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Constitutional Expectations

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CONSTITUTIONAL EXPECTATIONS

Richard Primus*

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INTRODUCTION

The inauguration of Barack Obama was marred by one of the smallest constitutional crises in American history. As we all remember, the President did not quite recite his oath as it appears in the Constitution.¹ The error bothered enough people that the White House redid the ceremony a day later, taking care to get the constitutional text exactly right.² Or that, at least, is what everyone thinks happened.³ What actually happened is more interesting. The second time through, the President *again* departed from the Constitution's text.⁴ But the second time, nobody minded. Or even noticed. In that unremarked feature of an otherwise trivial affair lies a deep truth about the role of text in American constitutionalism. And as the outlines of the great are sometimes visible in the small, careful attention to the

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1. Compare Barack Obama Oath of Office, <http://www.youtube.com/watch?v=m1Yff-9MZs> (last visited Feb. 14, 2010) (displaying video of inaugural oath on January 20, 2009), with U.S. CONST. art. II, § 1, cl. 8 (prescribing text of the oath).

2. Barack Obama Re-Takes Oath of Office, http://www.youtube.com/watch?v=bq_PzWzC7rA (last visited May 16, 2010) (recording of second taking of the oath on January 21, 2009).

3. See, e.g., Nicole Guadiano, *Day 1 capped with inauguration do-over for Obama*, USA TODAY, Jan. 23, 2009 ("The oath took 25 seconds—this time without a flaw."); Michael D. Shear, *Obama Sworn In Again, With Right Words*, WASH. POST, Jan. 22, 2009, at A4; Jeff Zeleny, *I Really Do Swear, Faithfully: Obama and Roberts Try Again*, N.Y. TIMES, Jan. 22, 2009, at A1 (describing the second recitation as "flawless"); *Anderson Cooper 360 Degrees* (CNN television broadcast Jan. 21, 2009).

4. See *infra* Part II.

“corrected” inaugural oath can reveal something important about how larger constitutional questions are resolved.

Consider the more significant issue, now before Congress, of whether to give the District of Columbia a voting seat in the House of Representatives.⁵ Many people consider giving the District a representative flatly unconstitutional,⁶ and their view has a reasonable basis. The Constitution says that members of the House shall be chosen “by the People of the several States,”⁷ and the District of Columbia is not a state. But the kerfuffle over the inaugural oath suggests two lessons. The first is that the text of the Constitution need not prevent D.C. from sitting in Congress. The second, however, is that passing the District of Columbia House Voting Rights Act might have the unintended effect of *delaying* the enfranchisement of District residents. If the inaugural oath played as constitutional farce, passage of the Act might lead to constitutional tragedy.

To understand why, we should start by going back to the inauguration.

I. THE OATH

Recall what happened on Inauguration Day. According to Article II of the Constitution, the President is supposed to swear that he will “faithfully execute the Office of President of the United States.”⁸ When prompting the President, the Chief Justice mistakenly put the word “faithfully” at the end of the phrase, so the inauguree swore to “execute the Office of President of the United States faithfully” instead.⁹ In all likelihood, the error had no legal significance. But as a matter of statesmanship, botching the Constitution was unfortunate, and self-appointed watchdogs began to chatter.¹⁰

Just to be sure, the President and the Chief Justice restaged the swearing-in one day later. When Chief Justice Roberts asked whether the President was ready to take the oath again, President Obama replied, “I am—and we’re going to do it very slowly.”¹¹ There was no room for mistake; everything should be perfect. White House Counsel Greg Craig emphasized this exacting approach to the oath in an official statement:

5. See District of Columbia House Voting Rights Act of 2009, H.R. 157, 111th Cong. § 2(a) (2009).

6. E.g., *The District of Columbia House Voting Rights Act of 2009: Hearing on H.R. 157 Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 85 (2009) (comments of Professor Jonathan Turley, calling the bill “flagrantly unconstitutional”).

7. U.S. CONST. art. I, § 2, cl. 1.

8. U.S. CONST. art. II, § 1, cl. 8.

9. See Barack Obama Oath of Office, *supra* note 1; U.S. CONST. art. II, § 1, cl. 8.

10. See, e.g., Joan Biskupic, *Oath gives Justice Roberts and Obama some pauses*, USA TODAY, Jan. 21, 2009, at 6A (stating that the “Internet was awash in commentary” after the botched oath).

11. Barack Obama Re-Takes Oath of Office, *supra* note 2.

We believe that the oath of office was administered effectively and that the president was sworn in appropriately yesterday. But the oath appears in the Constitution itself, and out of an abundance of caution, because there was one word out of sequence, Chief Justice Roberts administered the oath a second time.¹²

Given all that, one might think that the Chief Justice and the President adhered scrupulously to the text of Article II on their second try. But they did not. Taking his cue from the Chief Justice, President Obama began his second attempt at the oath with the words “I, Barack Hussein Obama, do solemnly swear”¹³ As should be obvious, Article II does not contain the words “Barack Hussein Obama.” Nor does Article II say “I [insert name here] do solemnly swear.” What the Constitution says, quite clearly, is, “I do solemnly swear”¹⁴ So when President Obama inserted his name between “I” and “do,” he deviated from the text of the Constitution just as surely as he had the day before.

The point here is not that the President got the oath wrong by inserting his name, much less that he and Chief Justice Roberts need to do a third take. For one thing, this second deviation from the text is legally inconsequential. But that was true of the oath as spoken on January 20, too. The important point is that on the second try, the President got the oath exactly right, albeit without conforming to the words of the Constitution. The first deviation from the text struck people as wrong—wrong enough to warrant staging the ritual again. The second deviation from the text struck people as right—right enough as to be the way that the ritual was conducted under conditions of maximum exactitude. People who were exercised about the first textual departure were happy with the second one: the cable news commentariat and the blogosphere, both of which had field days with the January 20 oath, seemed fully satisfied by the January 21 version.

The reason why is deeply planted in American legal culture. It has to do with something we might call constitutional expectations.

II. EXPECTATIONS

Constitutional expectations are intuitions about how the system is supposed to work. They arise from a combination of experience, socialization, and principle. Obviously, Americans do not all share a single, precisely defined set of expectations. Indeed, conflicts among rival sets of expectations help to account for many disagreements about constitutional law. Over a relatively broad domain, however, informed Americans share expectations about the rules of government. Those expectations are often closely related to the constitutional text, but the text does not always capture them

12. Steve Benen, *Out of an Abundance of Caution*, WASH. MONTHLY, Jan. 22, 2009, http://www.washingtonmonthly.com/archives/individual/2009_01/016551.php (quoting statement of White House General Counsel Greg Craig).

13. Barack Obama Re-Takes Oath of Office, *supra* note 2.

14. U.S. CONST. art. II, § 1, cl. 8.

precisely. On the contrary, our shared expectations go well beyond the strict textual requirements of the Constitution.

We all expect that members of both parties will stand up and applaud when the President enters the House chamber to deliver a State of the Union Address. More consequentially, we all expect that elections will be held on a certain Tuesday in November and that the party in power will not move election day to a time more favorable for its own partisan political fortunes. Political parties in other democracies routinely engage in election-timing gamesmanship, and we do not think that our elected officials are above partisan tactics, but moving election day is something we expect them not to do. The Constitution does not forbid it; on the contrary, Article I empowers Congress to pick the date.¹⁵ But as informed and experienced members of this society, we have a different sense of the rules of the game, and we firmly expect that those rules will be observed.

Constitutional expectations can supplement the Constitution's text. We all agree that the President may not censor speech critical of his administration, even though the First Amendment is addressed only to Congress.¹⁶ And sometimes our constitutional expectations actually override the text. For example, Article III says that "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury."¹⁷ In practice, criminal defendants in federal courts routinely waive jury trial, opting to be tried by judges alone. We read Article III as if it said that a defendant may choose a jury trial, even though it actually says that a jury trial is mandatory. Almost nobody minds that we deviate from this text.¹⁸ We think of a jury trial as a right of the accused rather than a necessary structural feature of adjudication, and we have done things this way for a long time, so nothing strikes us as strange when a judge grants a defendant's request to skip the jury. Our constitutional expectations are not offended, and we do not pause much over the language of Article III, if we notice it at all.

Our shared constitutional expectations explain why the constitutionally correct form of the inaugural oath began "I, Barack Hussein Obama, do solemnly swear," even though the text of Article II says something else. With the exception of Lyndon Johnson on the day of his emergency inauguration aboard Air Force One, every President since Franklin Roosevelt has inserted his name into the oath.¹⁹ Few Presidents inserted their names prior to Roosevelt. Some did not personally recite the oath at all, instead merely

15. U.S. CONST. art. I, § 4, cl. 1.

16. U.S. CONST. amend. I ("Congress shall make no law . . .") (emphasis added).

17. U.S. CONST. art. III, § 2, cl. 3.

18. Akhil Amar is a principled exception. See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1196 (1991) (arguing based on the text of Article III that criminal defendants may not constitutionally waive jury trial, despite established practice to the contrary).

19. See Audio recording: President Johnson Taking the Oath of Office: November 22, 1963 and Beyond, <http://www.lbjlib.utexas.edu/johnson/kennedy/Oath%20of%20Office/oath.htm> (last visited Feb. 14, 2010) (downloadable audio of President Johnson taking the Oath of Office aboard Air Force One). Recordings and accounts of all other takings of the Inaugural Oath since 1932 are on file with the author.

responding “I do” after someone else recited the oath in question form.²⁰ But as a result of a nearly continuous practice over the last seventy-six years, each of us today who remembers previous inaugurations—or has seen recordings or fictionalized representations—expects to hear the name. Those expectations define the operative constitutional norm, even though the text reads differently.

Our organic sense of the ritual defines the constitutional norm so powerfully that we depart from the text even when going slowly and carefully so as to get every little thing exactly right. This does *not* mean that we disrespect the Constitution. The Constitution is sacred to Americans, just as Scripture is sacred to believers. But as people of many faiths know, sacred texts are often approached through the lens of traditional practice, and the expectations that practice creates are often more powerful than words on paper. So when we have a settled practice of doing something different from what is written in the text, the text tends to give way.

When that happens, Americans rarely say, “We are now departing from the text.” Our genuine regard for the document and our self-conception as a political community governed under a written constitution are too powerful to permit that move, or at least to permit it frequently. More often, we re-read the text to make it match our practices, either by giving new content to specific terms or by deciding that what a textual passage reasonably means is different from what it literally says. And sometimes—indeed, more often than most of us realize—we just stop noticing that the text says what it does.

III. THE ACT

Four weeks after the inaugural mulligan, the Senate focused on a more consequential parsing of the Constitution’s text. The issue was the District of Columbia House Voting Rights Act. As its name suggests, this Act would give the people of Washington, D.C., a voting seat in the House of Representatives.²¹ Many of the Act’s opponents have acknowledged that the continuing denial of voting representation to the half-million Americans living in the District is unjust.²² But unfortunately, most of them say, the

20. For what it is worth, a few preliminary drafts of Article II at the constitutional convention of 1787 read “I, _____, solemnly swear,” suggesting that if the Framers made a choice on this matter, it was against the insertion of names. See 3 *THE FOUNDERS’ CONSTITUTION* 573 (Philip B. Kurland & Ralph Lerner eds., 2000).

21. District of Columbia House Voting Rights Act of 2009, H.R. 157, 111th Cong. § 2(a) (2009).

22. See Hearing on H.R. 157 Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties, *supra* note 6, at 84–85 (comments of Professor Jonathan Turley, saying that the continuing disfranchisement of District residents is a “great wrong”); COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS, REP. ON DISTRICT OF COLUMBIA HOUSE VOTING RIGHTS ACT OF 2007, S. REP. NO. 110–123, at 22 (2007) (additional views of Senators Tom Coburn and Ted Stevens) (“The lack of Congressional representation for American citizens living in the District of Columbia is a grave injustice.”).

Constitution does not permit Congress to fix the problem, because Article I limits membership in Congress to states.²³

Sixty-one senators voted to approve the bill.²⁴ The vote was not entirely along party lines—six Republicans were among the majority, and two Democrats dissented²⁵—but many commentators view the Act in simple partisan terms.²⁶ Everyone knows that a D.C. representative would be a Democrat. (Indeed, everyone knows that her name would be Eleanor Holmes Norton.) To secure some Republican support, the Act was written to add a predictably Republican seat in Utah as well as a seat for D.C.,²⁷ but that wrinkle maintains partisan balance only in the short term. Utah's entitlement to an extra seat would expire in 2013,²⁸ and the District of Columbia's representation would continue indefinitely. So given the text of Article I, it is easy to see Democratic support for the Act as a simple case of partisan interest overcoming constitutional obligation.

Given a certain set of constitutional expectations, awarding D.C. a representative would indeed be unconstitutional, and perhaps flagrantly so. But the Constitution only bars D.C. from the House if Article I is read with that particular set of expectations. The difficult and legitimately contestable question that the present conflict poses is whether those expectations should be permitted to determine how we read the Constitution, even at the expense of keeping half a million Americans unrepresented in Congress.

The argument that the Act is unconstitutional has a reasonable basis. Article I, Section 2 says that the House of Representatives “shall be composed of Members chosen every second Year by the People of the several States”²⁹ The District of Columbia is not a state. Accordingly, the constitutional objection runs, admitting D.C. to the House would ignore the written requirements of Section 2. And that cannot possibly be acceptable.³⁰ Yet this argument is not as tight as it seems, because our system for electing members of Congress already—and uncontroversially—deviates from the text of Section 2 on a regular basis. If we were more aware of those deviations, the argument that Section 2 requires excluding D.C. might have less weight. But like the practice of inserting the President's name in the inaugural oath, our accustomed departures from the text of Section 2 have become

23. See COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS, *supra* note 22, at 29.

24. U.S. Senate Roll Call Votes 111th Cong. on Passage of S. 160 As Amended, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=1&vote=00073 (last visited Feb. 14, 2010) (recording roll-call vote).

25. *Id.*

26. See, e.g., George F. Will, *In a D.C. State of Mind*, WASH. POST, Feb. 5, 2009, at A17.

27. District of Columbia House Voting Rights Act of 2009, H.R. 157, 111th Cong §§ 3–4 (2009).

28. See *id.*

29. U.S. CONST. art. I, § 2, cl. 3 (emphasis added).

30. See, e.g., Hearing on H.R. 157 Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties *supra* note 6, at 21–22 (comments of Professor Jonathan Turley) (noting that the constitutional question simply comes down to the plain meaning of “State” under Article I, § 2).

well integrated into our constitutional expectations. We tend not to notice them.

Consider something we might call the Scott Murphy problem, after the man who now represents New York's Twentieth District in the House of Representatives. After President Obama nominated then-Senator Hillary Clinton to be secretary of state, New York Governor David Patterson named Kirsten Gillibrand—then the representative for the Twentieth District—to replace Clinton in the Senate.³¹ In April 2009, Murphy won a special election held to replace Gillibrand.³² Now the problem: when will Murphy run for re-election? Again, Article I, Section 2 says that the House of Representatives “shall be composed of Members chosen *every second Year* by the People of the several States.”³³ But Murphy, who was elected in 2009, will run for re-election in 2010—that is, in two consecutive years, rather than every second year as required by the text. This is standard practice. When a representative dies or resigns, the seat is filled as quickly as possible by special election, and the newly chosen representative does not wait two full years from the special election to run again. He runs on the normal calendar, even if that means that he is chosen in two consecutive years, or twice in the same year, rather than every second year. As a result, the House regularly contains members who are not chosen quite as described in the text. Nobody minds. Nobody should. This is the way we do things, and nothing about it contradicts expectations that Americans hold in light of their educations, experiences, or values. Absent such a contradiction, we might not even notice that our practice deviates from the text.

Once we do notice the textual problem, we have three options. One, which we will surely not choose, is to discontinue the practice and require Murphy to wait until 2011 to run for re-election. The second, which we can think of as a hard textualist solution, is to find a way to read the words of Article I, Section 2 so as to permit our traditional practice. The third, which we can think of as a soft textualist solution, is to decide that the phrase “every second year” is not reasonably read to apply in a literal or wooden way to the situation of special elections.

It is not difficult to identify hard textualist solutions. Try this one. Article I, Section 2 says that the House “shall be composed of Members chosen every second Year.”³⁴ That is a problem if the House can only *include* the people who *compose* it. But maybe the word “composed” does not entail exclusivity, such that some representatives are members of the House but without being part of its “composition.” If we were inclined in this direction, we could have a long argument, by turns tendentious and unintentionally comical, about the meaning of “composed.” (Might a football game be

31. Danny Hakim & Nicholas Confessore, *Patterson to Pick a Senator Today*, N.Y. TIMES, Jan. 23, 2009, at A1.

32. Irene Jay Liu & Leigh Hornbeck, *Murphy going to Congress*, ALBANY TIMES UNION, Apr. 25, 2009, available at <http://www.timesunion.com/ASPStories/story.asp?StoryID=793690>.

33. U.S. CONST. art. I, § 2, cl. 1 (emphasis added).

34. *Id.*

“composed” of four quarters, even though halftime is also part of the game? Might a turkey sandwich be “composed” of bread and turkey, even if it also has a little mustard? What did James Madison put on his turkey sandwiches?) If we ultimately decided that “composed” can bear a non-totalizing meaning, such that the 400-plus representatives elected every second year “compose” the House but several others can come along for the ride, we could reconcile the practice we have come to expect with the literal terms of the text. And as practical constitutional lawyers have understood since the time of John Marshall, the fact that this view of “composed” would yield such a reconciliation is a reason to lean toward that reading.³⁵

This practical wisdom rests on the understanding that the verbal gymnastics of hard textualism are not the real reasons why people who enter the House at special elections can run for re-election on the regular schedule rather than having to wait for two full years. The real reasons lie in our intuitions about the way the system would sensibly work. This view of the matter is closer to soft textualism: if it doesn’t make sense to impose the “every second year” rule woodenly in cases involving special elections, then we say that insisting on a literal reading is not a mature or a reasonable way of showing respect for the text.

But why do some literal readings seem obtuse, and why do some non-literal readings seem reasonable? The chief answer lies in our constitutional expectations. Where our expectations match the literal text, we think of following the words carefully as demonstrating fidelity rather than small-mindedness. Where our expectations diverge from literal readings, we may regard literalism as cramped and juvenile. Accordingly, the soft textualist is willing to read “every second year” flexibly because our practice has not conformed to it literally. The hard textualist may be forced instead to adopt a particular view of the word “composed.” But we can be certain that both of them will read the text through their constitutional expectations. Just as nobody thinks that President Obama needs to take the oath a third time, nobody thinks that Congressman Murphy needs to wait until 2011 to run for re-election.

IV. CHANGE

For constitutional expectations to eclipse or to recast the text, they must be strongly held or widely shared. When they are not, we often get conflict, including conflict over textual meaning. To be sure, conflict over the meaning of a text is sometimes just garden-variety interpretive disagreement. But when one side of a constitutional conflict endorses an innovative position that the other side thinks plainly contradicts the text, it is sometimes the case that the innovators have a new set of constitutional expectations. At that point, the conflict is not finally about the text. It is about whether the inno-

35. See, e.g., *M’Culloch v. Maryland*, 17 U.S. 316, 401–02 (1819) (writing that the fact of the existence of the Bank of the United States counseled construing terms in the Constitution to be compatible with the existence of the Bank, if possible).

vators can destabilize an existing set of expectations. In such a conflict, defenders of the old arrangement may sincerely understand themselves as standing up for the text, plain and simple. But if decisionmakers adopt a new perspective about how government ought to work—if they can replace their old expectations with something new—then new ways of seeing the text will follow.

A. In General

That raises a great question of constitutional development: what makes constitutional expectations change? There is no formulaic answer. Sometimes new problems make people rethink their values and their institutional arrangements. For example, the Great Depression prompted many Americans to reevaluate the allocation of power between the federal and state governments.³⁶ Similarly, the confrontation with Nazi Germany and the Soviet Union prompted major changes in constitutional law's regard for racial equality, free speech, and open democratic politics.³⁷ Sometimes a rising generation has different experiences, educations, or demographics from those of the generation it replaces: Justice Sotomayor's cohort may question things that Justice Souter's took for granted. Sometimes political movements persuade decisionmakers to see American ideals, and American history, in ways that require new understandings of the Constitution.³⁸ Most Supreme Court Justices play some role in shaping constitutional expectations, but few have as much effect as Franklin Roosevelt, Ronald Reagan, or Martin Luther King. And in the struggle among different sets of constitutional expectations, the field of battle can be as wide, and the means of persuasion as varied, as they are in other struggles over prevailing social, political, or intellectual assumptions. In the decade before the Supreme Court decided *Brown v. Board of Education*,³⁹ Harry Truman decided to integrate the armed forces⁴⁰ and Branch Rickey decided to integrate Major League Baseball;⁴¹ both changes made it easier for millions of Americans—some of them judges—to imagine the end of segregation.⁴² Sergeant Joe Friday played an unquantifiable role in making ordinary Americans

36. See generally 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 105–30 (1991).

37. See generally RICHARD A. PRIMUS, *THE AMERICAN LANGUAGE OF RIGHTS* 177–233 (1999).

38. See, e.g., Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927 (2006).

39. 347 U.S. 483 (1954).

40. See MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS* 85–86 (2000).

41. See, e.g., JULES TYGIEL, *BASEBALL'S GREAT EXPERIMENT: JACKIE ROBINSON AND HIS LEGACY* 54 (2008).

42. See Jack M. Balkin, *What Brown Teaches Us About Constitutional Theory*, 90 VA. L. REV. 1537, 1547 (2004).

expect *Miranda* warnings to accompany arrests,⁴³ and the cultural changes that helped make *Lawrence v. Texas*⁴⁴ possible can be understood partly as William Rehnquist losing ground to *Will and Grace*.

Obviously, this account is in tension with the idea that legitimate constitutional change comes only through formal amendments that change the text.⁴⁵ But that idea does not capture most of the real constitutional change that has occurred in American history.⁴⁶ We understand the Fourteenth Amendment to prohibit racial segregation,⁴⁷ as courts a hundred years ago did not.⁴⁸ The text has not changed, but the dominant set of values has, and mainstream Americans read the Constitution in light of their new perspective. Similarly, the Supreme Court's recent announcement that the Second Amendment protects an individual right to own firearms⁴⁹ does not reflect the discovery of a heretofore neglected but inherently correct reading of the text. It is a victory for a political movement that, over the course of decades, persuaded many people to adopt a certain view of that text.⁵⁰ The gun rights movement's persuasive efforts did not just involve arguments about the words in the Second Amendment. They also involved appeals to values and heroic retellings of salient parts of American history.⁵¹ Their success has brought constitutional change through the same mechanism that drives most constitutional development: a change in understanding among the decision-making class, and therefore a change in constitutional expectations.

B. In Particular

Giving the District of Columbia a voting seat in the House of Representatives would be, if it occurred, the third act in a long-running drama featuring shifting constitutional expectations about the District. The first act concerned an issue of equal access to the legal system. The second act dealt with rights against racial discrimination. The third act, if it comes, will ad-

43. See LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 400 (2000) (describing the incorporation of the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966), into the standard script of the popular television show *Dragnet*, on which Sergeant Friday was a main character).

44. 539 U.S. 558 (2003) (striking down a law prohibiting sexual conduct between same-sex partners).

45. See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 551–52 (1994) (maintaining that the sole legitimate means of altering constitutional law is formal constitutional amendment).

46. See, e.g., David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1469–78 (2001) (enumerating examples of constitutional change that have come without formal amendment).

47. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

48. See *Plessy v. Ferguson*, 163 U.S. 537 (1896).

49. *McDonald v. Chicago*, 561 U.S. ____ (2010); *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

50. See Reva B. Siegel, *Dead or Alive: Originalism As Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008).

51. *Id.* at 196.

dress political representation. All in all, the story is about the triumph of a modern vision of constitutionalism on which equal individual rights are the cornerstone of constitutional law—a vision that is partly the product of the twentieth-century confrontation with European totalitarianism.⁵² As that vision has become more powerful in American constitutional expectations, it has become harder and harder to maintain a regime in which District residents are denied basic rights that other Americans enjoy.

1. *Access to law.* The technical issue in the first act was the doctrine of diversity jurisdiction. In the words of Article III of the Constitution, federal courts can exercise jurisdiction in controversies “between Citizens of different States.”⁵³ If Marvin Michigander sues Patricia Pennsylvanian in the courts of either Michigan or Pennsylvania, we might worry about bias toward the hometown party. Diversity jurisdiction permits the suit to proceed in the more neutral forum of a federal court.⁵⁴ In 1940, Congress authorized the federal courts to play the same role in lawsuits where one party resided in the District of Columbia.⁵⁵ The logic is easy. If Wally Washingtonian sues Mary Marylander in the local courts of either D.C. or Maryland, the home-field advantage problem is just as great as when Michigander sues Pennsylvanian. Putting the case in a federal court is again a potential solution. The trouble, of course, is that the District of Columbia is not a state, and the Constitution authorizes diversity jurisdiction only for controversies “between Citizens of different States.”⁵⁶ So by letting people from D.C. play the game on the same terms as everybody else, Congress may have violated the Constitution.

In *National Mutual Insurance Company v. Tidewater Transfer Company* (“*Tidewater*”), the Supreme Court addressed the issue and fractured badly.⁵⁷ Justice Rutledge argued that D.C. should, for this purpose, be treated as if it were a state.⁵⁸ Justice Frankfurter insisted that the District is not a state and cannot possibly be considered one.⁵⁹ And Justice Jackson articulated a complex theory—ingenious to some,⁶⁰ bizarre to others⁶¹—under which

52. See PRIMUS, *supra* note 37.

53. U.S. CONST. art. III, § 2, cl. 1.

54. *E.g.*, *Guaranty Trust Co. v. York*, 326 U.S. 99, 111 (1945) (“Diversity jurisdiction is founded on assurance to non-resident litigants of courts free from susceptibility to potential local bias.”). This does not mean that no other rationales for the rule have been advanced. See, e.g., Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 495–97 (1928) (arguing that diversity jurisdiction was established to provide parties with access to business-friendly federal common law and out of concern that state courts might be biased against creditors).

55. 28 U.S.C. § 1332(e) (1940) (stating that for the purposes of diversity jurisdiction, the District of Columbia is to be treated as a state).

56. U.S. CONST. art. III, § 2, cl. 1.

57. 337 U.S. 582 (1949).

58. *Id.* at 604–26 (Rutledge, J., concurring in the judgment, joined by Murphy, J.).

59. *Id.* at 646–55 (Frankfurter, J., dissenting, joined by Reed, J.).

60. See, e.g., Gil Seinfeld, *Article I, Article III, and the Limits of Enumeration*, 108 MICH. L. REV. 1389 (2010).

61. See, e.g., Philip B. Kurland, *The Supreme Court and the Attrition of State Power*, 10 STAN. L. REV. 274, 293–94 (1958); Louis H. Pollak, Book Review, 65 YALE L.J. 749, 754 n.20

Congress had not authorized the federal courts to exercise diversity jurisdiction in cases involving District residents but had instead (and legitimately) given the federal courts a separate function that looked like, but was not, diversity jurisdiction.⁶² None of these three positions commanded a majority. But together the Jackson and Rutledge opinions garnered five votes in favor of upholding Congress's law. So over the loud protests of the text-wielding dissenters,⁶³ *Tidewater* established that a District resident can sue people from Maryland in federal court, albeit without a clear explanation of why. And that is the law to this day.⁶⁴

Over the decades, something interesting has happened to the way that lawyers think about *Tidewater*. When a federal court hears a case between a D.C. resident and a non-D.C. resident in 2010, we just say that the court is exercising diversity jurisdiction.⁶⁵ It is cumbersome to say, "This might be diversity jurisdiction, or it might be some other complicated thing that Robert Jackson believed in." And the fact that courts have now done the thing thousands of times has rendered it normal. So today nobody blinks when we say that federal courts exercise diversity jurisdiction over cases involving District residents, even though the text of Article III still clearly speaks of cases "between Citizens of different States." Nobody thinks there is anything normatively wrong with giving D.C. residents access to law on the same terms as everyone else, and experience over time has made it seem a part of the system like any other. Our constitutional expectations have shifted: what was once a fighting issue has become a historical footnote.

2. *Racial equality*. The second act featured equal protection. When the Supreme Court heard argument in *Brown v. Board of Education*,⁶⁶ it also considered a companion case challenging school segregation in Washington, D.C.⁶⁷ *Brown* was decided under the Equal Protection Clause of the Fourteenth Amendment, which directs that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."⁶⁸ But again, the District is not a state, so the Fourteenth Amendment does not apply there. Absent some creative solution, the Supreme Court faced the prospect of ordering the desegregation of schools from Delaware to Kansas while leaving segregation in the nation's capital untouched.

(1956) (reviewing ROBERT H. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* (1955)).

62. *Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (plurality opinion of Jackson, J., joined by Black & Burton, JJ.).

63. *Id.* at 652–53 (Frankfurter, J., dissenting) (denouncing the Court's result as contrary to the language of Article III, the "whole history of the federal judiciary," and sound constitutional policy).

64. *See, e.g.*, *Vreven v. Am. Ass'n of Retired Pers.*, 604 F. Supp. 2d 9, 12 n.3 (D.D.C. 2009) (recognizing diversity jurisdiction in a suit between a Maryland resident and a D.C. corporation).

65. *See id.*

66. 347 U.S. 483 (1954).

67. *Bolling v. Sharpe*, 347 U.S. 497 (1954) (holding unconstitutional the racial segregation of public schools in the District of Columbia).

68. U.S. CONST. amend. XIV, § 1.

That did not happen. The felt imperative to apply the racial equality norm everywhere was too strong.⁶⁹ So on the same day in 1954 when it decided *Brown*, the Court announced in *Bolling v. Sharpe* that racial segregation in the District violated the Due Process Clause of the Fifth Amendment,⁷⁰ which says that no person shall “be deprived of life, liberty, or property, without due process of law.”⁷¹ The Fifth Amendment binds the federal government and therefore the District of Columbia. Later lawyers described this move by saying that the Fifth Amendment’s Due Process Clause incorporates the content of the Fourteenth Amendment’s Equal Protection Clause.⁷²

Measured by the standards of conventional legal interpretation, *Bolling* was strange.⁷³ In addition to its Equal Protection Clause, the Fourteenth Amendment contains a Due Process Clause forbidding states to “deprive any person of life, liberty, or property, without due process of law.”⁷⁴ If the Due Process Clause of the Fifth Amendment carries the content of the Equal Protection Clause, many people reasoned, so does the identically worded Due Process Clause of the Fourteenth Amendment—and that would make the Equal Protection Clause redundant. Partly on these grounds, the Court prior to 1954 routinely rejected the idea that the Fifth Amendment could support equal protection claims,⁷⁵ and many technically proficient lawyers

69. See, e.g., Michael W. McConnell, *The Fourteenth Amendment: A Second American Revolution or the Logical Culmination of the Tradition?*, 25 LOY. L.A. L. REV. 1159, 1162 n.14 (1992) (“As a matter of judicial statecraft, the imperative in *Bolling* was clear.”).

70. 347 U.S. 497.

71. U.S. CONST. amend. V.

72. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 32 (1980).

73. See Richard A. Primus, *Bolling Alone*, 104 COLUM. L. REV. 975, 977 & n.7 (2004) (collecting objections to the reasoning of *Bolling*).

74. U.S. CONST. amend. XIV.

75. See, e.g., *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) (upholding military curfew for persons of Japanese descent and declaring that the Fifth Amendment contains no Equal Protection Clause); *Detroit Bank v. United States*, 317 U.S. 329, 337 (1943) (upholding statute giving tax advantage to certain property owners, because “[u]nlike the Fourteenth Amendment, the Fifth contains no equal protection clause and it provides no guaranty against discriminatory legislation by Congress”). This is not to say that the pre-*Bolling* Court always rejected any suggestion that the federal government was bound by some sort of constitutional equality requirement. After all, any legal system that respects the idea that like cases should be treated alike entails a kind of equality norm. Even before *Bolling*, therefore, the Court acknowledged some minimal requirement of equality in adjudication. See, e.g., *Truax v. Corrigan*, 257 U.S. 312, 332 (1921) (“Our whole system of law is predicated on the general fundamental principle of equality of application of the law.”). But that norm did virtually none of the work that the Equal Protection Clause would later do. (Consider, after all, that that kind of equality norm was necessarily present in the constitutional system from the beginning, long before the Equal Protection Clause existed.) In the years leading up to *Bolling*, however, the Court became more solicitous of a thicker equality norm running against the federal government, albeit while still hanging on to the formal proposition that equal protection itself ran only against the states. See, e.g., *Hurd v. Hodge*, 334 U.S. 24, 35 (1948) (striking down a racially restrictive covenant partly on the grounds that “the public policy of the United States,” albeit not the Constitution, imposed an antidiscrimination norm on the federal government); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (stating that laws curtailing the civil rights of particular racial groups are subject to rigid scrutiny, but without accepting the idea that the category of constitutional

considered *Bolling*'s reasoning absurd. Even a generation later, John Hart Ely would pronounce *Bolling* "gibberish,"⁷⁶ and Lawrence Lessig would lament the "embarrassing textual gap" with which the decision's defenders must reckon.⁷⁷

Crucially, however, *Bolling*'s defenders quickly came to include virtually all respectable opinion in American law, Ely and Lessig included.⁷⁸ The decision was 9-0 in the Supreme Court. Justice Frankfurter signed on in spite of his dissent in *Tidewater*, as did the arch-textualist Justice Hugo Black.⁷⁹ Not surprisingly, segregationists proclaimed the Court lawless. In a bill proposing the impeachment of several Supreme Court Justices, the Georgia legislature adduced *Bolling* as evidence that the Justices had stopped paying any attention to the words of the Constitution.⁸⁰ But as official racial discrimination became a consensus evil, *Bolling* ceased to have detractors. In his Supreme Court confirmation hearings in 1987, Judge Robert Bork pronounced himself willing to hack away a good deal of modern constitutional law in the name of the integrity of the Constitution itself—but he would not dream, he said, of overruling *Bolling*.⁸¹

For a while, the oddity of *Bolling*'s interpretation of the Fifth Amendment remained visible in the legal culture. Courts sometimes continued to write as if there were some substantive difference between the equality rules of the Fourteenth Amendment, which apply to the states, and the equality rules of the Fifth Amendment, which apply to the District under the authority of *Bolling*.⁸² But over time the rules for handling the District converged with the more general rules. As lawyers lost any intuitive sense that non-discrimination principles should have less force against the federal government than against the states, they started treating the two sets of cases interchangeably.⁸³ Within a generation, revisionism had set in: in 1975 the Supreme Court flatly declared that its approach to equal protection claims under the Fifth and Fourteenth Amendments had "always been precisely the

equal protection applies to the federal government). The timing of this change was not arbitrary; it came just as the confrontation with Nazi Germany and the imperatives of the early Cold War prompted American constitutional decisionmakers to take racial equality more seriously. See PRIMUS, *supra* note 37, at 187–89.

76. See ELY, *supra* note 72.

77. See Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 409 (1995).

78. See ELY, *supra* note 72; Lessig, *supra* note 77, at 409–10; William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2365 (2002) (describing *Bolling* as "universally accepted").

79. On Justice Black as a hard-core textualist, see, for example, SANFORD LEVINSON, CONSTITUTIONAL FAITH 31–32 (1988).

80. See Impeachment of Certain U.S. Supreme Court Justices, H.R.J. Res. 100, 1957 Gen. Assem. (Ga. 1957).

81. *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. pt. 1, 287–88 (1989).

82. See, e.g., *Schneider v. Rusk*, 377 U.S. 163, 168 (1964) (asserting, as the Court routinely did before *Bolling*, that the Fifth Amendment contains no Equal Protection Clause).

83. See PRIMUS, *supra* note 73, at 989.

same.”⁸⁴ Just as the jurisprudential oddity of *Tidewater* became normalized over time, so did *Bolling*’s radical reading of the Fifth Amendment. And today law students and laypeople alike consider it bizarre that the constitutional rules regarding discrimination would ever have been any different in the District of Columbia from what they are in Alabama or New York.

3. *Representation in Congress*. Like Congress’s extension of diversity jurisdiction to the District in 1940 or the Supreme Court’s ordering school desegregation there in 1954, the proposal to give the District voting representation in Congress today faces sincere opposition based on constitutional text. Article I, Section 2, clause (i) does say that the House of Representatives “shall be composed of Members chosen every second Year by the People of the several States,”⁸⁵ and Article I, Section 2, clause (ii) does say that “[n]o Person shall be a Representative who shall not . . . when elected, be an Inhabitant of the State in which he shall be chosen.”⁸⁶ But if the text were the complete basis of opposition, the problem would be easily solved, because it is possible to read these clauses in a way that permits representation for Washington, D.C. To be sure, the fact that the clauses *can* be read to permit that representation does not prove that they *should* be read to do so. But at the very least, the availability of readings that permit a representative for D.C. suggests that reading the text to prohibit representation is rooted in decisions of value, or in constitutional expectations, rather than being dictated by the text of the Constitution alone.

As described earlier, the word “composed” in clause (i) need not entail exclusivity; perhaps the House can include people who do not help “compose” it.⁸⁷ If so, clause (i) does not bar D.C. from the House. If not, it is unclear why Scott Murphy can run for re-election before 2011. And we can dissolve the apparent obstacle of clause (ii) by reading “State” as a generic placeholder noun for “jurisdiction represented” rather than as implying that all representatives must be from states, just as we read “he” three words later as a generic placeholder for “that person” rather than as implying that all representatives must be men. Nothing is more textually problematic about reading “State” as a generic term that can include the District of Columbia in Article I, where the issue is congressional representation, than in Article III, where the issue is diversity jurisdiction. Similarly, the idea that “composed” need not entail exclusivity is no more textually problematic than the equation of “due process” with “equal protection” that has become orthodox since *Bolling*, or than reading “the trial of all crimes *shall* be by

84. See *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975). The possibility of some daylight between the two Amendments’ versions of equal protection remained articulable for a bit longer, as some Justices suggested that Congress might have more leeway than states to implement race-conscious affirmative action. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (opinion of O’Connor, J., joined by Rehnquist, C.J., and White, J.). By the 1990s, however, the Court settled on the view that equal protection is the same across the board, whether against the federal government or the states. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

85. U.S. CONST. art. I, § 2, cl. 1.

86. U.S. CONST. art. I, § 2, cl. 2 (emphasis added).

87. See *supra* Part III.

jury” to mean “*may* be by jury at the defendant’s option,”—or, for that matter, than inserting the words “Barack Hussein Obama” between “I” and “do solemnly swear” in Article II.

Perhaps this hard-textualist flyspecking will not seem like a good way to resolve important constitutional issues. But the point of the exercise is show that the real problem with interpreting Article I to permit D.C. to sit in Congress is not a matter of hard textualism. The real problem is that permitting representation for the District of Columbia is at variance with many people’s strong constitutional expectations. We are accustomed to Congress as a body for states only, and we have internalized this sense of how the system is supposed to work. Once that expectation is in place, it can easily find confirmation in the text of Article I, even though that text does not require it. If you are sure that D.C. cannot sit in Congress, you may hold fast to a (perfectly plausible) reading of Article I that supports that conclusion. And as Karl Llewellyn once said, “What satisfies the conscience lulls the mind.”⁸⁸ As long as people’s constitutional expectations firmly support excluding D.C. from Congress, they will not wonder whether the text could be read in a different way.

Suppose, however, that constitutional expectations were to shift on the issue of representation for D.C., just as they earlier shifted on the question of whether the Constitution requires the same racial equality regime in the District that it requires everywhere else. Suppose, in other words, that large majorities of American officials came to believe that our basic constitutional values demand letting the residents of Washington, D.C., vote and be represented. A different set of textual readings would then seem natural. To be sure, the new received wisdom in American law would not necessarily be the one that I have suggested about the meaning of “composed.” Perhaps a different textual reconciliation would emerge. Or perhaps the prevailing explanation would not take the form of hard textualism at all. Constitutional lawyers might simply learn to shrug their shoulders at the mismatch between the language of Section 2 and the fact of representation for D.C., just as they now overlook the practice of letting criminal defendants waive jury trial. If pushed, they might say that mature respect for the constitutional text means reading it in a reasonable way rather than a crabbed and literal one. But one way or another, the text would not prohibit the practice.

Such a shift is almost surely in progress. Sixty-one senators, including a small handful of Republicans, recently voted to let D.C. sit in Congress.⁸⁹ No less a conservative lawman than Kenneth Starr is publicly supporting the change.⁹⁰ And when Eleanor Holmes Norton appears on *The Colbert Report*

88. K.N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 10 (1934).

89. See U.S. Senate Roll Call Votes 111th Cong. on Passage of S. 160 As Amended, *supra* note 24 (including among the yea votes Republican Senators Susan Collins, Orrin Hatch, Richard Lugar, Olympia Snowe, Arlen Specter, and George Voinovich).

90. See Kenneth Starr & Patricia M. Wald, *Congress Has the Authority to Do Right by D.C.*, WASH. POST, Sept. 17, 2006, at B8 (arguing that Congress may and should give the District of Columbia a voting seat in the House of Representatives).

and invokes the heroic American tradition of expanding political equality, she is bidding to change the constitutional expectations of her audience.⁹¹ Just as other marginalized groups have achieved constitutional equality by slow degrees, residents of the District of Columbia may be progressing from access to law (*Tidewater*) to equal individual rights (*Bolling*) to participation in the lawmaking process (in a case yet to be named).

Each increment of that change makes the next increment more likely. *Tidewater* and *Bolling* are outgrowths of a deep social change, but they are not merely reflections of that change. Once they are part of the law, they also function as causal forces increasing the momentum of that change. That District residents are treated interchangeably with residents of states for more and more constitutional purposes helps condition Americans to expect such similarity of treatment more broadly, rather than to expect that the District will be treated as a constitutional anomaly. To be sure, the expectation that the District is anomalous remains alive, as the controversy over congressional representation demonstrates. But the strength of that expectation—or perhaps the balance between the expectation of anomaly and the expectation that the Constitution applies in the Nation's capital more or less as it does everywhere else—is shaped in part by the fact that the District's status is less anomalous than it once was. A future case testing the constitutionality of a law granting the District a voting seat in the House of Representatives would be decided under conditions that *Bolling* and *Tidewater* helped to shape, as well as in a world whose deeper conditions helped give rise to *Bolling* and *Tidewater* themselves.

In the best-case scenario, the judges who are asked to rule in that future case would avoid reflexively reading Article I through an old set of expectations. Indeed, it is precisely when existing expectations might be seriously unjust that courts should think most critically about whether those expectations are finally entitled to the force of law. Good judges would recognize that the best resolution of the D.C. voting issue depends on the answers to deeper questions. Does the long-established practice of excluding the District justify the continuing disfranchisement of the people living there? Does it reflect a conscious choice by the Founders, and if so, how much authority does such a choice have centuries later? Are there any sound reasons *other* than a possible obligation to abide by a past decision for denying D.C. residents representation today? Rather than taking the text of Article I to prohibit their asking these questions, perceptive judges might understand that the answers to these questions are crucial to figuring out the best reading of Article I. And if these deeper questions are too subjective to be entrusted to judges, the solution is for courts to decline to rule on the

91. See *The Colbert Report* (Comedy Central television broadcast Feb. 20, 2009) (featuring as guest District of Columbia Representative Eleanor Holmes Norton, making the argument that American fairness requires letting District residents vote).

issue—that is, to declare the matter nonjusticiable—rather than to decide the case on the basis of less appropriate questions.⁹²

C. Timing

To recognize that the Constitution might permit D.C. to sit in the House, a court would have to overcome a traditional set of constitutional expectations. That might happen before too long. But it is unlikely to happen right now. The majority of Supreme Court Justices sitting in 2010 probably still regard the exclusion of D.C. from Congress as deeply normal. As a result, the Court might find it hard to see past the apparent obstacles of Article I.

So consider a final irony. If the present District of Columbia Voting Rights Act becomes law, it will be challenged before a Court likely to strike it down.⁹³ There would then be a judicial precedent on the books declaring that D.C. cannot sit in Congress, and *stare decisis* would make it harder for a future Court to go the other way. But if the Court does not engage the issue now, there would be more time for constitutional expectations to continue shifting. If supporters of enfranchising the District's voters continue to press their case in public, the chances of the Court's upholding a future reform law will grow with each passing year. In other words, passing a law that enfranchises D.C. in the present Congress may be the last, best hope for locking in a waning set of constitutional expectations and denying representation to D.C. voters for years to come.

This was probably not the perspective of the senators who succeeded in amending the pending bill to include a second title before it passed the Senate. That second title, called the Second Amendment Enforcement Act,

92. Nonjusticiability could come in the form of either concluding that no plaintiff had standing to challenge the law or determining under the political question doctrine that, within broad parameters, a decision to broaden the electorate represented in Congress is the province of Congress itself. Either way, one benefit of the judiciary's declining to weigh in on the matter would be that enfranchising the District of Columbia would not force courts to confront the question of whether other presently unrepresented American jurisdictions must also have voting seats in the House of Representatives. Many people who recognize the injustice of disfranchising the District of Columbia's half-million residents worry that acknowledging a principle that would cure that problem would also require representation for Guam, the Virgin Islands, and all other American-Flag jurisdictions. Some of these territories are tiny, and the idea of giving each one its own Representatives might seem absurd. Nor can the problem be sensibly solved by grouping all the residual jurisdictions together into a "miscellaneous territories" district, given the enormous diversity of the political situations of the relevant populations. Fear of entering this swamp may persuade some people that the wiser course is simply not to enfranchise the District of Columbia in the first place: a Court that ruled on constitutional grounds that American citizens in the District of Columbia must be permitted to elect a voting member of the House of Representatives would either have to endorse the same principle for these other territories or else explain why not. This problem only presents itself, however, if the courts were to rule affirmatively that District residents are constitutionally entitled to voting representation. If instead the courts declared the issue nonjusticiable, the problem would not arise. The question of whether to extend the franchise would be left with Congress, and Congress would be free to extend the principle or not as it judged appropriate.

93. As noted in the previous footnote, a Court persuaded of the wisdom of not passing on the constitutionality of the Act might conclude that no plaintiff had standing to challenge the law. But standing doctrine being what it is, it is at least equally easy to imagine a Court convinced of the law's unconstitutionality finding that some plaintiff did have standing to bring a constitutional challenge.

would repeal D.C.'s ban on semiautomatic weapons.⁹⁴ The bill as passed by the Senate would thus give the District a voting seat in the House of Representatives and also eliminate a large portion of the District's remaining gun control laws. Many representatives who favor letting the District have a vote also support firearms regulation, so this tactic has put them to a choice of evils, and the inclusion of the weapons provision may have been intended to prevent the overall bill from becoming law. All twenty-three of the amendment's sponsors voted against final passage of the Act;⁹⁵ many or even all of them probably hold the good-faith belief that giving the District a vote in the House would be unconstitutional. But if the Second Amendment Enforcement Act scuttles the District of Columbia House Voting Rights Act, the senators who promoted it will have done an important if unintended service to the long-term project of enfranchising the District's voters. If the firearms amendment makes the House of Representatives balk, the issue will go away for a while. The present Supreme Court will not decide the constitutional question. Constitutional expectations will continue to change. And one day, the issue will return, perhaps to be adjudicated in a Court that is more ready to say yes, or at least to stay out of the way.

CONCLUSION

The District of Columbia House Voting Rights Act is now before the House of Representatives. If it reaches the President's desk—with or without the firearms provision attached—a constitutionally sophisticated chief executive will have to decide what to do. He will know that signing the bill would attract reams of criticism, and ridicule, from people who think of themselves as good-faith textualists. If misplacing a word in the oath was dicey, adding a seat in Congress could be downright explosive. Without a doubt, the President would be accused of ignoring the Constitution. Given the present state of constitutional expectations, many people thinking about the matter in good faith would find the accusation credible.

Others would have a different understanding. No less sincerely, they would see the Act as vindicating the Constitution's central democratic principles. Over time, their numbers would grow. Constitutional expectations cannot long avoid mapping the facts on the ground, especially when those facts conform to our basic principles. Down the road, it would seem strange that District residents were ever denied political representation, just as it

94. See District of Columbia House Voting Rights Act of 2009, Title II – Second Amendment Enforcement Act. The semiautomatic weapon ban still stands after *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), which struck down a ban on the use of handguns and other firearms commonly used for self-defense in the home.

95. Compare S. Amdt. 575 to S. 160, Feb. 25, 2009 (introduced by Senator Ensign and cosponsored by Senators Vitter, Coburn, DeMint, Burr, Wicker, Thune, Grassley, Risch, Inhofe, Bennett, Enzi, Chambliss, Isakson, Crapo, Cornyn, Brownback, Corker, Martinez, Murkowski, Graham, Roberts, and Barrasso), with U.S. Senate Roll Call Votes 111th Cong. on Passage of S. 160 As Amended, *supra* note 24 (recording Senate roll-call vote on District of Columbia House Voting Rights Act of 2009).

seems strange now that individual equality rights guaranteed to state residents might not have applied in the District as well.

Future readers of Article I might wonder why D.C. could sit in Congress, given the language about “states.” But the fact that D.C. *did* sit in Congress would go a long way toward persuading them that the text was consistent with the practice. If some of them were not persuaded—if they insisted that the practice contradicts the text and that constitutional text must be read strictly—then they might suspect that the President who signed the law making it happen failed to preserve, protect, and defend the Constitution of the United States. But if so, they would have trouble explaining what happened on the day, or days, when he swore to do so.