamentally test mutual exclusivity—whenever possible, policies should accomplish a compelling government interest while also preserving

[20] *Id*. at 16, 1285-1286.
[21] *Id*. at 16, 1336.

individual rights. How might this fundamental test of mutual exclusivity apply to the Organic Act of 1801? Answering this question requires the identification of the individual right(s), the compelling government interest(s), and the possible places to trim/tailor the "fabric" of the Organic Act.

The individual rights of the people residing in what would become the District of Columbia are well documented. Maryland and Virginia each adopted their own Constitutions in 1776. These constitutions extended individual rights to their citizens. In addition, the Bill of Rights extended individual rights with the sole purpose of checking against governmental policies that might erode those rights. The individual rights of those in the District of Columbia were exercised regularly through voting in Maryland and Virginia, by speaking and participating in public debate, and by running for public office. This raises the critical point: at a time when individuals were exercising their constitutional rights as guaranteed to them in the Bill of Rights, governments made the Organic Act of 1801. The governments of Maryland, Virginia, and the United States had made a law that would deprive the individuals (particularly those who did not agree to the Organic Act, and whose government imposed on them) of constitutional rights they had been exercising prior to 1801.[22] Still, the fabric of the Organic Act was created. The question arises over whether the law may be narrowly tailored to meet the compelling government interest.

[22] An important consideration in this observation is that even if no one residing in the areas that would become the District of Columbia were allowed to vote before the cession, the denial would have been authorized by government entities (i.e., congress) without being subject to due process and judicial review as necessary checks against individual rights being taken by governments.

The compelling government interests in establishing the District of Columbia are well documented. In short, the founders envisioned a capitol that would not be shared or housed within the jurisdiction of a particular state. Article 1, Section 8 of the Constitution grants Congress legislative power over a district that is the Seat of Government of the United States, and also legislative authority over the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings. The new American government needed buildings to conduct its business, to build its forts, to store its arms, to dock transportation vessels, and other buildings for the administration of government affairs. Such space needed to be provided by the existent states, because there was no land in the area left unclaimed by the states.

When the Organic Act was passed in 1801, the "fabric" had been non-existent such that tailoring was impossible. Judicial review of *Marbury* was still a couple years away, let alone getting the nation established to a place where it could begin to apply strict scrutiny to the nation's founding laws in order to figure out ways to narrowly tailor them in the service of both government interests and the preservation of individual rights. Of course, there are many ways that narrow tailoring of this Organic Act might be accomplished, and there are no shortage of arguments appearing in public affairs, law reviews, and legislative advocacy. Amongst the myriad alternatives to the Organic Act are advocates of statehood for the District of Columbia, advocates for retrocession, and other more creative solutions like shared sovereignty.[23] Each of these may forge alternatives as they

[23] Other solutions include simply including a proviso "permitting continued voting, similar to provisions governing voting rights of residents on other federally controlled land, e.g., military reservation." J. Young as cited in Peter Raven-Hansen.

seek remedies for rights of representation. However, these are not fundamentally the concerns that I am taking up in this essay.

In arguing for the narrow tailoring of the Organic Act of 1801, I advance two premises: (1) At the time of its passage, the Act was attempting to accomplish a rather monumental task of establishing the location of federal governance—a task that did not possess the luxury of surgical precision for considering all the implications of accomplishing the tasks necessary to achieve the government interests in establishing a place for the affairs of federal governance. Within a context where judicial review had not even been established as a norm, and the seeming impossibility to consider all the implications of these large projects on the individual rights of a relatively few number of people, the Organic Act of 1801 may be seen as a measure of progress for the establishment of the federal government. (2) The Organic Act of 1801 has never undergone judicial review, not to mention strict judicial scrutiny in order to test the mutual exclusivity of accomplishing the government interest (through ceding the land) while maintaining the individual rights of those that would lose their rights when the government made the law. Since we are in an era where such narrow tailoring is possible and a routine operation in making "alterations" (as a tailor would do) to policies that may achieve their objectives without mutual exclusivity with infringing on individual rights, the Organic Act may visit the tailor qua strict judicial scrutiny. This second premise is significant when it comes to First Amendment and other rights afforded in the Constitution.

Congressional Representation for the District of Columbia: A Constitutional Analysis, 12 *Harvard Journal on Legislation* 167, 175-176, note 42 (1975).

There are at least a couple of points that are central to considerations of narrowly tailoring the Organic Act of 1801 in order to achieve the government interest. First, the residential land that is inhabited in present day District of Columbia is not equivalent with the land that is the "Seat of Government." Rather, there is land consisting of residential homes/housing of the people that live there. The "Seat of Government" is in other buildings in the area. An apartment that a resident occupies is not the "Seat of Government;" Nor have the private residences been purchased to be government forts, to store arms, to be arsenals, to be dock-Yards, nor to be needful federal buildings in which to conduct proceedings and hold America's archives. Rather, they are private residences. The Constitution itself does not say that these individual residences must be included in the "Seat of Government," nor that the district needs to be a contiguous space, nor any other requirement aside from the fundamental requirement that the land that is the "Seat of Government" cannot also be the same as that of particular states. Only the Organic Act of 1801 required that private residences in the area be lumped together with the new "Seat of Government." In other words, with the Organic Act, the "Seat of Government" also acquired surrounding residences—residences that were not required for the formation of the federal district by the Constitution.

Second, the decisions over many individuals who had rights prior to the Organic Act of 1801 were decisions made by governments, and not of those individuals who had rights prior to the Act. Narrow tailoring of laws is precisely designed as a way to protect against the loss of individual rights from decisions of the government is precisely designed to protect against the loss of individual rights

that may unnecessarily infringe on the rights of its citizens. All of the decisions that were made surrounding the Organic Act were government decisions that failed to consider the narrow tailoring possibilities, including the "supposed" citizen agreement for $500,000 annually as the basis for ceding the rights of those who did not agree to sell their individual rights (the individuals were not given the choice). Many of the founders thought of the $500,000 benefit "as a bargained-for exchange for the burden of second-class citizenship. In 1789, it was estimated that the selected site would benefit from $500,000 spent there annually."[24] The agreement ("compact" with Congress) "was entered into on behalf of the District by Maryland and Virginia acting with apparent authority."[25] That certain individuals who were citizens of Maryland or Virginia did not give up their rights, but rather, that they were taken away in an overly broad agreement between the U.S. Congress, Maryland, and Virginia governments is a matter of significance. Aside from Ninth Amendment considerations, the significance is that when government makes these kinds of decisions, the Bill of Rights requires that we work hard to imagine the possibilities for preserving the individual rights of those who may not need to have them taken away along with creation of a "Seat of Government" in one fell swoop. Perhaps one fell swoop was necessary at the time of the Organic Act's passage, but we have the ability to narrowly tailor it today and we should do so to preserve the

[24] *Id.* at 15, 14.

[25] *Id.* at 15, 15. It is significant to note that the government(s), including the Congress of the United States, made the agreement for the $500,000. The Bill of Rights is fundamentally a check on this kind of government legislation that infringes on the individual liberties of citizens. For example, the Bill of Rights would surely prevent the U.S. Congress from making a deal with a state legislature today for $500,000 that would deprive people in a given state to be deprived of their right to bear arms—this is the kind of protection the Bill of Rights affords individuals.

very basis for conditioning the Constitution's ratification on a Bill of Rights in the first place (and its subsequent amendments).

At the very least, strict judicial scrutiny may highlight some of the problems for congressional authority determining for itself whether it had violated the rights of individuals that were, prior to the Organic Act of 1801, citizens of the State of Maryland or Virginia. At the time of its passage, the legislatures of Maryland, Virginia, and the United States made those determinations for itself.[26] This is an inherent conflict of interest for which *Marbury* sought to avoid. The founders who refused to ratify the Constitution without an accompanying Bill of Rights envisioned instances whereby Congress could interpret provisions and make laws to infringe on individual liberties. *Marbury* was precisely the case that established judicial review for policies grounded in the Constitution, but that may conflict with the conditions of the Bill of Rights.

III. First Amendment Considerations of the District of Columbia

While the above considerations so far may apply to a variety of individual rights, the remainder of this essay will focus specifically on some of the relationship between congressional authority and the First Amendment in the District of Columbia. Envisioning the Bill of Rights as a condition of ratifying the Constitution is

[26] Congressional determination for itself as a matter of a political process is what the Bill of Rights sought to protect against. Allowing Congress the authority to determine if it has itself violated the Bill of Rights is the epitome of politicizing rights that subject the individual to the will of Congress. The denial of the rights of residents in what would become the District of Columbia were the product of the politics of the American Revolution rather than the preservation of the Bill of Rights by way of judicial review. For example, see the Testimony of Kenneth R. Bowling in front of the D.C. Council's Special Committee on Statehood and Self-Determination. (May 13, 2009).

central to the primacy of First Amendment considerations. The Constitution's main text says very clearly in Article 1, Section 8 that Congress has the power to "exercise exclusive Legislation in all Cases whatsoever," over the District of Columbia. That the Bill of Rights conditions the Constitution's main text, congressional authority may be read as follows in terms of the First Amendment condition:

> Congress shall have Power to exercise exclusive Legislation over such District on the condition that it make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Taken together, therefore, congressional authority is limited by the First Amendment—the Congress does not have authority to make laws that violate the First Amendment. In what follows, I highlight some of the areas of tension, and possible violation, when it comes to the people of the District of Columbia and the presumption of congressional authority over the people residing there.

A. Voting as Both a Decisive Act and Symbolic Act

One cannot visit D.C. for very long without noticing the phrase (on license plates and elsewhere) "Taxation Without Representation." The District of Columbia does not have Senate representation, and it does not have a voting member of the House of Representatives. To claim that voting rights are First Amendment rights requires understanding what happens when a citizen casts a vote. On the one hand, the right to vote is founded on the fundamental democratic right of representing a

share of the power in making a "decision." This is the matter that has been taken up by many arguments in relation to enfranchisement and the District of Columbia. The concerns are framed as a matter of having a share in the power to make a decision that is rooted in the citizenship status of the person(s) in question. For example, in *Adams v. Clinton*, the Court affirmed the 3 judge panel ruling against the right of people in the District to vote in the selection of representation in the Congress because of the loss of citizenship that resulted from the Organic Act of 1801 (without citizenship, they do not share power in the affairs of the state). The *Adams* court cited a district court decision in *Albaugh v. Tawes* that relied on the Court's rationale in *Reily v. Lamar* which merely declared (without considering the possible loss of individual rights found in the Bill of Rights) that former residents of Maryland "lost their state citizenship upon 'the separation of the District of Columbia from the State of Maryland.' . . . *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.'"[27] Two significant points are worth observing in this rationale: (1) the decision does not render judgment on the constitutionality of the Organic Act of 1801—it is merely descriptive of how citizenship status was lost, and in fact confirms that these were government acts never tested in terms of their constitutionality. (2) The rationale relies

[27] Adams v. Clinton, 90 F. Supp. 2d 35, 56 (2000) (affirmed by Supreme Court). Important to note here is the passive voice construction of the lack of an agentive actor in the statement "former residents of Maryland lost their state citizenship upon 'the separation of the District of Columbia from the State of Maryland.'" The Bill of Rights restricts the Congress as the agent of action, and Congress' Act (the Organic Act) was overinclusive by lumping together private residences with the "Seat of Government" and other buildings authorized by Article 1, Section 8 of the Constitution.

presumptively on the quality of "merely" losing rights of state citizenship in the deal negotiated by the governments, rather than losing rights that are guaranteed in the Bill of Rights—namely that in the government deal that revoked state citizenship, individuals may have also lost their rights enshrined in the Bill of Rights, including possibly the right to voice their opinions on matters that they previously had the right to express (i.e., their First Amendment rights). Regardless, what appears at issue in these cases is the right to vote as a right of enfranchisement and a right of citizenship rather than a First Amendment consideration.[28]

On the other hand, the reason a loss of First Amendment rights occurs simultaneously with the right to vote is that there is more involved with a vote than simply making a decision. If voting is intrinsically connected with our First Amendment rights, then those rights are embedded in the Bill of Rights as a condition for ratifying the Constitution (and by extension, Congress does not have the power to make a law like the Organic Act in a manner that would result in the loss of voting rights). Votes symbolically communicate credibility, commitments, dismay, approval, confidence, values, and other ideas and beliefs. When residents in D.C. are denied the right to vote for congressional representatives that make rules about them, the residents are denied this form of symbolic communication. The denial of the right to vote ignores the intrinsic connection between the right to vote and the way our country has coupled the right to vote with the freedom of

[28] Furthermore, if a U.S. citizen wants to move from a state to the District for any reason (career advancement, civic service, etc.), the Organic Act requires that they choose between Senate representation and moving—only the Organic Act forced private residences to relinquish rights even though the residences are not government buildings outlined in Article 1, Section 8.

expression. There are at least a few ways to discern this intrinsic connection between the right to vote and First Amendment ideals. One way is to examine decisions that affirm a right to vote as intrinsic to the First Amendment.[29]

Another way is to visit the ongoing debate between anonymity and disclosure in the voting process—both sides of the debate between whether votes should be anonymous or disclosed recognize a vote as *both* a decision *and* intrinsically linked with the freedom of speech. Those advocating anonymity in voting cite the need to be free to make their decision without communicating that decision to other people who may retaliate; "Anonymity allows communication without retribution."[30] Casting secret ballots "protects voters against threats and reprisals from government officials, employers, and the like, while 'open government allows voters to monitor their representatives."[31] Put differently, the inherent risk of requiring votes to be publicly communicated might chill the voters'

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[29] For example, the D.C. Circuit case of *Clarke v. United States* explained, "The Supreme Court long ago made it clear that '[t]he manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy.' . . . Pursuant to this mandate, the First Circuit recently held that 'the act of voting on public issues by a member of a public agency or board comes within the freedom of speech guarantee of the first amendment,' and that '[t]here can be no more definite expression of opinion than by voting on a controversial issue." Not the least of controversial issues include how decisions are made in the Senate—a controversial issue that D.C. residents are deprived of the right to express through their vote. David A. Clarke v. United States 886 F. 2d 404 (D.C. Cir. 1989). Although vacated as moot after rehearing *en banc*, 915 F.2d 699 (D.C. Cir. 1990), the logic undergirding Clarke never implicated consideration of the more basic subject of considering the Organic Act in the context of strict scrutiny in the first place—a premise that questions the foundational assumptions of much in the Clarke decision by reconsidering the components of the decision that are rooted in Article 1, Section 8 and Organic Act doctrines.

[30] Saul Levmore, *The Anonymity Tool*, 144 U Pa. L. Rev 2191, 2192-2193 (1996).

[31] *Id.* at 2220.

expression because intimidation might compel a voter to cast a ballot contrary to their personal beliefs (thus preventing the expression of that belief). On the other hand, those advocating on behalf of disclosing votes in public note the symbolic nature of voting that goes above and beyond the decision itself. For example, Justice Scalia explained in his concurring decision in *Doe v. Reed* (also suggesting the inherent connection between voting and freedom of speech), "Any suggestion that *viva voce* voting infringed the accepted understanding of the pre-existing freedom of speech to which the First Amendment's text refers is refuted by the fact that several state constitutions that required or authorized *vive voce* voting *also* explicitly guaranteed the freedom of speech. . . . . Surely one constitutional provision did not render the other invalid."[32] In noting how voting is a form of speech that communicates "courage" and "personal conviction" (and "manliness" for that matter), Justice Scalia cited the following examples, "'[I]n the appeal to unflinching manliness at the polls [Virginia and Kentucky] insisted still that every voter should show at the hustings the courage of his personal convictions.'"[33] Extending this reasoning, when voters lost their right to vote with the Organic Act, they also lost the freedom to communicate their "courage" and "manliness" in heated House and Senate races (despite their First Amendment right to do so) that they had previously been free to communicate prior to the Act, a position Justice Scalia affirmed by

[32] Doe v. Reed, 130 S. Ct. 2811, 225 (2010).
[33] *Id.,* 226.

highlighting the idea that the freedom to speak did not render the freedom to vote invalid, or vice-versa—they were intrinsic and inseparable.[34]

A second way of thinking about the expressive nature of voting is to consider the way America has negotiated the impossibility of everyone speaking on every issue. Specifically, our representative democratic republic inherently links the ballot to voting as a form of expression to resolve the impossibility of hearing everyone on all issues—a fact that is one way of differentiating America's system of government from other systems of deliberation. Justice Holmes, writing in the Court's decision in *Bi-Metallic Investment Co. v. State Board of Equalization*, explained that all voices do not need to be heard in a debate in complex society, requiring that those that cannot be heard in a public forum be able to express their approval/disapproval through voting for/against those who make the rule, "General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the way that they can be in a complex society—by their power, immediate or remote, over those who make the rule."[35]

Power over those that make the rules, in the form of voting, therefore is a way of communicating that which cannot be communicated in public fora. The communication of free speech in the fora is not inherently protected by the First Amendment—however, the restriction on that freedom was noted by the Court to be a necessity in a republican form of government. This point is critical—the *ideal* of

[34] The case now is relevant to today, as Justice Scalia applies it to the Senate races and direct election.
[35] Bi-Metallic Investment Company v. State Board of Equalization, 36 S. Ct. 141, 445 (1915).

the right of all people to be heard was affirmed precisely *because* such ideal is given recourse in the right to express those opinions in the form of casting votes for/against those who make the rules (e.g., the House and the Senate). More specifically, the expression of "disagreement" or "disapproval" is inseparable from the "decisive act" made in a vote. Justice O'Connor affirmed this idea in *Minnesota Board for Community Colleges v. Knight* by explaining that policymakers are not required by the First Amendment to listen or respond to individuals' communication—the right of citizens to communicate their approval or disapproval is by voting at that polls,

> Nothing in the First Amendment or in this Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues. . . . Disagreement with public policy and disapproval of officials' responsiveness, as Justice Holmes suggested in Bi-Metallic, supra, is to be registered principally at the polls.[36]

What both Holmes and O'Connor affirmed is the idea that a vote is also a way of channeling expression that ideally might be protected but for the necessities of republican government—the recourse to the limitation on this expression in public forums is that those things that cannot be spoken out of necessity, at the very least, may be expressed through acts of voting. Holmes and O'Connor thus confirmed that there are at least two components to a vote—one is decisive, the other is a type of speech act that communicates more than the decision itself. When a person votes for

[36] Minnesota State Board of Community Colleges v. Knight, 104 S. Ct. 1058, 285 (1984).

a Senator, they make the decision for that Senator to *be* Senator. When a person votes for a Senator, they also communicate that which they cannot in public forums—things like "disapproval" and "disagreement" are affirmed by O'Connor as things that may be otherwise communicated in public fora but that are expressed in the registration of a ballot. No ballot for Senator asks a voter to cast a vote to decide whether they "approve/disapprove" of a candidate, nor whether they "agree/disagree" with a Senator. The ballot only asks what candidate they choose to be Senator, while the Court has affirmed that choice to also be the location of expressing disapproval and disagreement that functions as a necessary remediation to the necessary limitations on individuals' expression in republican democratic governance.

A third way of understanding a vote as a symbolic form of expression is the way voting takes on meaning in political life. When votes are cast in elections, the act means that certain leaders take office. However, the election of leaders in elections historically is a public expression of ideas. At the congressional level, voting has historically served to communicate many ideas. Party leaders, for example, have taken votes to have an expressive supplement to the merely factual election of leaders. Examples are abundant of the importance of this type of expression when it comes to voters' sentiments about those that make rules about them (most elections communicate to those that make rules that apply to voters). This is especially true, for example, of the political expression that occurs with votes in mid-term elections for congressional representation. The ability to vote in a midterm election for House and Senate seats is often a way of expressing

disapproval of the President. For example, according to political scientist Gary Jacobson, midterms function to communicate a referendum on the job of the President, "All of the evidence suggests that the referendum component was even larger in 2006 than is normal for a midterm. For example, evaluations of the president's performance had a much greater impact on the individual vote in 2006 that in any of the eight previous midterms going back to 1974."[37]

Furthermore, elected officials learn not just who the elected representatives are in election results—they also find *meaning* in the vote. Tim Kaine, Chairman of the Democratic National Committee, stated after the 2010 election that, "Voters *sent a message* that change has not happened fast enough."[38] President Obama stated of the 2010 mid-terms, "and I think it is clear that *the voters sent a message*, which is they want us to focus on the economy and jobs and moving this country forward."[39] Senator Rand Paul stated in 2014 mid-terms, "Today, *voters sent a message* to President Obama and Hillary Clinton, rejecting their policies and many of their candidates."[40] That some American citizens may *send a message* to those that rule over them with a vote, while citizens residing in the District may not share the same

[37] Gary C. Jacobson, *The 2008 Presidential and Congressional Elections: Anti-Bush Referendum and Prospects for the Democratic Majority*, 124 Political Science Science Quarterly 1, 3 (2009).
[38] Tim Kaine. "DNC Chairman Tim Kaine's Statement on the Midterm Election Results," *DemRulz*. (November 3, 2010). Available at http://demrulz.org/news/dnc-chairman-tim-kaine%E2%80%99s-statement-on-the-midterm-election-results.
[39] President Barack Obama. "Remarks by the President After a Cabinet Meeting," *White House Archives*. (November 4, 2010), Available at https://obamawhitehouse.archives.gov/the-press-office/2010/11/04/remarks-president-after-a-cabinet-meeting.
[40] From Rand Paul Facebook post, quoted in Erin McClam, "Rand Paul Mocks Hillary Clinton in Possible Preview of 2016 Fight," *NBCNews.com*. (November 5, 2014), Available at http://www.nbcnews.com/politics/rand-paul/rand-paul-mocks-hillary-clinton-possible-preview-2016-fight-n241956.

right to *send their message* means those in the former category may "say more" or "speak more" with their votes than those citizens residing in the current District.

B. Prior Restraint and the Doctrine of Unconstitutional Conditions.

Prior restraint is a one of several foundational ideas concerning the First Amendment. "Prior restraint" as regards the First Amendment freedom of speech, "is an administrative or judicial order forbidding certain communications when issued in advance of the time that such communications are to occur. A prior restraint on speech is the most serious and least tolerable infringement on First Amendment rights."[41] Furthermore, "A prior restraint of speech cannot be upheld under the First Amendment unless justified by a compelling State interest to protect against a serious and identified threat or harm."[42] The federal government thus possesses the highest demand to create laws that do not engage in the practice of restraining speech activities before they occur unless there is a compelling reason to do so.

Prior restraint may take several forms, including the restriction of speech as a condition of federal funding. Heather Blakeman explained that, "Congress frequently conditions federal funding allocations on requirements that recipients refrain from or engage in certain speech."[43] However, more recently, the Supreme

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[41] Fern L. Kletter, *First Amendment Protection Afforded to Comic Books, Comic Strips, and Cartoons*, 118 A.L.R. 213 (2004), § 11[a].
[42] George Blum et al., *§472. Freedom From Prior Restraints and Censorship*, AMERICAN JURISPRUDENCE (2ND Edition), (2017).
[43] Heather Blakeman, *Speech-Conditioned Funding and the First Amendment: New Standard, Old Doctrine, Little Impact*, 13 NORTHWESTERN JOURNAL OF INTERNATIONAL HUMAN RIGHTS 27, 27 (2015).

Court has developed a new standard to determine when a funding condition that "implicates speech is a proper exercise of Congress's power under the Spending Clause and when the condition unconstitutionally burdens recipients' First Amendment rights."[44] The standard set forth in *Agency for International Development v. Alliance for Open Society International, Inc.* "protects the primary justification for protecting recipients' freedom of speech in conditional funding cases—the development of knowledge—by preserving their ideas and opinions on matters of public debate. In practice, however, the standard will not protect the speech of most recipients of speech-conditioned foreign aid."[45]

The foreign aid exemption highlights the underlying principle involved in First Amendment restrictions through federal funding conditions. The sole justification in allowing federal funds to be conditioned on restraining certain types of speech is rooted in the foreign policy objectives that, by definition, provide a compelling government interest, "Foreign policy, the allocation of foreign aid, and the imposition of conditions on foreign funds all work together to contribute to national interests achieved internationally."[46] Even more importantly, foreign recipients of federal funds are not entitled to First Amendment protection, "Because Congress can allocate foreign aid funds to foreign recipients, who are not entitled to First Amendment protection, instead of to U.S. recipients, it can bypass the constitutional limits on speech-conditioned foreign aid funding."[47]

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[44] *Id.*
[45] *Id.,* 28.
[46] *Id.*, 29.
[47] *Id.*, 28.

When conditioning aid to recipients who are American citizens, the doctrine of unconstitutional conditions holds "that the government ordinarily may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether. . . . The doctrine of unconstitutional conditions requires that in order to condition a grant of discretionary benefit on the release of a constitutional right, the government must have an interest which outweighs the particular right at issue."[48] Thus, "a condition that coerces recipients into relinquishing their constitutional rights, for example, by leaving recipients no practical choice but to accept the funds, is an unconstitutional condition."[49] The issue of "practical choice" and the District is of central importance.

Congress has considerable power[50] over the district in budgetary matters—power retained by Congress in the Home Rule Act (1973).[51] Congress may thus choose to fund certain activities and not fund other activities as a matter of general practice. Congress may exercise control over the budget operations of the District. Specifically, the Home Rule authorizes Congress to reserve "reserve the right, at any

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[48] George Blum et al., *§411. Doctrine of Unconstitutional Conditions*, AMERICAN JURISPRUDENCE (2ND Edition), (2017).
[49] *Id. at 36*, 33. Blakeman also noted to see Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415 (1989).
[50] Powers are more troubled in matters pertaining to funds in D.C.'s budget that are garnered by taxes and fees levied by D.C., not by Congress.
[51] President Clinton vetoed the 2000 District of Columbia Appropriations Act. The Act would "prohibit not only the use of Federal, but also District funds to provide assistance for petition drives or civil actions that seek to obtain voting representation in the Congress for residents of the District of Columbia." While President Clinton vetoed on the grounds of Home Rule, this essay suggests that he could have very easily done so on First Amendment grounds—not only because congress prohibited the drive to express sentiments for statehood, but also on the grounds of the right to petition (see the unconstitutional conditions section of this essay, for example).

time, to exercise its constitutional authority as legislature for the District, by enacting legislation for the District on any subject, whether within or without the scope of legislative power granted by this Act, including legislation to amend or repeal any law in force in the District prior to or after enactment of this Act and any act passed by the Council."[52] Aside from the challenges described above to whether the Home Rule may inhibit the rights secured in the Bill of Rights in the first place by its being rooted in the Organic Act, the critical point here is that the Act established a Council that has authority to make particular types of legislation—legislation that must still adhere to those rights enshrined in the Bill of Rights.

In other words, when Congress declared its "reservation of rights" in the Home Rule Act, the reservation of rights cannot be taken to mean the exercise of complete authority over the District regardless of the rights in the Bill of Rights. One would not, for example, think it justified by the Bill of Rights for Congress to allocate money to the District of Columbia on the condition that no money be given to particular legal defenses that city public attorneys use in court (as that would violate a person's Sixth Amendment rights), or that money be granted for the salaries of publicly elected officials of the District on the condition that they not make certain arguments in their speeches (as that would inhibit the First Amendment rights of elected officials in public deliberations). Thus, just as when Congress grants municipal charters, non-profit organization status, corporate charters, and other organizational structures, the funds allocated to those entities cannot be conditioned on the forfeiture of a constitutional right. When Congress

[52] D.C. CODE ANN. § 1-206 (1981 & Supp. 1984).

issued the municipal charter to the District, it granted certain legislative powers to the District. In granting those powers, the Congress may not condition the funding of those legislative powers in ways that require the forfeiture of constitutional rights. They "may" be able to undo the Home Rule Act of 1973 and take over the activities of the charter, just as they can revoke the charter of any municipality, non-profit, or corporate charter, but they cannot condition federal funds to those entities on the basis of forfeiting rights guaranteed by the Bill of Rights and subsequent Amendments. Thus, Congress may choose to revoke particular legislative acts by the Council consistent with the Home Rule Act, but conditioning federal funds on the legislative acts that are intrinsic to First Amendment expression is a form of prior restraint in the same way that conditioning federal funds on the condition that legal defenses not be funded violates the Sixth Amendment right to a fair trial.

C. Viewpoint Discrimination

Another area that may implicate the District of Columbia concerning the First Amendment lies in the regulation of particular viewpoints that are permissible or impermissible by the District. The First Amendment principle of viewpoint discrimination "prohibits that government from discriminating based on a viewpoint that the speaker seeks to express, regardless of the nature of the forum. 'Viewpoint discrimination' is an egregious form of content discrimination, and, therefore, the government must abstain from regulating speech when a specific motivating ideology or opinion or perspective of the speaker is the rationale for the restriction. Viewpoint discrimination is censorship in its purest form and

government regulation that discriminates among viewpoints threatens the continued vitality of free speech."[53] Because the District passes laws based on its municipal status on a regular basis, the laws regularly express the will of the people of the District. That Congress may regulate the legislative affairs of the District in a general sense may by the result of the Home Rule Act. However, if Congress were to allow one piece of expressive legislation, while vetoing another expressive legislation based on the expressive content of the legislation, then the Congress would be engaged in discrimination based on the content of the legislation. Other rationales may suffice, but restricting based on expressive content switches the burden of presumption, "When the government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded congressional enactments is reversed; content-based regulations are presumptively invalid under the First Amendment, and the government bears the burden of rebutting that presumption."[54] Where Congress selectively allows or disallows the District to express certain ideas and not other ideas, it invokes a power that infringes on the underlying value of First Amendment speech—that individuals may communicate issues of significance through their elected officials, and by passing laws requiring their elected officials to advocate for their democratically decided interests.

D. Corporate Free Speech and the District Municipal Corporation

[53] George Blum et al., *§476. Regulations Based on Speaker's Viewpoint or Content of Speech*, AMERICAN JURISPRUDENCE (2ND Edition), (2017).
[54] United States v. Playboy Entertainment Group, 120 S. Ct. 1878, 817 (2000). See also R.A.V. v. St. Paul, 112 S. Ct. 2538 (1992).

The District of Columbia is a municipal corporation given all the powers of a municipal corporation. In *Barnes v. District of Columbia*, the Court affirmed the municipal corporate status of the District, explaining that Congress created this corporation, declaring "it to be a body corporate, not only with the power to contract, to sue and be sued, and have a seal, but also that it is a body corporate for municipal purposes, and that it shall exercise all other powers of a municipal corporation, not inconsistent with the constitution and laws of the United States and the provisions of this act."[55] Of significance here is the distinction between powers and rights. The Congress may limit the powers of corporations, "The legislature may give it all the powers such a being is capable of receiving, making it a miniature State within its locality. Again, it may strip it of every power, leaving it a corporation in name only, and it may create and recreate these changes as often as it chooses, or it may itself exercise directly within the locality any or all the powers usually committed to a municipality."[56] The ruling in *Barnes* thus establishes the *powers* of the corporation. However, it does not rule on the *rights* of the municipal corporation.

The rights of the corporation are a matter outlined in the First Amendment (amongst other) rights. *Citizens United v. Federal Elections Commission* affirmed the fundamental First Amendment rights of corporations, "The Court has recognized that First Amendment protections extends to corporations."[57] Justice Kennedy continued in the Court's opinion by explaining,

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[55] Barnes v. District of Columbia, 91 U.S. 540 (1875).
[56] *Id.*
[57] Citizens United v. Federal Election Commission, 130 S. Ct. 876, 883 (2010).

> 'The identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster' (quoting *Belotti*, 435 U.S., at 783)). The Court has thus rejected the argument that political speech of corporation or other association should be treated differently under the First Amendment simply because such associations are not 'natural persons.'"[58]

Even though Congress creates the corporation by way of granting charter, in *Citizens United* the Court ruled that, "the Government lacks the power to ban corporations from speaking."[59] Furthermore, "the worth of speech 'does not depend upon the identity of its source, whether corporation, association, union, or individual.'"[60] Thus, even if, under the provisions set forth by *Barnes*, the municipal corporation were stripped of *power* to the point where the District existed as a corporation in name only, the District's corporate name would have the First Amendment *right* to speak as a corporate person that contributes to discussion, debate, and the dissemination of information and ideas.

E. The Freedom of Government Speech

Municipalities are governments that have the freedom of expression. The Home Rule Act was specifically an Act that provided "a charter for local government in the District of Columbia subject to acceptance by a majority of the registered

[58] *Id.*, 400.
[59] *Id.*, 347.
[60] *Id.*, 349.

qualified electors in the District of Columbia, to delegate certain legislative powers to the local government, to implement certain recommendations of the Commission on the Organization of the Government of the District of Columbia, and for other purposes."[61] In short, the charter established the District of Columbia as a local government. As a matter of First Amendment law, government speech has been affirmed by the Court.

Most recently, the Court expressed different views on the proper application of the Texas specialty license plate program in *Walker v. Sons of Confederate Veterans*.[62] However, the *Walker* case was particularly significant in affirming "the Court's unanimous assertion that the government, when speaking as the government, is free to say or not say whatever it wishes, and is free to express some viewpoints and not others."[63] When it comes to the local government of the District as a municipality, citizens may choose to speak collectively through expressions of their ballot. This would include, for example, the mandate provided by citizens that recently voted to express their desire for statehood.

F. Freedom of Speech and Senate Debates.

Without revisiting some of the points above related to the intrinsic connection between the right to vote and the First Amendment (voting in the House

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[61] United States Government Publishing Office, *District of Columbia Charter Act*. H.R. 9682 (93rd). (October 10, 1973). Available at https://www.gpo.gov/fdsys/granule/STATUTE-87/STATUTE-87-Pg774/mods.xml.
[62] Walker v. Sons of Confederate Veterans, 135 S. Ct. 2239 (2015).
[63] Frederick Schauer, *Not Just License Plates: Walker v. Sons of Confederate Veterans, Government Speech, and Doctrinal Overlap in the First Amendment*, 2015 Sup. Ct. Rev. 265, 271.

and Senate is both *decisive* and *expressive*), suffice it to say that one of the undergirding First Amendment principles is the ability to participate in political discussions, have the views of the American people represented in the Senate, and the opportunity to have the voices contribute to vibrant political debate. One of the most common ways that American citizens express their ideas about national policy is to have direct influence over those that make policy over them. However, another common way that expression occurs is by the way Senators express the views of their constituents in Senate debates, "In the nation's capital, Members [of the Senate] serve as *advocates* for the *views* and needs of their constituents as well as stewards of national interests."[64] Citizens residing in the District of Columbia are not citizens like those in federal territories like Puerto Rico or Guam—those countries were never fully citizens in the same way those living in D.C. were prior to the Organic Act. The people were citizens of Maryland and Virginia—fully citizens of the United States. Their voices were recognized in the constitutional delegation when debating over the ratification of the Constitution. Their voices were included prior to the Organic Act of 1801 through their representatives. The denial of representation by the now nearly 700,000 people in the District means the denial of their voice on matters concerning the most significant decisions that our country makes. This includes representation on vital Senate committees where many of these important issues are debated. The refusal of full representation is a denial of First Amendment expression. Justifying such denial based on a provision found in

[64] R. Eric Petersen, *Roles and Duties of a Member of Congress: Brief Overview*, CONGRESSIONAL RESEARCH SERVICE, 5 (November 9, 2012). Available at https://fas.org/sgp/crs/misc/RL33686.pdf.

the Constitution's main text ignores the central purpose of conditioning the passage of that provision on the protection of the expression that comes with having ideas expressed on the Senate floor by the delegates of American citizens.

G. Future Possibility: Assisted Suicide Restrictions and the District.

While not specifically at issue at the time of this writing, there has been considerable attention given to congressional provisions that may restrict the District of Columbia from providing for the expression of its health practitioners concerning the expression of ideas pertaining to assisted suicide. The First Amendment law is currently unsettled in this area, but may have implications for the citizens residing in the District of Columbia. For example, a Minnesota Supreme Court recently ruled that prohibiting "a person from advising or encouraging another in taking the other's own life" violated the First Amendment freedom of speech,"[65] even while upholding the provision of the law that "prohibited a person from assisting another in taking the other's own life."[66] Those concerned with the First Amendment rights of citizens in the District will continue to pay attention to this issue if it develops any further.

Conclusion

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[65] Sherry F. Colb, *Minnesota Court Rules That First Amendment Protects Encouraging a Suicide*, JUSTIA: LEGAL ANALYSIS AND COMMENTARY FROM JUSTIA. (April 16, 2014). Available at https://verdict.justia.com/2014/04/16/minnesota-court-rules-first-amendment-protects-encouraging-suicide.

[66] *Id.*

The founding era of the United States bore witness to several large projects in order to found the United States—passing a Constitution and Bill of Rights, establishing a national treasury, instituting judicial review in *Marbury*. As the founders built that foundation, many rights were violated (some due to simple lack of oversight). We exist in an historical moment where the broad projects at the origins of the nation may undergo narrow tailoring in order to consider those rights that may have been left in the wake of the founding era's larger projects. The Bill of Rights are significant in the predictive wisdom of the founders who thought there might come a time when the Constitution's text would be used as justification for the erosion of rights. The Bill of Rights were designed to be a safeguard against what might be lost in the "broad strokes" in forming a new national government. Not the least of these are the First Amendment protections[67] that are designed to prevent the federal government from ruling over its citizens with no accountability by those very citizens. The purpose of the Bill of Rights was to serve as a tool of future generations to consider the details that may eventually erode the rights of certain citizens from being represented both collectively and individually on matters of public concern in the most significant fora where the First Amendment activity of debates occur *and* where decisions are made by representatives in the republican form of government. We have the ability to worry about those details today, and we should.

[67] There may be other rights to consider given this insight. Subjecting the Organic Act to strict scrutiny may be relevant to, for example, the right to self-government. See for example, George Blum et al., *§91. Inherent Right of Self-Government*, AMERICAN JURISPRUDENCE (2ND Edition), (2017).