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DISTRICT OF COLUMBIA HOUSE VOTING RIGHTS ACT OF 2009

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

ON

H.R. 157

JANUARY 27, 2009

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DISTRICT OF COLUMBIA HOUSE VOTING RIGHTS ACT OF 2009

TUESDAY, JANUARY 27, 2009

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND CIVIL LIBERTIES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:05 a.m., in room 2141, Rayburn House Office Building, the Honorable Jerrold Nadler (Chairman of the Subcommittee) presiding.

Present: Representatives Conyers, Nadler, Watt, Scott, Johnson, Baldwin, Cohen, Jackson Lee, Sensenbrenner, Rooney, Franks, King, Jordan, and Gohmert.

Staff present: David Lachmann, Subcommittee Chief of Staff; Kanya Bennett, Majority Counsel; and Paul Taylor, Minority Counsel.

Mr. NADLER. This hearing of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties will come to order. I want to welcome all of you to our first hearing in this Congress.

We are joined by some Members who are new to this Committee and some who are new to the Congress. I look forward to working with each of you.

Our Subcommittee has an extremely important jurisdiction. It includes amendments to the Constitution, civil rights, civil liberties, the Civil Rights Division of the Justice Department, the U.S. Commission on Civil Rights, and the Community Relations Service.

Big debates in the Subcommittee have always been spirited—an interesting word—as well they should be. It reflects the fact that the Members of this Subcommittee care very deeply about these fundamental issues and are not inclined to shrink from the difficult questions.

Whatever our differences, that is something we all share.

Our Ranking Member in this Congress is the former Chairman of the full Committee, the gentleman from Wisconsin, Mr. Sensenbrenner. He was first elected to Congress in 1978 and has previously chaired the Judiciary Committee and the Committee on Science.

He has made many important contributions in the area of civil rights. As Chairman of the full Committee, he shepherded through the reauthorization of the Voting Rights Act. Of course, he also championed it in 1982.

He has also been a tireless advocate for the rights of the disabled. He can be an effective partisan, an effective adversary, but he is also adept at working across the aisle to solve problems.

I very much look forward to working with you, sir, during this Congress. Does the gentleman wish to make any opening remarks before we have opening statements on the hearing?

Mr. SENSENBRENNER. No, I will reserve my time and have an opening statement on the hearing.

Mr. NADLER. Thank you very much.

And I will make my opening statement on the hearing now.

We now turn to the subject of the hearing. The Chair recognizes himself for 5 minutes for an opening statement.

Today we returned to one of the great injustices in our Nation, the fact that the citizens of the District of Colombia do not have voting representation in Congress. After more than two centuries, the only word to describe this state of affairs is inexcusable.

More than half a million Americans within sight of this capital are completely disenfranchised. The people who patrol the streets, put out the fires and provide emergency services, the people who operate the trains and buses, drive the cabs, even to people who work for the Members sitting up here on the dais, the people who work so hard to make sure we can do our jobs, do not have the simple voting rights we demand of other Nations.

It is appropriate that this Committee, which produced the Voting Rights Act, showed as its first act of the new Congress consider legislation to secure the votes for the people of the District of Columbia.

The current state of affairs is not without consequences. How else would this Congress decide a high profile issue for the District of Columbia? This body regularly interferes with the rights of D.C. residents in ways that none of our constituents would ever tolerate, yet Congress does it time and time again.

How can Congress get away with it? Very simply. Because the people of the District of Columbia have no vote. They have what this Nation fought its revolution over: taxation without representation.

The District is not without a voice. The District's delegate, Eleanor Holmes Norton, is a powerful and persuasive voice for the District of Columbia to Members of Congress. Even without a vote in the House, she has been an effective voice for the city. But she is effective in spite of her lack of full voting rights—no small matter.

This legislation represents a carefully crafted bipartisan compromise. In 2007 it passed the House by a vote of 241 to 177. The principle is clear, and I hope uncontroversial. The current state of affairs is repugnant to our system of government.

For this reason I believe that Delegate Norton's must receive careful and thoughtful consideration. I hope the 111th Congress will be the one that finally rights this historic wrong. The citizens of the capital of this greatest democracy on earth must not be disenfranchised. It is time to remove this stain from our Nation's honor.

I yield back the balance of my time, and I would now recognize the distinguished Ranking minority Member, the gentleman from Wisconsin, Mr. Sensenbrenner, for his opening statement.

[The bill, H.R. 157, follows:]

111TH CONGRESS
1ST SESSION

H. R. 157

To provide for the treatment of the District of Columbia as a Congressional district for purposes of representation in the House of Representatives, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 6, 2009

Ms. NORTON introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To provide for the treatment of the District of Columbia as a Congressional district for purposes of representation in the House of Representatives, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "District of Columbia
5 House Voting Rights Act of 2009".

6 **SEC. 2. TREATMENT OF DISTRICT OF COLUMBIA AS CON-**
7 **GRESSIONAL DISTRICT.**

8 (a) IN GENERAL.—Notwithstanding any other provi-
9 sion of law, the District of Columbia shall be considered

a Congressional district for purposes of representation in the House of Representatives.

(b) CONFORMING AMENDMENTS RELATING TO APPORTIONMENT OF MEMBERS OF HOUSE OF REPRESENTATIVES.—

(1) INCLUSION OF SINGLE DISTRICT OF COLUMBIA MEMBER IN REAPPORTIONMENT OF MEMBERS AMONG STATES.—Section 22 of the Act entitled "An Act to provide for the fifteenth and subsequent decennial censuses and to provide for apportionment of Representatives in Congress", approved June 28, 1929 (2 U.S.C. 2a), is amended by adding at the end the following new subsection:

"(d) This section shall apply with respect to the District of Columbia in the same manner as this section applies to a State, except that the District of Columbia may not receive more than one Member under any reapportionment of Members.".

(2) CLARIFICATION OF DETERMINATION OF NUMBER OF PRESIDENTIAL ELECTORS ON BASIS OF 23RD AMENDMENT.—Section 3 of title 3, United States Code, is amended by striking "come into office;" and inserting the following: "come into office (subject to the twenty-third article of amendment to

the Constitution of the United States in the case of the District of Columbia);".

SEC. 3. INCREASE IN MEMBERSHIP OF HOUSE OF REPRESENTATIVES.

(a) PERMANENT INCREASE IN NUMBER OF MEMBERS.—Effective with respect to the One Hundred Eleventh Congress and each succeeding Congress, the House of Representatives shall be composed of 437 Members, including any Members representing the District of Columbia pursuant to section 2(a).

(b) REAPPORTIONMENT OF MEMBERS RESULTING FROM INCREASE.—

(1) IN GENERAL.—Section 22(a) of the Act entitled "An Act to provide for the fifteenth and subsequent decennial censuses and to provide for apportionment of Representatives in Congress", approved June 28, 1929 (2 U.S.C. 2a(a)), is amended by striking "the then existing number of Representatives" and inserting "the number of Representatives established with respect to the One Hundred Eleventh Congress".

(2) EFFECTIVE DATE.—The amendment made by paragraph (1) shall apply with respect to the regular decennial census conducted for 2010 and each subsequent regular decennial census.

(c) SPECIAL RULES FOR PERIOD PRIOR TO 2012 REAPPORTIONMENT.—

(1) TRANSMITTAL OF REVISED STATEMENT OF APPORTIONMENT BY PRESIDENT.—Not later than 30 days after the date of the enactment of this Act, the President shall transmit to Congress a revised version of the most recent statement of apportionment submitted under section 22(a) of the Act entitled "An Act to provide for the fifteenth and subsequent decennial censuses and to provide for apportionment of Representatives in Congress", approved June 28, 1929 (2 U.S.C. 2a(a)), to take into account this Act and the amendments made by this Act.

(2) REPORT BY CLERK.—Not later than 15 calendar days after receiving the revised version of the statement of apportionment under paragraph (1), the Clerk of the House of Representatives, in accordance with section 22(b) of such Act (2 U.S.C. 2a(b)), shall send to the executive of each State a certificate of the number of Representatives to which such State is entitled under section 22 of such Act, and shall submit a report to the Speaker of the House of Representatives identifying the State (other than the District of Columbia) which is enti-

tled to one additional Representative pursuant to this section.

(3) REQUIREMENTS FOR ELECTION OF ADDITIONAL MEMBER.—During the One Hundred Eleventh Congress and the One Hundred Twelfth Congress—

(A) notwithstanding the final undesignated paragraph of the Act entitled "An Act for the relief of Doctor Ricardo Vallejo Samala and to provide for congressional redistricting", approved December 14, 1967 (2 U.S.C. 2c), the additional Representative to which the State identified by the Clerk of the House of Representatives in the report submitted under paragraph (2) is entitled shall be elected from the State at large; and

(B) the other Representatives to which such State is entitled shall be elected on the basis of the Congressional districts in effect in the State for the One Hundred Tenth Congress.

SEC. 4. NONSEVERABILITY OF PROVISIONS.

If any provision of this Act, or any amendment made by this Act, is declared or held invalid or unenforceable, the remaining provisions of this Act and any amendment

1 made by this Act shall be treated and deemed invalid and
2 shall have no force or effect of law.

○

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman. And I think it is significant that you have called the first legislative hearing of this Congress on this important issue.

Let me state at the outset that I think that there is discrimination against residents of the District of Colombia.

There are three ways to address this discrimination. Two of them are constitutional. One of them is of questionable constitutionality and which will result in litigation that will take years. And if H.R. 157 is determined to be unconstitutional, then we will go back to square one to address this issue.

The two constitutional ways are first, to pass a constitutional amendment granting the residents of the District of Columbia the right to vote for voting representation in the Congress of the United States. That was tried once before. It failed ratification of the states. I think we ought to try it again and send it to the states for their consideration.

The second is to retrocede the residential and nongovernment part of the District of Columbia back to the state of Maryland. That was done with the part of the District of Columbia across the river in 1846, when that area was retroceded to Virginia, even though it probably gave the Commonwealth of Virginia more tax dollars in which to fight a very unfortunate war a few years later.

That is very clearly constitutional as well and can be done short of a constitutional amendment.

The H.R. 157 is questionable. We know that there will be litigation. This promise might be a hollow promise, and it is very clear that while there is litigation, a court will then join the residents of the District of Columbia from holding an election to vote for and seat a voting representative in Congress.

There is also one additional problem, and that is dealing with the extra seat for Utah that is contained in this bill. What this bill does is it grants an at-large seat for Utah. That means that Utah residents, unlike those anywhere else in the country, including the District of Columbia, will be able to vote for two representatives in Congress. The rest of us would just vote for one representative in Congress.

As one who has championed the Voting Rights Act, the author of the 2006 extension and a facilitator of the 1982 extension, I am concerned by the precedent that is set in having mixed at-large in single district elections.

And that is one of the things that we tried to get rid of in the Voting Rights Act, because in certain jurisdictions that was used for invidious discrimination against minorities, where they could elect some representatives by district, but the at-large election would ensure that a minority was not elected.

There is one additional problem, and that is that this bill raises the number of representatives to 437. And that means when the 2011 reapportionment of seats in Congress takes place, granting the two extra seats will mean that two other states will end up losing seats in Congress.

That is something that I don't think should happen as a result of additional seats being granted, but should happen as a result of population shifts.

Frankly, this bill has got a lot of problems. It seems to me that to deal with this in a clearly constitutional way that does not raise these issues, we ought to consider the constitutional amendment route or the retrocession route, rather than going down the road of H.R. 157.

I yield back the balance of my time.

Mr. NADLER. I thank the gentleman.

In the interest of proceeding to our witnesses and mindful of our busy schedules, I ask that other Members submit their statements for the record.

I should note at this point that it is a custom in this Subcommittee that we would recognize the Chairman or the Ranking Member of the full Subcommittee for a statement and ask other Members to submit their statements to the record, but the Chairman has indicated he is willing not to have an opening statement this morning in the interests of speeding the proceedings.

Without objection, all Members will have 5 legislative days to submit opening statements for inclusion in the record. Without objection, the Chair will be authorized to declare a recess of the hearing.

We will now turn to our first panel of witnesses. I would normally at this point talk about our procedures for asking questions of witnesses, but it is the custom that in a panel of Members of the House, they are not asked questions, so I will skip that until the second panel.

And now I would like to introduce our first panel.

Congressman Steny Hoyer is the distinguished majority leader of the House of Representatives, a position he has held since 2006. More importantly for this hearing, he represents Maryland's 5th Congressional District.

Now serving his 14th term in Congress, he also became the longest-serving Member of the U.S. House of Representatives from Maryland in history on June 4th, 2007.

Congressman Jason Chaffetz—and I hope I have that pronunciation correctly—Congressman Jason Chaffetz is a freshman Member of the House. He represents Utah's 3rd Congressional District and is a Member of the Committee on the Judiciary.

Mr. Chaffetz grew up in California, Arizona and Colorado. He is well-traveled. But he may be best known as BYU's star place-kicker in the mid-1980's, where he set two school records.

Congressman Louie Gohmert began representing the 1st Congressional District of Texas on January 4, 2005. He is the Ranking Member of the Subcommittee on Crime, Terrorism, and Homeland Security, as well as a Member of this Subcommittee.

He previously served three terms as District Judge in Smith County, Texas. He was later appointed by Texas Governor Rick Perry to complete a term as chief justice of the 12th Court of Appeals of the state of Texas.

Former Congressman Tom Davis served 14 years in the U.S. House of Representatives, representing Virginia's 11th District. He retired just last year, prior to the conclusion of the 110th Congress.

As the Chairman of the House Government Reform Committee, he worked with Congresswoman Eleanor Holmes Norton to develop the legislative proposal that we will consider today.

I am pleased to welcome all of you, and your written statements will be made part of the record in its entirety. I would ask each of you to summarize your testimony in 5 minutes or less.

To help you stay within that time, there is a timing light at your table. When 1 minute remains, the light will switch from green to yellow, if it is working properly, and then red when the 5 minutes are up.

Mr. Leader, you may proceed.

TESTIMONY OF THE HONORABLE STENY HOYER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MARYLAND

Mr. HOYER. Thank you very much, Mr. Chairman. You heard me say thank you very much.

Chairman Nadler, Chairman Conyers, Ranking Member Sensenbrenner, Mr. Rooney, Mr. King, Mr. Franks and Mr. Cohen, thank you very much for allowing me to testify here.

We celebrated just a few days ago an extraordinary event in the history of our democracy to ensure that all peoples in America have the opportunity to serve in the highest office, but also that over the years we have celebrated that the inclusion not only of African-Americans, but women and those of 18 years of age and voting for people who could make a difference by voting in their representative bodies.

I thank you for inviting me to testify on issues that test every year our commitment to the democratic principle we voice here so often and with such certainty.

As you know, these last few weeks have been a time for listening to and reading inaugural addresses—not just the most recent one, but if we want some context, the 55 that came before it.

Together, they would add up to 500 pages, pages that historians—Ted Widmer—called the book of the republic.

Last week I had a look at the biggest and most maligned chunk in the entire book, the address given by our ninth President, William Henry Harrison, which I am sure you know was delivered in a snowstorm, lasted almost 2 hours, and caused the death of the President, who was speaking.

If I had been advising the President back then, I would have told him that he could throw out the entire speech except for this one passage.

"It is the District only where American citizens are to be found who are deprived of many important political privileges without any inspiring hope as to the future." That was William Henry Harrison.

Are their rights alone not to be guaranteed, he went on, by the application of those great principles upon which all our constitutions are founded? That is the question this Committee, this Congress will answer.

We are told that the commencement of the war of the Revolution, the most stupid men in England spoke of "their American subjects." Are there indeed citizens of any of our states, who have dreamed that there are subjects in the District of Columbia?

The people of the District of Columbia are not the subject of the people of the states, but free American citizens. So concluded William Henry Harrison

That was over 170 years ago. And the residents of the District of Columbia have a representative who cannot vote in this democracy of which we are also proud—free American citizens.

It has been obvious since President Harrison spoke those words in 1841, and in fact it has been obvious as long as America has had a constitution. In The Federalist Papers, James Madison wrote that Congress could not legitimately set aside a Federal district unless its people had, "their voice in the election of the government which is to exercise authority over them."

Some of you are original constructionists. Some of you believe that our founding fathers, as all of us do, had a pretty good handle on what they intended to do: their voice in the election of the government which is to exercise authority over them.

And that is some 600,000 of our fellow citizens do not have that right. But where is that equal voice to date? The people in the District were represented in the Congress under the Constitution until the capital moved here and their vote was taken from them.

The Constitution says that no person shall be a representative who shall not obtain the age of 25 years and been 7 years a citizen of the United States and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

I suggest to you that all of the citizens, as Mr. Sensenbrenner suggested, were in fact citizens of the several states—i.e., Maryland. These are not aliens from some far off land. They were Maryland citizens, and Maryland for the Nation gave a portion of its state for the capital of this great Nation and had no intent of depriving its people from a vote.

I would like to debate some of the points that my good and dear friend, Mr. Sensenbrenner, raised. Time does not permit, but at some point we will have that debate.

Today, out of all the world's democracies—think of this—out of all the world's democracies, Washington, DC, the center of democracy, of which we are so proud, is the only capital in the free world who citizens do not have a voting member of their parliament.

This bill is about setting that blight right. The people of the District have watched as Americans extended the right to vote over and over again, wondering when their time would come.

Now in this time of change for America, we can succeed where so many before us failed. We can give the people of this city be equal vote they deserve, that equal say in the decisions that shape their lives every day.

You are going to hear of young men, who fought for this country and its freedom and its liberty, but whose voting member is unable to vote in the capital of the Nation he defended.

We cannot do it by giving them at last—we can do it by giving them a vote at last in this House. There are plausible legal arguments both for and against this bill. Mr. Sensenbrenner has raised some.

Of course, I am convinced that it falls well within Congress' constitutional authority to "exercise exclusive legislation in all cases whatsoever over the District."

That is why Tom Davis' Committee reported this out with an overwhelming vote. It never got to the floor in the 109th Congress, but in the 110th Congress it came to the floor, and Chairman Nadler has referenced the vote.

Whichever side we come down on, however, I think we can agree that legal arguments are best sorted out in the courts.

Mr. Chairman, at some point in time I will be for the Issa amendment, says that we will have an accelerated consideration of this in the courts. I think that makes sense.

At this point in the debate, we should make our case on principle, however, not on technicalities. If you oppose the bill, you need to tell us. Just what does our country gain by treating the people of Washington, DC, differently from America's other 300 million people?

In the same way, if you support this bill, we need to answer the question: Just what would one vote be worth—a vote that won't teach one child to read or subtract in the District's schools, a vote won't prevent a handgun murder or build a new park or attract a new business, a vote won't even tilt the balance in this House?

But as our Nation's story tells us again and again, a vote that means dignity, respect, individual personhood and identity. A vote means that men, women and children from the city can walk down the national mall and know that they own it as much as any tourist off the bus from Indiana, New York or Georgia or Maryland owns it.

And for the people of this city, a tremendous amount of good can come from that that small, critically important beginning.

Mr. Chairman, I thank you for the opportunity to testify, and I would urge my colleagues to pass a bill giving the District of Columbia its vote. I know that one of the speakers on the panel—perhaps he will speak next—believes that this bill ought not pass.

Very frankly, Utah is appended to this bill. I have a list here of the states that had been admitted to the union. My good friend Tom Davis once said, "Well, normally we have two states admitted."

We normally had two states admitted after the 1840 Missouri Compromise, when one state was admitted as a free state and one state was admitted as a slave state.

That practice has not been followed in recent years, thankfully—certainly after the Civil War—because we didn't admit slave states. And we said that former slaves ought to have the right to vote. It took them a long time to get it—over 100 years.

This Congress has a responsibility to the Constitution, to our democracy, and to the moral precepts we hold dear to give to our 600,000 fellow citizens of the District of Columbia the opportunity, the right to have their representatives of full voting Member of the House of Representatives.

As majority leader, I tell you I intend to bring that bill to the floor in the very near term.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Hoyer follows:]

PREPARED STATEMENT OF THE HONORABLE STENY HOYER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MARYLAND, AND MAJORITY LEADER, U.S. HOUSE OF REPRESENTATIVES

Mr. Chairman:

Thank you for inviting me to testify on an issue that tests, every year, our commitment to the democratic principles we voice here so often and with such certainty.

As you know, these last few weeks have been a time for listening to and reading inaugural addresses—not just the most recent one, but, if we want some context, the 55 that came before it. Together they would add up to 500 pages, pages that historian Ted Widmer called "the Book of the Republic." Last week, I had a look at the biggest and most maligned chunk in the entire Book: the address given by our ninth President, William Henry Harrison—which, I'm sure you know, was delivered in a snowstorm, lasted almost two hours, and caused the President's death from pneumonia.

If I had been advising the President back then, I would have told him that he could throw out the entire thing, except for this one passage: "It is in this District only where American citizens are to be found who . . . are deprived of many important political privileges, without any inspiring hope as to the future. . . . Are their rights alone not to be guaranteed by the application of those great principles upon which all our constitutions are founded? We are told . . . that at the commencement of the War of the Revolution the most stupid men in England spoke of 'their American subjects.' Are there, indeed, citizens of any of our States who have dreamed *of their subjects* in the District of Columbia? . . . The people of the District of Columbia are not the subjects of the people of the States, but free American citizens."

Free American citizens. It's been obvious since President Harrison spoke those words in 1841. In fact, it's been obvious as long as America has had a Constitution. In the Federalist Papers, James Madison wrote that Congress could not legitimately set aside a federal District unless its people have "their voice in the election of the government which is to exercise authority over them."

But where is that equal voice today? The people of the District were represented in Congress, under the Constitution, until the capital moved here and their vote was taken from them. Today, out of all of the world's democracies, there is only one national capital without full voting rights: this city full of monuments to democracy. The people of the District have watched as America extended the right to vote over and over again, wondering when their time would come.

Now, in this time of change for America, we can succeed where so many before us failed. We can give the people of this city the equal vote they deserve, the equal say in the decisions that shape their lives every day. We can do it by giving them, at last, a vote in this House.

There are plausible legal arguments both for and against this bill. Of course, I am convinced that it falls well within Congress's constitutional authority to "exercise exclusive Legislation in all Cases whatsoever, over [the] District." But whichever side we come down on, I think we can agree that legal arguments are best sorted out in the courts. At this point in the debate, we should make our case on principle, not on technicalities. If you oppose this bill, you need to tell us: Just what does our country gain by treating the people of Washington, DC, differently from America's other 300 million?

In the same way, if we support this bill, we need to answer the question: Just what would one vote be worth? A vote won't teach one child to read or subtract in the District's schools. A vote won't prevent a handgun murder, or build a new park, or attract a new business. A vote won't even tilt the balance in this House.

But as our Nation's story tells us again and again, a vote means dignity. A vote means that men, women, and children from this city can walk down the National Mall and know that they own it—as much as any tourist off the bus from Indiana, New York, or Georgia owns it. And for the people of this city, a tremendous amount of good can come from that small beginning.

Thank you for the opportunity to testify, and I urge my colleagues to pass this bill.

Mr. NADLER. Thank you, Mr. Leader. And I do understand that the majority leader is needed elsewhere. He is excused with our thanks.

I must comment that his reference to the great compromise of Henry Clay—some of us think that in this era of partisan division,

we could use Henry Clay's presence in the house today, but that is not to be.

Mr. HOYER. First day in the House, he became speaker.

Mr. NADLER. First day—that is right. And then he went on to other things.

Before we go on to the other witnesses in this panel, I have been neglectful. I should recognize the presence here with us today of the mayor of Washington, DC, Mayor Adrian Fenty.

And we welcome you.

And also the presence here of our colleague, the delegate from the District of Columbia, Eleanor Holmes Norton.

And I will now recognize—after the leader went, we do have to—we are under some time constraints this morning, because there is a markup of the full Committee following this later today, so I am going to from this point on do what I normally don't do, which is try to fairly strictly enforce the 5-minute rule. And I am serving fair warning on everybody.

So with that, Mr. Chaffetz, you are recognized for 5 minutes.

TESTIMONY OF THE HONORABLE JASON CHAFFETZ, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF UTAH

Mr. CHAFFETZ. Thank you, Mr. Chairman.

Thank you, Members of this Subcommittee.

It has been an honor and a privilege to serve, to represent the state of Utah. I am a freshman. It is my first such a meeting. And I appreciate the opportunity.

It is very humbling to represent the people and to discuss the issues that affect so many Americans. I have submitted some written testimony. I ask that it be submitted to the record. And I just like to add a few—just like to add a few additional comments.

There are many people that argue that principles should matter, and I totally agree. I totally agree. Taxation without representation is fundamentally flawed. I don't think there is any argument that you could make that would go the other direction.

But how we remedy that, how we move forward is critically important. And even though my state, the state of Utah, stands to benefit, I still believe we need to stand on the principle that this bill, as currently written, is just simply unconstitutional.

And we need to recognize the fact that there are other ways to tackle this difficult issue and remain within the spirit, the letter of the Constitution.

Now, Utah is the next. We feel a bit slighted by the fact that we were not granted a fourth Congressional seat. That was presented to the Supreme Court, and we lost.

As much as I would like to see us get a fourth seat sooner rather than later, we feel as a state that we were underrepresented and have been underrepresented for a number of years. I support the idea and the notion that Utah should get a fourth seat. I still don't think you can just run around the Constitution to try to get what you want.

And so even though the state of Utah would benefit, I am here to say there are a good number of us in Utah that believe that the Constitution and the principles of the Constitution must come first.

The reality of the situation is that in 1788, Alexander Hamilton put forward a possible amendment, and it was rejected.

Now, there are several problems that I see with this bill. One of the things that I would point out is it does not abolish the current delegate, or there would actually be some double representation, particularly at the Committee level, in representation of Washington, DC.

I also find it problematic that the fourth Congressional seat of the state of Utah would be a statewide seat, giving people of the state of Utah two representatives. I don't find that to be in the spirit or letter of what we should be doing as well.

For me the bottom line is the Constitution cannot simply be amended by statute. There are ways to amend the Constitution, but you cannot amend it by statute.

The founders clearly ratified the Constitution to deny congressional representation, but I think there is a better, smarter way to do this, whether it is the retrocession back to the state of Maryland.

Whether there are other remedies and things that we can do, I stand fully committed to fight and support the idea and the notion that we need to fix this idea that there is taxation right now in the United States of America without representation.

That is fundamentally flawed. I want to do what I can to do it, to fix it, but we cannot simply ignore and bypass the Constitution of the United States of America.

I appreciate the Chairman and visibility and this opportunity to share some comments. And I yield back the remainder of my time. Thank you.

[The prepared statement of Mr. Chaffetz follows:]

PREPARED STATEMENT OF THE HONORABLE JASON CHAFFETZ, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF UTAH

Introduction

Chairman Watt, Ranking Member Sensenbrenner, and distinguished members of the Subcommittee, I want first to thank you for the opportunity to testify today concerning an issue that clearly and significantly impacts not only the good people of the Third District of Utah, but our nation as a whole.

I want to make clear from the outset that I, like all of you, want to see every voting citizen of these great United States receive equal representation in government. The people of Washington, DC, no less than the people of Utah or any other state, deserve to have a voice.

But we must ensure that in our eagerness to provide equal representation and equal protection of the laws that we uphold and respect the principles our nation's founders enshrined in the Constitution. With all due respect to my colleagues and others who support this bill, my primary concern with the DC Voting Rights Act is that it is unconstitutional. And if we cannot resolve the issue of constitutionality, no amount of discussion about "taxation without representation" or how long Utah has deserved a fourth seat would permit us to move forward with this bill.

Perhaps what I should say is that I believe there are other proposals, such as the bill offered by my distinguished colleague from Texas, which provide the District's residents the voting rights they deserve and which we seek to respect, but without the concerns of constitutional conflicts.

I am concerned that this bill is not only unconstitutional, but is generally bad public policy. It sets a dangerous precedent. It creates uncertainties about the future of the District's voting representation. And while it gives the District's citizens a proportionately greater voice in the House than other Congressional districts, it gives them a diluted right to representation overall.

H.R. 157 Is Unconstitutional

Washington, DC, is not a State of the United States of America, but a specially-created Federal District. This is made clear in the Twenty-third Amendment to the Constitution, which refers to the number of electors the District would be entitled to have "if it were a State." This is not a matter of playing semantic games, but an instance where real consequences are attached to the term we use. The question, then, is whether the District can constitutionally be treated like a State for purposes of representation in the House. The Supreme Court recently affirmed the decision of a federal district court here in DC, which stated "We conclude from our analysis of the text that the Constitution does not contemplate that the District may serve as a state for purposes of the apportionment of congressional representatives."

The interpretation required by this bill's proponents asks too much of the plain language of the "District Clause" of the Constitution, found in Article I, Section 8, clause 17, which describes Congress' power to legislate in matters regarding Washington, DC. This clause gives Congress the power to "exercise exclusive Legislation in all Cases" over the District. "Exclusive legislation," it seems to me, refers to this specially-created federal District being free from governance of the legislature of the state from which the land was ceded. This rationale is supported by comments made by the Constitution's primary author, James Madison, in Federalist Paper No. 43. Otherwise the supremacy of the federal government would be in question, if the state in which the District sat could contend for power to govern it.

I do not believe, as the proponents of H.R. 157 suggest, that the Constitution's Framers intended to give plenary power to Congress to give the District voting representatives in the House. A proposed amendment by Alexander Hamilton at the Constitutional Convention in New York would have given the District representation in Congress when its population grew sufficiently, but that amendment was rejected. In light of the specific and deliberate provisions the Founders provided for choosing members of Congress, and the rejection of Hamilton's amendment, I cannot accept that the Founders intended to give Congress power to amend that Constitutional process by a mere statute, and neglected to specify that belief. By this logic, there is no prohibition in the Constitution preventing H.R. 157 from giving the District two Senators, multiple representatives, or amending other provisions of the Constitution that refer to citizens of the District. If this is appropriate, why are we not providing the District with two Senators and other privileges normally reserved to States? If it is not, as I assert, then how can we provide even one voting Representative?

Another provision of H.R. 157 that raises constitutional concerns is the designation of an "at-large" seat for the State of Utah. Under this bill each citizen of Utah will be represented by both their geographically designated representative as well as the at-large representative. While the allocation of an at-large representative to Utah may not present a "one person, one vote" problem in the traditional *intrastate* context, the at-large seat would likely result in a "one person, one vote" problem in the *interstate* context. In essence, the at-large seat results in Utah residents having disproportionately more representation in the House than citizens of other states.

The Supreme Court acknowledged that Congress receives "far more deference [in apportionment] than a state districting decision." However, the Court also made it clear that Congressional alterations of the apportionment formula "remain open to challenge . . . at any time." Accordingly, I agree with Senator Hatch, who recently stated that an at-large seat proposal of this nature is unconstitutional, and that he would not support it.

H.R. 157 is Bad Public Policy

Even setting aside the Constitutional concerns, this bill is bad public policy. First, it sets a dangerous precedent. If Congress has the power to seat voting Members for the District, is there any prohibition to prevent granting the District two, five, or even ten members? Will a future Congress take back those seats if the Members do not vote with the majority? Because one Congress cannot bind future Congresses, we are setting up ongoing contention, in which citizens of the District first receive and then have taken from them their voting representatives. We can do better than this.

Second, H.R. 157 not only results in District residents being represented at a lesser level than they deserve, as I will discuss shortly, but perversely results in the District being represented at a higher level than other congressional districts. This bill would not abolish the position of Delegate for the District of Columbia. As a result, District residents would be represented by both member of Congress who could vote in committee and on the House floor, and a delegate who could vote in com-

mittee. Consequently, District residents would get more representation in congressional committees than other American citizens.

Last, because this issue is so divided among constitutional law scholars we have every reason to believe H.R. 157 will be contested in the federal courts, and that every level of the federal courts is likely to strike down this legislation. But that process will likely take years, and at the end District residents will be exactly where they are now in their quest for Congressional representation—frustratedly waiting. This legislation, and the rights of the citizens it impacts, is far too important to consign to this unsatisfactory and deferred resolution.

H.R. 157 Gives the District's Citizens a Diluted Right to Representation

Taxation without representation is fundamentally flawed. The question should be how we can respect District residents' rights of representation without sacrificing constitutional principles.

Should H.R. 157 pass, District citizens will find themselves with one representative in the House, no representation in the Senate, and likely with years of uncertainty regarding whether their representation will be declared unconstitutional and taken away. Some might argue that granting the District representation in the Senate ameliorates these concerns, but doing so only compounds the constitutional problems discussed above.

To ensure that the District's citizens receive their full rights of representation, while upholding the Constitution, we should consider plans that would allow District residents to vote with Maryland in federal elections, as they did before the rights we now seek to restore were taken. District residents will thus end up with full representation in both the House and Senate, and will not have to worry that years down the road their representation might be taken away by the Courts.

Conclusion

In conclusion, I fully support the voting rights of the good people of Washington, DC. However, H.R. 157 is not the long-term solution that citizens of the District deserve. They deserve to enjoy full representation in Congress, as do the people of the several states. We can achieve this goal, while at the same time remaining true to the Constitution. This bill is neither constitutional nor the best of the proposed legislative solutions to the problem. A plan that would allow District residents to vote with Maryland in federal elections is constitutional, sound public policy, and avoids the problems implicated by H.R. 157. As I have said before, this is the far better course of action for District residents, Utah residents, and the Constitution. I urge this committee to carefully consider these things. We should do this in the right way now, and not be so caught up in our desire to ensure that District residents have a voice that we abandon constitutional principles that make that voice meaningful.

Mr. NADLER. I thank the gentleman.

The gentleman from Texas, Mr. Gohmert, is now recognized for 5 minutes.

TESTIMONY OF THE HONORABLE LOUIE GOHMERT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. GOHMERT. Thank you, Mr. Nadler, Mr. Chairman.

I have submitted written testimony, and I ask unanimous consent that that might be made a part of the record.

Thank you, Mr. Chairman.

Residents of Washington, DC, pay Federal income tax, but they don't have voting members of the House of Representatives. No one represents them that they vote for as a representative in the U.S. Congress.

Article I, Section 2, Clause 1 of the United States Constitution says, "The House of Representatives shall be composed of members chosen every second year by the people of the several states."

The Supreme Court has taken this up. They have said "states" means states. That is what they said.

Now, the founding fathers did not consider Washington, DC, a state under the Constitution, and that was evidenced by the fact that Alexander Hamilton offered an amendment to the convention, and that provision was rejected in July of 1788.

Thomas Treadwell stated the same convention that planned for Washington, DC, departs from every principle of freedom, because it did not give residents of the District of Columbia full representation.

Now, congressional supporters of Washington, DC, voting rights have agreed that Washington, DC, is not a state, as evidenced by a Democratic-controlled Congress in 1978 attempting to amend the Constitution to provide them with that right.

The House Judiciary Committee reported the resolution and stated, "Statutory action alone will not suffice. It required a constitutional amendment."

We shouldn't just toss the Constitution over. We need to do things the right way. Proposals to grant Washington, DC, congressional representation will inevitably be challenged in court, and in all likelihood, the provision will fail, making the promises here rather hollow.

Taxation without representation is not right. The people in D.C. are correct about that. But in 1847 there was a desire to allow the District of Columbia land across the Potomac not being used by the Federal Government to have its citizens vote for representatives.

They ceded the land on the other side of the Potomac back to Virginia. They now have representatives and two senators.

Now, accordingly, I have a bill that cedes the land. It draws a meets and bounds line description around the Federal property in Washington, DC, and cedes everything else back to Maryland, just like what was done in 1847. That can be done legislatively. It stands up.

And that will get a representative. Six hundred thousand will get them their own representative, and it will also get them to senators they vote for that will have to come court them. That is the American way.

Also, Representative Dana Rohrabacher has a bill that doesn't necessarily cede the land back, but does provision only require the District of Columbia residents to be considered and be voting in Maryland for two senators and for a representative.

Now, American colonists increasingly resent it being levied taxes without actually having legislators seated and voting in Parliament in London. That is where the idea of taxation without representation gained a foothold, and it was a hallmark during the Revolution.

The Organic Act of 1801 placed Washington, DC, under exclusive jurisdiction of the United States Congress, and people in the District were no longer considered residents of Virginia or Maryland.

Many in Washington immediately opposed the idea of being taxed, and over the years other congressional leaders introduced constitutional amendments, but it hasn't happened yet.

But in 1917, Puerto Rico became a territory, and all Puerto Rican citizens were granted citizenship. But since they have a delegate and not a representative, they were not required to pay Federal income tax.

March 31st of 1917, the U.S. took possession of the Virgin Islands. In 1927 when their citizens were granted citizenship, they were not required to pay income tax.

Guam was established as a territory of the United States, and since it does not have a representative—it has a delegate—it was not required to pay Federal income tax.

The Commonwealth of North Mariana Islands was established in 1975, but because it has a delegate, and not representative, it was not required to pay Federal income tax.

American Samoa, technically considered unorganized, but it has a delegate, but not a representative. It doesn't pay income tax.

I have a bill I am filing this week. I would welcome all my colleagues joining in. Since this is not being done constitutionally and trying to legislatively change the Constitution, my bill says there shall be no taxation without representation in D.C.

Mr. SENSENBRENNER. Would the gentleman yield? Sign me on.

Mr. GOHMERT. Pardon?

Mr. SENSENBRENNER. Sign me on.

Mr. GOHMERT. Thank you. I sure will.

No Federal income tax for the District of Columbia. That is legislatively correct. It takes care of the problem until our body is ready to do it constitutionally and give them a constitutional representative.

I would welcome everyone else signing on to fix this great injustice.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Gohmert follows:]

PREPARED STATEMENT OF THE HONORABLE LOUIE GOHMERT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND MEMBER, SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

TESTIMONY OF U.S. REPRESENTATIVE LOUIE GOHMERT (TX-01)

Subcommittee on the Constitution, Civil Rights, and Civil Liberties
10:00 A.M. in 2141 Rayburn House Office Building

Hearing on: H.R. 157, the "District of Columbia House Voting Rights Act if 2009"

Thank you, Chairman Nadler.

It is contrary to our nation's democratic traditions to levy federal income taxes on Washington, D.C. residents while denying them full representation in the U.S. Congress. It is incumbent upon Congress to address this matter in a way that is in compliance with our Constitution.

The District of Columbia House Voting Rights Act of 2007 is an unconstitutional attempt to give D.C. a full house member. It does not fully address the problem, as it does not provide for Senate representation. A broad reading of Article I, Section 8, Clause 17 of the U.S. Constitution is not sufficient to overcome the plain meaning of Article I, Section 2's requirement that House members come from states. There are proper methods to address the unfairness of Washington, D.C.'s taxation without representation but the bill under consideration by the committee today is not one of those methods. I have great respect for the gentlelady from D.C., Del. Eleanor Holmes Norton, but her effort to legislatively create an end-run around the expressed words of the Constitution is a clear claim that all those who fought to create a constitutional amendment in the late 1970s lied or were completely wrong to assert that it could not be done without a constitutional amendment. There are ways that can correct the improper taxation without representation which I can and would support, but a legislative effort at a constitutional amendment is not one of them.

As you are aware, Ms. Holmes Norton's District of Columbia House Voting Rights Act permanently increases the size of the House to 437 members[1], gives the District of Columbia a full House member[2], and gives an at-large member to Utah.

II. The Provision Granting a Member to DC is Unconstitutional

A. The Basics of D.C.'s Status

The proponents of the Holmes Norton bill stretch the reading of the D.C. clause in Article I, Section 8, Clause 17 in an attempt to overcome the plain meaning of Article I, Section 2 – which says that Members come from States.

Article I, Section 2, Clause 1 states in part:

> The House of Representatives shall be composed of members chosen every second year by the people of the several states

[1] H.R. 157 § 3(a).
[2] *Id.* at § 2.

Article I, Section 8, Clause 17 states in part:

> The 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

The voting bill even states that "[n]otwithstanding any other provision of law, the District of Columbia shall be considered a Congressional District…."[3] One of the "other provisions" that the voting bill is trying to overcome is Article I Section 2.

It is well established that the word "states" in Article I, Section 2 does not refer to D.C.[4] Chief Justice John Marshall made this point in *Hepburn v. Ellzey*[5] when he wrote that the term "state" plainly does not include D.C. for representation purposes, and used this finding as a baseline when deciding that D.C. residents cannot establish diversity of citizenship jurisdiction because they do not come from states.[6]

A review of the framer's debates reveals that the founders did not consider D.C. a state, nor did they contemplate that those living in the federal district would have full representation in Congress. Alexander Hamilton offered an amendment to the Constitution during the New York ratification to provide full congressional representation to D.C., but the convention rejected the amendment on July 22, 1788.[7] Thomas Tredwell stated at the same convention that the plan for D.C. "departs from every principle of freedom" because it did not give residents full representation in Congress.[8] These actions show that the Constitution, as it currently stands, does not provide D.C. with full congressional representation. The Constitution must be amended or the status of D.C. must be changed for the District to have full voting members of Congress.

B. Tidewater

In *National Mut. Ins. Co. of Dist. of Col. v. Tidewater Transfer Co.*[9], the U.S. Supreme Court did not squarely address Congress's power to grant full voting members by

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[3] *Id.* at § 2(a).
[4] *See* Igartua de la Rosa v. United States, 32 F.3d 8 (1st Cir. 1994) (holding that United States citizens in Puerto Rico are not entitled to vote in presidential elections); Attorney Gen. of Guam v. United States, 738 F.2d 1017 (9th Cir. 1984) (holding that United States citizens in Guam are not entitled to vote in presidential and vice-presidential elections). Most legal commentators agree that D.C. is not a state. *See, e.g.*, Viet Dinh and Adam H. Charnes, The Authority of Congress to Enact Legislation to Provide the District of Columbia with Voting Representation in the House of Representatives 9 (2004) (Dinh and Charnes are well-known proponents of D.C. voting rights.).
[5] 6 U.S. (2 Cranch) 445 (1805).
[6] *Id.* at 452.
[7] 5 THE PAPERS OF ALEXANDER HAMILTON, at 189-90 (Harold C. Syrett and Jacob E. Cooke, eds. 1962).
[8] 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 402 (Jonathan Elliot ed., 2d ed. 1888), reprinted in 3 THE FOUNDERS' CONSTITUTION 225 (Philip B. Kurland & Ralph Lerner eds., 1987).
[9] 337 U.S. 582 (1949).

statute under the D.C. clause[10], but it provided guidance that is helpful to analyzing the constitutionality of H.R. 157. In *Tidewater*, a three-judge plurality overruled part of Justice Marshall's *Hepburn* opinion and found that D.C. residents can provide the basis for federal diversity jurisdiction. The plurality took pains to emphasize that diversity jurisdiction for D.C. residents is not a significant constitutional issue, stating that the case did not involve extending a fundamental right.[11]

Tidewater's significance lies in the fact that seven Justices agreed with Chief Justice Marshall that D.C. is not a state under the Constitution[12], and six Justices rejected the plurality's creative reading of the D.C. clause as it pertained to granting diversity jurisdiction.[13] It is highly unlikely that these six Justices would have held that the D.C. clause granted Congress the power to provide full Members to D.C. by statute after holding that the clause did not even provide diversity jurisdiction. It is possible that even the three-Justice plurality would reject the voting bill's interpretation of the D.C. clause given that it limited *Tidewater* to cases not involving the extension of a fundamental right. The *Hepburn* and *Tidewater* cases firmly establish the principle that Article I, Section 2 cannot be easily evaded by an expansive reading of the D.C. clause.

III. The Provision Granting a Member to Utah is Unconstitutional

A. At-Large Members

The voting bill creates another position in the House that would be filled by Utah, but on an at-large basis through the 112th Congress, meaning all residents in the state's three congressional districts would vote for a fourth member.[14] The Utah provision explicitly exempts itself[15] from a 1967 law that requires that each citizen only vote for one House member.[16] The 1967 law is read in tandem with an apparently contradictory 1941 law[17] that provides for at-large representation when a state does not redraw its districts after a reapportionment grants it another member.[18] The Supreme Court in *Branch v. Smith* held that reading the two laws together establishes that single-member districts must be drawn whenever possible.[19]

B. One Person, One Vote

The U.S. Supreme Court clearly defined the one person, one vote rule in *Wesberry* when it held that a Georgia apportionment law violated Article I, Section 2 by drawing districts that contained two to three times as many residents as other districts in the state.[20]

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[10] No court has squarely addressed this issue.
[11] *Id.* at 585.
[12] *Id.* at 587; *Id.* at 645 (Vinson, J., dissenting); *Id.* at 646 (Frankfurter, J., dissenting).
[13] *Id.* at 604-06 (Rutledge, J., concurring); *Id.* at 628-31 (Vinson, J., dissenting); *Id.* at 646-55 (Frankfurter, J., dissenting).
[14] H.R. 157, § 3(c)(3)(A).
[15] *Id.*
[16] 2 U.S.C. § 2c.
[17] 2 U.S.C. § 2a.
[18] *Branch v. Smith*, 538 U.S. 254, 266-71 (2003).
[19] *Id.*
[20] 376 U.S. 1, 7 (1964).

The Court stated that "the command of Art. I, s 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."[21] This means that, to the extent possible, congressional districts must contain the same number of citizens.

The fact that the Utah provision has to exempt itself from a law requiring single-member districts whenever possible gives cause to question the legal foundation of the voting bill. The fact that the new seat remains at large through the 112th Congress probably makes the bill unconstitutional under the one person, one vote principle discussed above. No court has ruled that at-large districts violate Article I, Section 2 per se, but reading *Wesberry* along with the '41 and '67 at-large laws could reasonably lead to a conclusion that allowing citizens of a state to vote for two House members over two Congresses is unconstitutional.

If H.R. 1433 became law, Utah would not need four years to draw a fourth district. The kind of emergency contemplated by the '41 law that necessitates an at-large seat would pass, and Utah voters would each be voting for two House members for no reason at all. Their vote would be worth more than a vote in a state without an at-large member, and would be in violation of the one person, one vote rule found in Article I, Section 2.

In fact, the Utah legislature approved a new four-seat Congressional map in December 2006 in response to concerns about creating an at-large seat that kept a similar version of the voting bill from being reported out of the House Judiciary Committee in the 109th Congress.[22] The creation of an at-large district is entirely unnecessary, and unconstitutional.

IV. Other Solutions

If the District of Columbia House Voting Rights Act of 2009 became law, it would still leave DC residents without representation in the U.S. Senate. Indeed, the idea of granting two Senators to a 69-square-mile city with less than 600,000 residents would inevitably delay many efforts to address this matter, including any attempt to provide Senate representation in the same manner as Ms. Holmes Norton's bill. Further, H.R. 157 will inevitably be challenged in court, calling into question the validity of any narrowly-passed legislation that a Washington, D.C. member votes on and leaving Washington, D.C. residents in a continued state of flux over their status. Lastly, passage of the voting bill would set numerous bad precedents, including that Congress can add or remove D.C. members at will, and can do the same for territories such as American Samoa, which has only 58,000 residents, most of whom are not American citizens.[23]

The clearest option is to amend the Constitution to provide D.C. with representation, as was done when Presidential electors were granted to D.C.[24] A Democrat-controlled Congress **in 1978** attempted to do this very thing, and **the House Judiciary Committee**

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[21] *Id.* at 7-8.
[22] Alan Choate, *Push begins for 4th Utah district*, DAILY HERALD, March 12, 2007.
[23] *See* CRS Report RL33824, *The Constitutionality of Awarding the Delegate for the District of Columbia a Vote in the House of Representatives or the Committee of the Whole*, at 17.
[24] *See* U.S. CONST. AMEND. XXIII.

reported the bill and wisely stated that this action required a constitutional amendment, because "statutory action alone will not suffice."[25]

V. Conclusion

The District of Columbia House Voting Rights Act of 2007 is an unconstitutional attempt to give D.C. a full house member. It does not fully address the problem, as it does not provide for Senate representation. A broad reading of the D.C. clause is not sufficient to overcome the plain meaning of Article I, Section 2's requirement that House members come from states. There are proper methods to address the unfairness of Washington, D.C.'s taxation without representation but the bill under consideration by the committee today is not one of those methods.

[25] H. REP. NO. 95-886 (95th Cong., 2d Sess.) at 4.

Mr. NADLER. I thank the gentleman.

It now gives me great pleasure to recognize our former colleague, the gentleman from Virginia, Mr. Davis, for 5 minutes.

TESTIMONY OF THE HONORABLE TOM DAVIS, A FORMER REPRESENTATIVE IN CONGRESS

Mr. DAVIS. Thank you. Before I begin, I would like to ask to insert in the record a testimony from Honorable Kenneth Starr and his legal brief supporting the constitutionality——

Mr. NADLER. Without objection, so ordered.

[The information referred to follows:]

TESTIMONY OF THE HON. KENNETH W. STARR BEFORE THE HOUSE GOVERNMENT REFORM COMMITTEE 2154 RAYBURN HOUSE OFFICE BUILDING JUNE 23, 2004

I am pleased to testify on the very important issue and to discuss congressional authority to govern the District of Columbia more generally. Following immediately in the wake of the District's establishment as the Seat of our National Government in 1800,[1] Congress began working to enfranchise the capital city's residents. Previous efforts – which have included bills to retrocede the District to Maryland, bills calling for the District's residents to vote in Maryland's House and Senate contests, and bills deeming the District to be a "State" for purposes of federal elections – have been thwarted by constitutional and political barriers. While I will leave for others discussion of the political considerations presented by the particulars of the D.C. Fairness Act, I commend Chairman Davis for seeking to address – and surmount – the legal and constitutional obstacles that have hobbled congressional efforts to solve the continuing problem of District disenfranchisement.

I. CONGRESS ENJOYS PLENARY POWER OVER THE DISTRICT OF COLUMBIA.

Legislation to enfranchise the District's residents is authorized by the Seat of Government Clause, Art. I, § 8, Cl. 17, which provides: "The Congress shall have power ... to exercise exclusive legislation in all cases whatsoever" over the District of Columbia. This

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1. *See* "An act establishing the temporary and permanent seat of the Government of the United States," 1 Stat. 130 (July 16, 1790). The 1790 Act identified the first Monday of December 1800 (December 1) as the date for the transfer of the seat of the federal government from its current home (then Philadelphia) to its new permanent home in the District of Columbia.

sweeping language gives Congress "extraordinary and plenary" power over our nation's capitol city.[2]

To understand the scope and importance of the Seat of Government Clause, it is important first to understand its historical foundations. There is general agreement that the Clause was adopted in response to an incident in Philadelphia in 1783, in which a crowd of disbanded Revolutionary War soldiers, angry at not having been paid, gathered to protest in front of the building in which the Continental Congress was meeting under the Articles of Confederation.[3] Congress called upon the government of Pennsylvania to provide protection, but the Commonwealth refused, Congress was forced to adjourn, quietly leave the city, and

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[2]. *United States v. Cohen*, 733 F.2d 128, 140 (D.C. Cir. 1984) (Scalia, J.). *See also id.* at 140-141 (the Seat of Government Clause, Art. I, § 8, Cl. 17, "enables Congress to do many things in the District of Columbia which it has no authority to do in the 50 states. There has never been any rule of law that Congress must treat people in the District of Columbia exactly the same as people are treated in the various states.") (footnote omitted).

[3]. *See, e.g.*, KENNETH R. BOWLING, THE CREATION OF WASHINGTON, D.C. 30-34 (1991); JUDITH BEST, NATIONAL REPRESENTATION FOR THE DISTRICT OF COLUMBIA 14-15 (1984) ("The proximate cause of the provision for a federal district was the Philadelphia Mutiny of 21 June 1783."); STEPHEN MARKMAN, STATEHOOD FOR THE DISTRICT OF COLUMBIA 47 (1988) ("Unquestionably, this incident made a deep impression on the members [of the Continental Congress]."); Peter Raven-Hansen, *Congressional Representation for the District of Columbia: A Constitutional Analysis*, 12 HARV. J. ON LEGISLATION 167, 171 (1975) ("That the memory of the mutiny scare . . . motivated the drafting and acceptance of the 'exclusive legislation' clause was clearly demonstrated in the subsequent ratification debates."). THE FEDERALIST, No. 43 at 289 (Jacob E. Cooke ed., 1961); JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION §§ 12-13 (1833). Despite requests from the Congress, the Pennsylvania state government declined to call out its militia to respond to the threat, and the Congress had to adjourn abruptly to New Jersey. The episode, viewed as an affront to the weak national government, led to the widespread belief that exclusive federal control over the national capitol was necessary. "Without it," Madison wrote, "not only the public authority might be insulted and its proceedings be interrupted, with impunity; but a dependence of the members of the general Government, on the State comprehending the seat of the Government for protection in the exercise of their duty, might bring on the national councils an imputation of awe or influence, equally dishonorable to the Government, and dissatisfactory to the other members of the confederacy." THE FEDERALIST NO. 43, *supra*, at 289; *see also* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 220 (Jonathan Elliot ed., 2d ed. 1888), *reprinted in* 3 THE FOUNDERS' CONSTITUTION 225 (Philip B. Kurland & Ralph Lerner eds., 1987) ("Do we not all remember that, in the year 1783, a band of soldiers went and insulted Congress? . . . . It is to be hoped that such a disgraceful scene will never happen again; but that, for the future, the national government will be able to protect itself.") (North Carolina ratifying convention, remarks of Mr. Iredell).

reconvene at Princeton.[4] In the wake of this dramatic event, the Framers took drastic measures – through the Seat of Government Clause – to ensure "that the federal government be independent of the states,"[5] and to ensure that the District would be beholden exclusively to the federal government for any and all purposes, big and small.[6]

Congress's powers over the District are not limited to simply those powers that a State legislature might have over a State.[7] As emphasized by the federal courts on numerous occasions, the Seat of Government Clause is majestic in its scope. In the words of the Supreme Court, "[t]he object of the grant of exclusive legislation over the [D]istrict was, therefore, national in the highest sense. . . . In the same article which granted the powers of exclusive legislation . . . are conferred all the other great powers which make the nation."[8] And my predecessors on the D.C. Circuit Court of Appeals once held that Congress can "provide for the

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4. MARKMAN, *supra* note 3, at 46-47; Raven-Hansen, *supra* note 3, at 169.

5. MARKMAN, *supra* note 3, at 48.

6. *See, e.g.*, THE FEDERALIST No. 43, at 272 (Madison) (Clinton Rossiter ed. 1961) (remarking on the "indispensable necessity of complete authority at the seat of government" since without it, "the public authority might be insulted and [the federal government's] proceedings interrupted with impunity"); Raven-Hansen, *supra* note 3, at 169-72 (citing statements from the ratification debates).

7. *See* Palmore v. United States, 411 U.S. 389, 397-398 (1973) ("Not only may statutes of Congress of otherwise nationwide application be applied to the District of Columbia, but Congress may also exercise all the police and regulatory powers which a state legislature or municipal government would have in legislating for state or local purposes. Congress 'may exercise within the District all legislative powers that the legislature of a State might exercise within the State; and may vest and distribute the judicial authority in and among courts and magistrates, and regulate judicial proceedings before them, as it may think fit, so long as it does not contravene any provision of the Constitution of the United States.' *Capital Traction Co. v. Hof*, 174 U.S. 1, 5 (1899). This has been the characteristic view in this Court of congressional powers with respect to the District. It is apparent that the power of Congress under Clause 17 permits it to legislate for the District in a manner with respect to subjects that would exceed its powers, or at least would be very unusual, in the context of national legislation enacted under other powers delegated to it under Art. I, § 8.").

8. *O'Donoghue v. United States*, 289 U.S. 516, 539-40 (1933). Presumably, these "great powers" include the power to admit States to the Union and the power to regulate elections.

general welfare of citizens within the District of Columbia by any and every act of legislation which it may deem conducive to that end."[9]

II. THE CONSTITUTION IS SILENT ABOUT VOTING RIGHTS FOR THE DISTRICT'S RESIDENTS.

While the Framers clearly intended to give Congress plenary authority over the District, what is far less clear is what they intended with respect to representation of the area. The question of representation does not appear to have seriously arisen until the federal government took up residence in the District in 1800, well after the Constitution had been drafted and ratified.[10]

In the face of the Constitution's silence, some ardent textualists (and indeed some courts) have insisted that Article I effectively disenfranchises the District's residents in congressional elections. For example, the United States District Court for the District of Columbia has held that D.C.'s residents cannot be treated like residents of the 50 States for purposes of electing members to the House of Representatives,[11] and the House may not unilaterally amend its Rules to give the District's Delegate the right to vote in the Committee of the Whole.[12]

But legislation to enfranchise the District's residents presents an entirely and altogether different set of issues. While the Constitution may not affirmatively grant the District's residents

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9. *Neild v. District of Columbia*, 110 F.2d 246, 250-51 (D.C. Cir. 1940).

10. *See* Raven-Hansen, *supra* note 3, at 172.

11. *Adams v. Clinton*, 90 F. Supp. 2d 35, 62 (D.D.C.) (holding "exclusion [of D.C. residents from voting in Congressional elections] was the consequence of the completion of the cession transaction – which transformed the territory from being part of a state, whose residents were entitled to vote under Article I, to being part of the seat of government, whose residents were not. Although Congress' exercise of jurisdiction over the District through passage of the Organic Act was the last step in that process, it was a step expressly contemplated by the Constitution. *See* U.S. Const. art. I, § 8, cl. 17."), *aff'd*, 531 U.S. 941 (2000), *reh'g denied*, 531 U.S. 1045 (2000), *appeal dismissed*, 2001 U.S. App. LEXIS 25877 (D.C. Cir. Oct. 18, 2001), *cert. denied*, 537 U.S. 812 (2002).

12. *Michel v. Anderson*, 817 F. Supp. 126, 141 (D.D.C. 1993), *aff'd*, 14 F.3d 623 (D.C. Cir. 1994).

the right to vote in congressional elections, the Constitution *does* affirmatively grant Congress plenary power to govern the District's affairs. Accordingly, the judiciary has rightly shown great deference where Congress announces its considered judgment that the District should be considered as a "State" for a specific legislative purposes.[13] For example, Congress may exercise its power to regulate commerce across the District's borders, even though the Commerce Clause[14] only referred to commerce "among the several states."[15] And Congress may bind the District with a duly ratified treaty, which allows French citizens to inherit property in the "States of the Union."[16]

III. THE SUPREME COURT HAS AFFIRMED CONGRESS'S PLENARY POWER TO EXTEND "STATES'" RIGHTS TO D.C. RESIDENTS WHERE THE CONSTITUTION IS SILENT.

In *Hepburn & Dundas v. Ellzey*,[17] the Supreme Court considered whether the District's citizens could bring suits in federal court under the Constitution's Diversity Clause,[18] which confers power on the federal courts to hear suits "between Citizens of different **States**." Absent

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13. *Adams* does *not* compel a different result. In *Adams*, the court held the District's voters could not vote in Maryland's congressional elections, basing its decision, in large part, on the fact that "Congress has ceded none of its authority over the District back to Maryland, and Maryland has not purported to exercise any of its authority in the District." 90 F. Supp. 2d at 64. The Fairness Act, in sharp contrast, would express Congress's incontrovertible intention to enfranchise the District's voters.

14. U.S. Const. Art. I, § 8, Cl. 3.

15. *Stoutenburgh v. Hennick*, 129 U.S. 141 (1889).

16. *De Geofroy v. Riggs*, 133 U.S. 258, 268-69 (1890) (while "state" might not ordinarily include an "organized municipality" such as the District, "[t]he term is used in general jurisprudence . . . as denoting organized political societies with an established government. Within this definition the District of Columbia . . . is as much a State as any of those political communities which compose the United States.").

17. 6 U.S. 445 (1805).

18. Art. III, § 2, Cl.1.

a congressional pronouncement to the contrary,[19] the Court concluded that the constitutional reference to "States" did not include the District.[20]

In 1948, however, Congress enacted a statute that treated the District as a State so that its residents could maintain diversity suits in federal courts.[21] In 1949, the Supreme Court's *Tidewater* decision upheld that statute as an appropriate exercise of Congress' power under the Seat of Government Clause, even though the Diversity Clause refers *only* to cases "between Citizens of different **States**."[22] The *Tidewater* holding confirms what is now the law: the Constitution's use of the term "State" in Article III cannot mean "and not of the District of Columbia." Identical logic supports legislation to enfranchise the District's voters: the use of the word "State" in Article I cannot bar Congress from exercising its plenary authority to extend the franchise to the District's residents.

IV. FUNDAMENTAL PRINCIPLES OF REPRESENTATIVE DEMOCRACY SUPPORT CONGRESS' DETERMINATION TO EXTEND THE FRANCHISE TO DISTRICT OF COLUMBIA RESIDENTS.

As the Supreme Court has repeatedly insisted, interpretation of the Constitution, particularly Article I, should be guided by the fundamental democratic principles upon which this nation was founded.[23] Absent any persuasive evidence that the Framers' intent in using the

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19. Section 11 of the Judiciary Act of 1789 gave federal courts jurisdiction to hear cases where "the suit is between the citizen of the State where the suit is brought, and a citizen of another State." 1 Stat. 73, 78. It was unclear whether Congress intended for the Judiciary Act to apply to the District's residents.

20. *Hepburn*, 6 U.S. at 452-53.

21. *See* 62 Stat. 869, *codified at* 28 U.S.C. § 1332(d).

22. *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949).

23. *See Powell v. McCormack*, 395 U.S. 486, 547 (1969) (noting that "[a] fundamental principle of our representative democracy is, in Hamilton's words, 'that the people should choose whom they please to govern them'") (citation omitted); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 819-823 (1995) (adding that "an aspect of sovereignty is the right of the people to vote for whom they wish").

term "State" was to deny the inhabitants of the District the right to vote for voting representation in the House of Representatives, a consideration of fundamental democratic principles further supports the conclusion that the use of that term does not necessitate that result.

A republican, that is representative, form of government, is a foundational cornerstone in the Constitution's structure; the denial of representation was one of the provocations that generated the Declaration of Independence and the War that implemented it. Article I creates the republican form of the national government, and Article IV guarantees that form to its *people*,[24] regardless of whether they reside in a District or a State.

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[24]. The right to vote arises out of the "relationship between the people of the Nation and their National Government, with which the States may not interfere." *Term Limits*, 514 U.S. at 845 (Kennedy, J., concurring); *see also id.* at 844 ("The federal right to vote . . . do[es] not derive from the state power in the first instance but . . . belong[s] to the voter in his or her capacity as a citizen of the United States,"); *id.* at 805 (noting that "'while, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states,'" in fact it "was a new right, arising from the Constitution itself") (quoting *United States v. Classic*, 313 U.S. 299, 314-15 (1941)); 514 U.S. at 820-21 (noting "that the right to choose representatives belongs not to the States, but to the people").

Mr. DAVIS [continuing]. And also from Senator Orrin Hatch of Utah.

Mr. NADLER. Without objection.

[The information referred to follows:]

POLICY ESSAY

"NO RIGHT IS MORE PRECIOUS IN A FREE COUNTRY": ALLOWING AMERICANS IN THE DISTRICT OF COLUMBIA TO PARTICIPATE IN NATIONAL SELF-GOVERNMENT

SENATOR ORRIN G. HATCH*

In this Policy Essay, Senator Orrin Hatch argues for passage of the District of Columbia House Voting Rights Act of 2007, a bill that neared passage in 2007 but failed to survive a cloture vote in the Senate. The bill would treat the District of Columbia as a congressional district, granting the District a seat in the House of Representatives. Focusing on the history of the District's creation and on existing case law regarding Congress's authority over the District, Senator Hatch argues that Congress has the constitutional authority to grant the District a seat in the House. Senator Hatch also argues that the 2007 Act would be an appropriate means to remedy the District's lack of voting representation in Congress, and why it is superior to past proposals relating to District representation.

In 2005, the world witnessed Iraqis holding up fingers stained with purple ink, proudly demonstrating that they had voted. Decades earlier, the U.S. Supreme Court had suggested why such a scene would be so dramatic, stating that "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live."[1] Yet, unlike American citizens living in the fifty states or even outside the United States altogether, Americans living in the District of Columbia ("the District") cannot exercise this most precious right with respect to their national government. Residents of the District are "Americanized for the purpose of national and local taxation and arms-bearing, but not for the purpose of voting."[2] This is simply inconsistent with the well-recognized principle that "[f]oremost among the basic principles of American political philosophy is the right to self-government."[3]

Efforts to allow District residents to exercise the right of representative self-government began more than two centuries ago, within months after it

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[1] Wesberry v. Sanders, 376 U.S. 1, 17 (1964); *see also* Powell v. McCormack, 395 U.S. 486, 547 (1969) ("A fundamental principle of our representative democracy is, in Hamilton's words, 'that the people should choose whom they please to govern them.'") (quoting 2 DEBATES ON THE FEDERAL CONSTITUTION 257 (Jonathan Elliot ed., 1876)).

[2] Roy P. Franchino, *The Constitutionality of Home Rule and National Representation for the District of Columbia*, 46 GEO. L.J. 207, 207 (1957–58) [hereinafter Franchino I].

[3] Roy P. Franchino, *The Constitutionality of Home Rule and National Representation for the District of Columbia*, 46 GEO. L.J. 377, 377 (1958) [hereinafter Franchino II].

became the seat of national government.[4] That effort continues today with the District of Columbia House Voting Rights Act of 2007,[5] which would give the District one seat in the House of Representatives by treating it as a congressional district.[6] Other provisions of the bill would prohibit treating the District as a state for purposes of Senate representation;[7] give Utah an additional House seat, thereby increasing the total House membership from 435 to 437 seats;[8] repeal the current law establishing the office of District of Columbia delegate to the House of Representatives;[9] and provide for expedited judicial review of any action challenging the bill's constitutionality.[10] Last year, although a majority of Senate and House members registered their support for this bill, a filibuster kept it from a final Senate vote.[11]

After briefly reviewing the history of the District's establishment and past efforts to give it congressional representation, this Article will explain why Congress is constitutionally empowered to enact this legislation, and why it should do so.

I. The Establishment of the District of Columbia

When the Continental Congress met in Philadelphia during the summer of 1783, hundreds of Revolutionary War soldiers surrounded the meeting site, demanding back pay while "wantonly pointing their muskets to the windows of the halls of Congress."[12] The Commonwealth of Pennsylvania and the City of Philadelphia ignored Congress's requests for military or police assistance, and so it was forced to move its proceedings to New Jersey.[13] Thus, the nation's early leaders learned of the dangers of holding congressional meetings under state jurisdiction.[14] Three months later, the Continental Congress endorsed the idea of locating the national legislature in a

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[4] *See infra* note 42 and accompanying text.

[5] S. 1257, 110th Cong. (2007); H.R. 1905, 110th Cong. (2007).

[6] S. 1257 § 2(a)(1).

[7] *Id.* § 2(a)(2).

[8] *Id.* § 4.

[9] *Id.* § 5(a).

[10] *Id.* § 7.

[11] The House passed its version of the bill, H.R. 1905, on April 19, 2007, by a vote of 241–177. 153 Cong. Rec. H3,593 (daily ed. Apr. 19, 2007). On September 18, 2007, a Senate vote on a motion to end debate over the Act failed by a vote of 57–42. 153 Cong. Rec. S11,631 (daily ed. Sept. 18, 2007). Rule 22, Clause 2, of the Standing Rules of the Senate requires "three-fifths of the Senators duly chosen and sworn" for passage of a motion to end debate on "any measure, motion, [or] other matter pending before the Senate." S. Doc. No. 110-9, at 16 (2007).

[12] 1 The Writings of James Madison 481 (Gaillard Hunt ed., 1900).

[13] See Kenneth R. Bowling, The Creation of Washington, D.C. 30–34 (1991).

[14] *See* Franchino I, *supra* note 2, at 209. ("This incident emphasized to Congress the need for a site of its own, independent of any state control.").

"suitable district" over which the federal government would exercise jurisdiction.[15]

America's founders had that incident in mind when they returned to Philadelphia four years later to draft the Constitution.[16] Apparently without debate, they gave the new Congress authority to create a district from land ceded by states to serve as "the seat of government of the United States" and to "exercise exclusive legislation in all cases whatsoever" over that district.[17] In addition to providing the security lacking in 1783, establishing the nation's capital outside any of its component states would, as George Mason argued, avoid "giv[ing] a provincial tincture to national deliberations."[18] There was little, if any, discussion during the framing convention or the ratification debates about whether creation of the District would deprive its future residents of the right to participate in congressional elections.[19]

During 1788–89, Maryland and Virginia ceded to the United States land along the Potomac River "to establish the capital city" between Alexandria and Georgetown.[20] It was "widely assumed that the land-donating states would make appropriate provision in their acts of cession to protect the residents of the ceded land."[21] As James Iredell put it in the North Caro-

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[15] 25 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789 714 (Worthington C. Ford ed.) (1922) (presenting notes from the October 21, 1783 meeting of the Continental Congress).

[16] *See* JUDITH BEST, NATIONAL REPRESENTATION FOR THE DISTRICT OF COLUMBIA 14–15 (1984); Lawrence M. Frankel, Comment, *National Representation for the District of Columbia: A Legislative Solution*, 139 U. PA. L. REV. 1659, 1683 (1991); Peter Raven-Hansen, *Congressional Representation for the District of Columbia: A Constitutional Analysis*, 12 HARV. J. ON LEGIS. 167, 191 (1975).

[17] U.S. CONST. art. I, § 8.

[18] THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 332 (Gaillard Hunt and James Brown Scott eds., 1970); *see also* THE FEDERALIST No. 43, at 289 (James Madison) (arguing that the lack of an independent, permanent capital would, among other things, promote "a dependence of the members of the general Government, on the State comprehending the seat of the Government."); Orrin G. Hatch, *Should the Capital Vote in Congress? A Critical Analysis of the Proposed D.C. Representation Amendment*, 7 FORDHAM URB. L.J. 479, 484 (1978–79) ("The inclusion of [the independent capital] provision stemmed from the concern of the Founding Fathers that the national capital be free from both the disproportionate influence of any state, and the influence of the states generally.").

[19] *See The Authority of Congress to Enact Legislation to Provide the District of Columbia with Voting Representation in the House of Representatives: Hearing Before the H. Comm. on Government Reform*, 108th Cong. 7 (2004) (statement of Viet D. Dinh, Professor, Georgetown Univ. Law Ctr., and Adam Charnes, Partner, Kilpatrick Stockton L.L.P.) [hereinafter *Voting Representation Hearing*] ("The delegates to the Constitutional Convention discussed and adopted the Constitution without any recorded debates on voting, representation, or other rights of the inhabitants of the yet-to-be-selected seat of government.").

[20] 1788 Md. Acts 46, 13 Va. Statutes at Large, ch.32, *reprinted in* D.C. Code Ann. § 33–34 (2001). The land ceded by Virginia was ceded back in 1846. Act of July 9, 1846, ch. 35, 9 Stat. 35.

[21] Raven-Hansen, *supra* note 16, at 172; *see also* RICHARD P. BRESS & LORI ALVINO MCGILL, CONGRESSIONAL AUTHORITY TO EXTEND VOTING REPRESENTATION TO CITIZENS OF THE DISTRICT OF COLUMBIA: THE CONSTITUTIONALITY OF H.R. 1905, at 2 (2007), *available at* http://www.acslaw.org/files/Bress%20and%20McGill%20on%20Constitutionality%20of%20HR%201905.pdf.

lina ratification debate, those ceding states were expected to "take care of the liberties of [their] own people."[22]

Suffrage was certainly among those liberties, as America's founders prized the franchise as central to the political system they were establishing. Pierce Butler of South Carolina, who served in the Continental Congress and later in the Senate, said that there was "no right of which the people are more jealous than that of suffrage" and warned that limiting suffrage would risk revolution.[23] Oliver Ellsworth of Connecticut, who also served in the Continental Congress and Senate and who became Chief Justice of the Supreme Court, similarly warned that limitations on suffrage could prevent ratification of the Constitution altogether.[24]

In ceding their land, Virginia and Maryland took steps to safeguard their residents' liberties. They stated as a condition that their jurisdiction would not end until Congress accepted the cession and took formal control of the District.[25] Congress then passed legislation accepting the ceded land and agreeing that "operation of the laws" of the ceding states would govern until Congress would "otherwise by law provide."[26] Thus, residents of the ceded land retained the right to vote in congressional elections in Maryland and Virginia.[27] As a result, "the citizens enjoyed both local and national suffrage notwithstanding the fact that the District was a federal jurisdiction and theoretically under the exclusive control of Congress."[28] Thus, as the result of affirmative legislative acts both by the states and by Congress, during this period District residents ceased to be residents of any state but nevertheless could vote in congressional elections.

The District became the seat of national government in December 1800,[29] "and on that date, the citizens of the District became disenfranchised."[30] Although Congress's 1790 acceptance of the Virginia and Maryland cessions had allowed for the continued voting rights of District

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[22] 4 DEBATES ON THE FEDERAL CONSTITUTION, supra note 1, at 219.

[23] THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 202–03 (Max Farrand ed., 1911). Similarly, James Madison wrote that "the right of suffrage is very justly regarded as a fundamental article of republican government." THE FEDERALIST No. 52 (James Madison).

[24] *See* RECORDS OF THE FEDERAL CONVENTION, *supra* note 23, at 201.

[25] *See Equal Representation in Congress: Providing Voting Rights to the District of Columbia: Hearing Before the S. Comm. on Homeland Security & Governmental Affairs*, 110th Cong. 7 (2007) (statement of Viet D. Dinh) [hereinafter *Providing Voting Rights Hearing*] ("The legislatures of both Maryland and Virginia provided that their respective laws would continue in force in the territories they had ceded until Congress both accepted the cessions and provided for the government of the District.").

[26] Act of July 16, 1790, ch. 28, 1 Stat. 130.

[27] *See* Memorandum from Richard Bress and Amanda Reeves to Walter Smith 6 (May 11, 2007) (on file with author) (stating that the 1790 Act "authorized the District's residents to continue voting in Maryland and Virginia."); *Voting Representation Hearing*, *supra* note 19, at 9 (statement of Viet D. Dinh and Adam Charnes) (District residents' "voting rights derived from Congressional action under the District Clause recognizing and ratifying the ceding states' law as the applicable law for the now-federal territory until further legislation.").

[28] Franchino I, *supra* note 2, at 214.

[29] *See id.* at 210.

[30] Frankel, *supra* note 12, at 1663.

residents under state law, the legislation in 1800 failed to provide for their continued representation under federal law.[31] This disenfranchisement of District residents persists to this day, yet it came about due to no more than an "historical accident by which D.C. residents lost the shelter of state representation without gaining separate participation in the national legislature."[32]

This brief sketch of the District's creation suggests several considerations that are important for the present discussion of whether Congress can and should enact legislation giving District residents representation in the House. First, the Framers' purpose in providing for the creation of an independent capital city was to "create a Federal District free from any control by an individual state,"[33] and the disenfranchisement of District residents was not necessary to accomplish that goal.[34] Second, consistent with their philosophical and political commitment to the franchise, America's founders had provided for continued congressional representation of District residents even after they no longer lived in a state.[35] There is no record of anyone in Congress, including the many members who had participated in drafting and

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[31] *Providing Voting Rights Hearing*, *supra* note 25, at 8 (statement of Viet D. Dinh).

[32] Raven-Hansen, *supra* note 16, at 185; *see also* Frankel, *supra* note 16, at 1664 ("[R]esidents of the District have the same responsibilities as the residents of any state in the nation and yet simply because of geography and historical accident, they are controlled by a national government in which they have no effective representation."); Memorandum from Richard Bress and Amanda Reeves to Walter Smith, *supra* note 27, at 6 ("It was this Act of Congress—the 1800 legislation—not a judicial interpretation of the Constitution and the Framers' intent that took away District residents' right to vote.").

[33] Franchino I, *supra* note 4, at 211; *see also id.* at 213 ("It cannot be overemphasized that . . . the desire for an area free from state control was paramount."); *Voting Representation Hearing*, *supra* note 19, at 7 (statement of Viet D. Dinh and Adam Charnes) ("The purpose for establishing a federal district was to ensure that the national capital would not be subject to the influences of any state.").

[34] *See* Jamin B. Raskin, *Is This America? The District of Columbia and the Right to Vote*, 34 HARV. C.R.–C.L. L. REV. 39, 77 (1999) ("[T]he historical record is plain that the overriding purpose of the District Clause was to guarantee that Congress would not be forced to depend on a state government that could compromise or obstruct its actions for parochial reasons. Congress did not intend to disenfranchise citizens within the capital city."). Some opponents of the bill making operative Congress's exclusive legislative authority over the District argued that it would disenfranchise District residents. *See* Raven-Hansen, *supra* note 16, at 176. ("The premise underlying their opposition to the bill—a premise never challenged in the congressional debates which ensued—was that the location of the seat of government at the District and the lodging of exclusive legislative authority over the District in Congress were consistent with continued representation of District residents in Congress.").

[35] Professor Raven-Hansen argues that the ability of District residents to vote in congressional elections between 1790 and 1800 provides "no precedent for the representation of District citizens" today. Raven-Hansen, *supra* note 16, at 174. I do not agree. Congress passed legislation that had the effect of allowing Americans not living in a state to vote in congressional elections. The fact that the entity we now call the District of Columbia had not yet been formally established is less relevant than the fact that these citizens were no longer residents of either Maryland or Virginia. *See Voting Representation Hearing*, *supra* note 19, at 9 (statement of Viet D. Dinh and Adam Charnes) ("The critical point here is that during the relevant period of 1790–1800, District residents were able to vote on Congressional elections in Maryland and Virginia not because they were citizens of those states—the cession had ended their political link with those states. Rather, their voting rights derived from *Congressional action under the District Clause* recognizing and ratifying the ceding states' law as the applicable law for the now-federal territory until further legislation.") (emphasis in original).

ratifying the Constitution,[36] suggesting that this posed any constitutional conflict.

Third, in light of the foregoing, there should be actual and substantial evidence that America's founders intended to strip District residents of the franchise they wanted for other Americans—and that District residents previously had enjoyed—to justify continuing to deny them representation. That evidence simply does not exist. There is no evidence of "intent on the part of the authors of the Constitution to . . . exclude residents of the District from voting representation in the local and national assemblies."[37] And finally, it is worth noting that Congress's authority to enact legislation regarding the District is unparalleled in scope. It has been called "sweeping,"[38] "plenary,"[39] and "extraordinary,"[40] and described as surpassing "both the authority a state legislature has over state affairs and Congress's authority to enact legislation affecting the 50 states."[41]

II. Efforts to Give the District Congressional Representation

The desire for District residents to have the same voice as other Americans in electing those who govern is not a recent development. As a Congressional Research Service report published in 2007 stated: "One year after establishing the District of Columbia as the national capital, District residents began seeking representation in the national legislature. As early as 1801, citizens of what was then called the Territory of Columbia voiced concern about their political disenfranchisement."[42]

That concern was borne both of the conviction that suffrage is central to the system of representative self-government America's founders had established and the desire to restore the franchise that District residents had only recently been able to exercise in electing members of Congress. The Americans living in the District were now excluded altogether from such participation, not because they no longer lived in America; indeed, they had not moved at all. They did not lose the franchise because they no longer lived in a state; indeed, Congress provided that they could vote in congressional

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[36] The First Congress included twenty members of the House and Senate who had been delegates to the Constitutional Convention in Philadelphia, and at least forty-two members who had been delegates to their states' ratifying conventions. Louis L. Sirico, Jr., *Original Intent in the First Congress*, 71 Mo. L. Rev. 687, 689 (2006).

[37] Franchino I, *supra* note 2, at 213; *see also id.* ("At no time during the prolonged debates was there any mention of the effect upon the franchise (whether nationally or locally) of the then-residents by the cessions and the acceptance by Congress of the ceded territory.").

[38] *Voting Representation Hearing*, *supra* note 19, at 1 (2004) (statement of former U.S. Solicitor General and U.S. Circuit Judge Kenneth W. Starr).

[39] Hobson v. Tobriner, 255 F. Supp. 295, 299 (D.D.C. 1966).

[40] United States v. Cohen, 733 F.2d 128, 140 (D.C. Cir. 1984).

[41] Memorandum from Richard P. Bress and Ali I. Ahmad to Walter Smith 2 (Sept. 12, 2006) (on file with author).

[42] Eugene Boyd, Cong. Research Serv., District of Columbia Voting Representation in Congress: An Analysis of Legislative Proposals 2 (2007).

elections even after the land on which they lived was no longer part of a state. They lost the franchise because Congress, apparently negligently rather than deliberately, failed to protect under federal law the franchise these residents had enjoyed under state law once Congress officially started its work in the District. Early representation advocates argued that District residents "do not cease to be a part of the people of the United States" and that "it is violating an original principle of republicanism, to deny that all who are governed by laws ought to participate in the formulation of them."[43]

Building on such early advocacy, official efforts to provide District residents with congressional representation began as early as 1803.[44] The most common vehicle for pursuing this goal has been the constitutional amendment, with more than 150 introduced since 1888.[45] In 1976, an amendment proposal reached the House floor, but the 229–181 vote fell short of the necessary two-thirds.[46] The same proposal passed the House in March 1978 by a vote of 289–127[47] and passed the Senate three months later by a vote of 67–32.[48] This amendment would have granted the District full representation in the Senate and House, changed the way the District participated in electing the President and Vice President, and given the District a role in the constitutional amendment process.[49] With the constitutional threshold of two-thirds of Congress met, the proposed amendment went before the states for ratification, but it expired when only 16 states ratified it by the 1985 deadline.[50]

Advocates have also sought to achieve congressional representation for the District through legislation.[51] In the 105th Congress, Delegate Eleanor

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[43] AUGUSTUS BREVOORT WOODWARD, CONSIDERATIONS ON THE GOVERNMENT OF THE TERRITORY OF COLUMBIA, PAPER NO. I (1801). Augustus Brevoort Woodward, who wrote this pamphlet eponymously, was a District landowner and member of its city council. BOYD, *supra* note 42, at 4.

[44] *See* 12 ANNALS OF CONG. 493–507 (1803) (discussing various approaches to returning suffrage or territorial control to District residents); *see also, e.g.*, 21 CONG. REC. 10,122 (1890) (statement of Rep. Henry Blair (R-N.H.)) (arguing that denying representation for District residents is "a drop of poison in the heart of the Republic.").

[45] *See* BOYD, *supra* note 42, at 3.

[46] *See* H.R.J. RES. 280, 94th Cong. (1976); *see also* BOYD, *supra* note 42, at 6 (detailing the legislative history of H.R.J. Res. 280 and similar proposals).

[47] District of Columbia Voting Rights Amendment, H.R.J. RES. 554, 95th Cong. (1977); 125 CONG. REC. 5272–73 (1978).

[48] 125 CONG. REC. 27,260 (1978).

[49] H.R.J. Res. 554, 95th Cong. § 1 (1977).

[50] BOYD, *supra* note 42, at 6.

[51] The fact that most attempts to provide congressional representation for the District have utilized the constitutional amendment vehicle does not mean that this is the only vehicle by which the goal may be sought. *See* S. REP. NO. 107-343, at 6 (2002) (reporting on behalf of the Senate Committee on Government Affairs the Committee's belief that "a constitutional amendment to afford D.C. full Congressional representation would be an effective and appropriate means to this end," but also that "[t]he Committee does not, however, believe that a constitutional amendment is necessary."). The use of a constitutional amendment, if successful, would be a clear reflection of national consensus and would be virtually impossible to change. Constitutional amendments are also, of course, very difficult to achieve, as suggested by the failure of each of the many proposed constitutional amendments on this topic. *See supra*

Holmes Norton (D-D.C.)[52] introduced H.R. 4208, the District of Columbia Voting Rights Act of 1998.[53] This very short bill simply declared: "Notwithstanding any other provision of law, the community of American citizens who are residents of the District constituting the seat of government of the United States shall have full voting representation in the Congress."[54] It had no provisions for actually implementing such representation, it attracted no co-sponsors, and it received no hearings.[55] Nonetheless, the debate allowed Delegate Norton to argue that "Congress cannot continue constitutionally to deny District residents representation in the national legislature, but must and can take all steps necessary to afford them full representation."[56] She introduced into the Congressional Record a "petition for redress of grievances" that she said laid out "the constitutional framework that requires that District citizens be treated like the full American citizens they are."[57]

In the 107th Congress, Senator Joseph Lieberman (D-Conn.) introduced S. 3054, the No Taxation Without Representation Act of 2002.[58] This bill would have provided for the District two Senators and as many House members as the District would receive if it were a state.[59] This bill had ten Senate co-sponsors, and was reported to the full Senate by the Committee on Governmental Affairs, which Senator Lieberman chaired.[60]

In the 109th Congress, Senator Lieberman and Delegate Norton introduced, respectively, S. 195[61] and H.R. 398,[62] the No Taxation Without Representation Act of 2005, with the same provisions as the 2002 bill. Although the Senate and House bills attracted, respectively, fifteen and ninety-four cosponsors, they received no hearings.[63] When he introduced the bill, Senator Lieberman said that the lack of congressional representation for the District is "a shadow overhanging the democratic traditions of our Nation as a

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notes 45–50 and accompanying text. The pursuit of representation through legislation, on the other hand, is numerically easier to achieve but subject to future repeal or amendment and open to constitutional challenge.

[52] United States territories have been represented by delegates since the Northwest Ordinance of 1787. *See* BETSY PALMER, CONG. RESEARCH SERV., TERRITORIAL DELEGATES TO THE U.S. CONGRESS: CURRENT ISSUES AND HISTORICAL BACKGROUND 1 (2006); *see also id.* ("Through most of the 19th century, territorial Delegates represented areas that were on the way to ultimate statehood."). Americans living in the District have been represented by a delegate since 1970. *See* Pub. Pub. L. No. 91-405, Tit. II, § 202, 84 Stat. 848 (1970) (codified at 2 U.S.C. § 25(a) (2000)). House rules have determined whether delegates may vote in committee, or in the full House, but their vote has never been able to determine legislative outcomes. *See* S. REP. No. 107-343, at 3 (2002).

[53] H.R. 4208, 105th Cong. (1998).

[54] *Id.* § 2.

[55] 1998 Bill Tracking H.R. 4208 (LEXIS).

[56] 105 CONG. REC. 5413 (1998) (Statement of Del. Norton).

[57] *Id.*

[58] S. 3054, 107th Cong. (2002); 148 CONG. REC. S9901 (daily ed. Oct. 3, 2002).

[59] S. 3054, 107th Cong. §§ 4, 5 (2002).

[60] S. REP. No. 107-343, at 9 (2002).

[61] S. 195, 109th Cong. (2005); 151 CONG. REC. S604 (2005) (daily ed. Jan. 26, 2005).

[62] H.R. 398, 109th Cong. (2005); 151 CONG. REC. H234 (daily ed. Jan. 26, 2005).

[63] 2005 Bill Tracking H.R. 398 (LEXIS); 2005 Bill Tracking S. 195 (LEXIS).

whole. . . . The right to vote is a civic entitlement of every American citizen, no matter where he or she resides. It is democracy's most essential right."[64] He said that America's founders "placed with Congress the solemn responsibility of assuring that the rights of D.C. citizens would be protected in the future."[65]

On the first day of the 110th Congress, Delegate Norton introduced H.R. 328, the District of Columbia Fair and Equal Voting Rights Act of 2007.[66] This bill pursued the same goal of District representation but was different from previous legislation in several important ways. First, and most obviously, it provided for representation of the District in the House but not in the Senate.[67] Second, it stated that the District "shall be considered a Congressional district" for purposes of representation,[68] whereas in the earlier legislation it was to be characterized "as a State."[69] Third, the 2007 bill provided that the District "may not receive more than one [House] Member under any reapportionment of Members."[70] Fourth, it directed the Clerk of the House to submit to the Speaker of the House a report "identifying the State . . . which is entitled to one additional Representative" under the apportionment formula used after the 2000 Census.[71] Most observers of the census and reapportionment process believe that Utah would receive that additional seat.[72]

Two months later, Delegate Norton introduced H.R. 1433, the District of Columbia Voting Rights Act of 2007, which superseded her previous bill.[73] In addition to the provisions of H.R. 328, this bill would have abolished the office of District of Columbia Delegate[74] and required that the new member granted to one of the states "be elected from the State at large."[75] The House Government Reform and Oversight Committee approved, by voice vote, an amendment that the District would not be considered a state for purposes of Senate representation[76] and voted 24–5 to approve the amended bill.[77] The House Judiciary Committee voted 21–13 to approve the bill after rejecting several amendments, including a provision that would

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[64] 109 CONG. REC. 604 (2005) (daily ed. Jan. 26, 2005) (statement of Sen. Lieberman).

[65] *Id.*

[66] 153 CONG. REC. H251 (daily ed. Jan. 9, 2007).

[67] H.R. 328, 110th Cong. § 3(a) (2007).

[68] *Id.*

[69] *E.g.*, H.R. 398, 109th Cong. §3 (2005).

[70] H.R. 328, 110th Cong. § 3(d) (2007).

[71] *Id.* § 4(c)(2).

[72] *See, e.g.*, S. REP. NO. 110-123, at 3 (2007) (stating that Utah was "the next state in line to receive an additional representative based on the 2000 census."). Utah would have needed just 855 more people in its "apportionment population" to gain an additional seat following the 2000 Census. *See* ROYCE CROCKER, CONG. RESEARCH SERV., DISTRICT OF COLUMBIA REPRESENTATION: EFFECT ON HOUSE APPORTIONMENT 4 tbl.2 (2007).

[73] 153 CONG. REC. H2838 (daily ed. Mar. 22, 2007) (statement of Del. Norton).

[74] H.R. 1433 § 5, 110th Cong. (2007).

[75] *Id.* § 4(c)(3)(A).

[76] H.R. REP. NO. 110-52, at 7 (2007).

[77] *Id.*

have allowed the Utah legislature to choose whether to elect its additional representative at-large or to create a new district.[78]

I objected strongly to this bill's attempt to dictate to a state how it must elect a member to Congress. In addition, as I explained in testimony before the Senate Homeland Security and Governmental Affairs Committee on May 15, 2007,[79] I have constitutional concerns about electing an additional House member at-large. States with a single House member, such as Alaska or Wyoming, elect that member at-large because the entire state is a single congressional district. Using this approach in states with multiple members, however, means that each state resident would be represented by two House members, twice what residents in every other state enjoy. In addition, the Utah legislature indicated its desire and ability to elect an additional House member through the normal redistricting process by voting overwhelmingly to adopt a new redistricting map in December 2006.[80] As I said in that same testimony, "I see no reason for Congress to undermine this and impose upon Utah a scheme it has not chosen for itself."[81]

As a result, rather than trying to change the House-passed bill, I agreed to co-sponsor legislation with Senator Lieberman, who once again chaired the Committee on Governmental Affairs. This effort took the form of S. 1257, the District of Columbia House Voting Rights Act of 2007, which adheres to the basic provisions of H.R. 1433 but allows Utah to choose for itself how it will elect its additional House member.[82] Committees of both the House and Senate held multiple hearings on this legislation.[83]

III. Congress Has the Constitutional Power to Grant House Representation to the District

To be sure, "the fact that basic American political theory supports national and local franchise for District citizens does not establish the constitutional propriety of such franchise."[84] Professor Philip B. Kurland wisely reminds us that, in constitutional law as in life, "the right answer depends on the right question."[85] The constitutional question regarding S. 1257 is whether the Constitution allows Congress to provide representation for the District in the House of Representatives through legislation, rather than through a constitutional amendment.

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[78] *Id.* at 34–38.

[79] *Providing Voting Rights Hearing*, *supra* note 25, at 2 (statement of Sen. Orrin G. Hatch).

[80] S.B. 5001, 56th Leg., 5th Spec. Sess. (Utah 2006).

[81] *Providing Voting Rights Hearing*, *supra* note 25, at 2 (statement of Sen. Orrin G. Hatch).

[82] *See* S. 1257 § 4(1), 110th Cong (2007).

[83] *See, e.g.*, S. Rep. No. 110-123, at 4–5 (2007).

[84] Franchino II, *supra* note 3, at 377.

[85] Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 Wm. & Mary L. Rev. 839, 839 (1986).

As a preliminary matter, it is clear that Congress possesses the constitutional authority to enlarge the House of Representatives. The Constitution's grant of legislative power in Article I directs Congress to determine the number and allocation of House seats, within certain constitutional constraints.[86] The Constitution establishes that the number of representatives "shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative."[87] Today, this means that the House must have a minimum of 50 members and, based on current population estimates, may have a maximum of just over 10,000 members.[88] Congress set the number of House seats at 435 in 1911,[89] and it remains at that number today.[90]

Because this basic constitutional authority is clear, this Article addresses whether the Constitution's provision that the House of Representatives "shall be composed of members chosen every second year by the people of the several states,"[91] referred to as the House Composition Clause, provides an additional limitation on Congress's authority to determine the number and allocation of House members. The refined question is thus: Did the framers of the Constitution intend this clause—by using the word "states"—to preclude Congress from providing District residents House representation?

For opponents of S. 1257, the word "states" begins and ends the constitutional debate. District residents may not be represented in the House, they say, because the District is not a state. Senate Minority Leader Mitch McConnell (R-Ky.), for example, has called S. 1257 "clearly and unambiguously unconstitutional," stating that it "contravenes what the framers wrote, what they intended, what the courts have always held, and the way Congress has always acted in the past."[92] The Bush Administration's Statement of Administration Policy similarly asserts: "The Constitution limits representation in the House to Representatives of States . . . . The District of Columbia is

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[86] *See* U.S. Const. art. I, § 2 ("The actual enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, *in such Manner as they shall by Law direct*.") (emphasis added).

[87] *Id.*

[88] The U.S. Census Bureau estimates the U.S. population to be over 300 million people. *See* U.S. Census Bureau, U.S. and World Population Clocks, http://www.census.gov/main/www/popclock.html (last visited Apr. 12, 2007).

[89] Pub. L. No. 62-5, ch. 5, 37 Stat. 13 (1911).

[90] ROYCE CROCKER, CONG. RESEARCH SERV., THE HOUSE APPORTIONMENT FORMULA IN THEORY AND PRACTICE 2 (2000). Congress temporarily expanded the House to 437 members upon the admission of Alaska and Hawaii as states, but the number reverted back to 435 following the 1960 census. *See* U.S. Census Bureau, Congressional Apportionment—Historical Perspective, http://www.census.gov/population/www/censusdata/apportionment/history.html (last visited Apr. 12, 2007).

[91] U.S. CONST. art. I, § 2.

[92] 153 CONG. REC. S11,539 (daily ed. Sept. 17, 2007) (statement of Sen. McConnell).

not a State. Accordingly, congressional representation for the District of Columbia would require a constitutional amendment."[93]

Both the Senate and House should debate, openly and more often, whether the Constitution allows them to pass individual pieces of legislation. Such public debate would demonstrate to our fellow citizens our continuing commitment to the Constitution as both the foundation of our government and the source of limitations on it. I freely admit that there are legitimate arguments on both sides of the constitutional debate regarding legislation to grant House representation to the District. As I have listened and participated in debates and discussions during the 110th Congress, I have been impressed that thoughtful experts, Democrats and Republicans, liberals and conservatives, are indeed on both sides of this question. The considerations outlined below, however, have led me to believe that "those who drafted the Constitution did not, by guaranteeing the vote to state residents, intend to withhold the vote from District residents."[94] Because America's founders did not intend to prohibit Congress from providing House representation for the District through legislation, S. 1257 rests on a firm constitutional foundation.

The first consideration is that America's founders grounded our entire political system on the principles of self-government and popular sovereignty. The Declaration of Independence asserts that government derives its "just powers from the consent of the governed."[95] The Constitution guarantees republican government,[96] a system of government in which, as James Madison wrote, power comes from "the great body of the people."[97] Alexander Hamilton famously explained the American system of representative self-government by saying: "Here, sir, the people govern; here, they act by their immediate representatives."[98] Today, his words appear inscribed above an entrance to the U.S. House of Representatives in the Capitol,[99] a building Thomas Jefferson described as "dedicated to the sovereignty of the people."[100]

I believe that this principle of popular sovereignty is so fundamental to our Constitution, the existence of the franchise so central, that it ought to govern absent actual evidence that America's founders intended that it be

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[93] EXECUTIVE OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: S. 1257—DISTRICT OF COLUMBIA HOUSE VOTING RIGHTS ACT OF 2007, at 1 (2007), http://www.whitehouse.gov/omb/legislative/sap/110-1/s1257sap-s.pdf.

[94] Memorandum from Richard Bress and Kristen E. Murray to Walter Smith 5 (Feb. 3, 2003) (on file with author).

[95] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[96] U.S. CONST. art. IV, § 4.

[97] THE FEDERALIST No. 39, at 209 (James Madison).

[98] Alexander Hamilton, Remarks at the New York Ratifying Convention (June 27, 1788), *in* SELECTED WRITINGS AND SPEECHES OF ALEXANDER HAMILTON 228, 229 (Morton J. Frisch ed., 1985).

[99] Architect of the Capitol, Quotations and Inscription in the Capitol Complex, http://www.aoc.gov/cc/cc_quotations.cfm (last visited Feb. 22, 2008).

[100] Letter from Thomas Jefferson to Benjamin Latrobe (1812), *in* THE JEFFERSONIAN CYCLOPEDIA 48, 48 (John P. Foley ed., 1900).

withheld from one group of citizens. The Supreme Court said in 1964 that the Constitution "leaves no room for classification of people in a way that unnecessarily abridges" the right of participating in the election of those who make the laws by which we must live.[101] This places a significant burden on those who would argue that the Constitution, by not providing directly for such representation itself, actually bars Congress from doing so. Repeating the dictionary definition of the word "states" does not meet that burden, and the remaining considerations discussed below convince me that this burden cannot be met.

Second, as noted above, the act of setting apart a district for the nation's capital provides no evidence that America's founders wanted to disenfranchise the Americans who would live there.[102] Rather, "[i]t cannot be overemphasized that throughout the debates regarding the selection of the site and the adoption of the District clause, the desire for an area free from state control was paramount."[103] Just as disenfranchisement was certainly not necessary to achieve that goal, correcting that error by providing today for House representation does not undermine the District's continuing status as a jurisdiction separate from the states and under the legislative authority of Congress.[104]

Third, far from indicating an intent to disenfranchise, the evidence shows that America's founders intended that District residents retain the franchise and be represented in Congress. They demonstrated that intention, as well as their acceptance of legislation as an appropriate means to that end, by providing for congressional representation of District residents between 1790 and 1800 even though they no longer resided in a state.[105] The founders' strong commitment to the franchise as the very heart of republican government makes it "inconceivable that they would have purposefully intended to deprive the residents of their capital city of this most basic right."[106] And the fact that they provided for, and then negated, congressional representation for District residents by legislation leads to the conclusion that, as Representative Tom Davis (R-Va.) has put it, "[w]hat was done by statute in 1790, and then undone by statute in 1800, can be redone by statute today."[107]

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[101] Wesberry v. Sanders, 376 U.S. 1, 17–18 (1964).

[102] *See supra* notes 18–19, 33–34 and accompanying text.

[103] Franchino I, *supra* note 2, at 213.

[104] Raven-Hansen, *supra* note 16, at 188 ("The question of the District's subordination to congressional authority is logically unrelated to the composition of Congress.").

[105] *See Voting Representation Hearing*, *supra* note 19, at 8 (statement of Viet D. Dinh and Adam Charnes) ("The terms of the cession and acceptance illustrate that, in effect, Congress exercised its authority under the District Clause to grant District residents voting rights coterminous with those of the ceding states when it accepted the land in 1790.").

[106] Memorandum from Richard Bress and Kristen E. Murray to Walter Smith, *supra* note 94, at 7.

[107] H.R. REP. NO. 110-52, pt. 1, at 29 (2007).

Fourth, federal courts for nearly two centuries have held that constitutional, legislative, and treaty provisions framed in terms of "states" can nevertheless apply to the District. They have done so either by interpreting those provisions to include the District or by holding that Congress may extend to the District through legislation what the Constitution applies to the states. Article I, section 8, of the Constitution, for example, gives Congress power to "regulate commerce . . . among *the several states*."[108] This is the same phrase, appearing in the same constitutional section, as the House Composition Clause.[109] And in *Stoutenburgh v. Hennick*,[110] the Supreme Court long ago held that this reference to "the several states" applies equally to the District.[111]

Similarly, the Sixth Amendment provides that in criminal prosecutions, "the accused shall enjoy the right to a speedy and public trial, by an impartial jury in *the state* and [judicial] district wherein the crime shall have been committed."[112] In *Callan v. Wilson*,[113] the Supreme Court held that this right applies within the District even though it is not a state.[114]

Federal courts also have held that Congress may, under its exclusive and plenary legislative authority over the District, treat the District like a state for certain purposes. For example, Article I, section 2, of the original Constitution stated that "direct taxes shall be apportioned among *the several states*."[115] This section again contains the same phrase as the House Composition Clause. Yet in *Loughborough v. Blake*,[116] the Supreme Court held that Congress could indeed tax the District.[117] Of course, the District was no more a state then for purposes of taxation than it is today for purposes of representation. Nonetheless, the Court said that "[i]f the general language of the constitution should be confined to the States, still the [District Clause] gives to Congress the power" to treat the District in the same way that the Constitution treats the states.[118]

Similarly, Article III, section 2, of the Constitution provides that federal courts may review lawsuits "between citizens of different *states*."[119] In *Hepburn & Dundas v. Ellzey*,[120] the Supreme Court held that this does not itself include the District.[121] Significantly, however, Chief Justice Marshall found it "extraordinary" that federal courts would be open to citizens living

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[108] U.S. CONST. art. I, § 8, cl. 3 (emphasis added).
[109] *See* U.S. CONST. art. I, § 2.
[110] 129 U.S. 141 (1889).
[111] *Id.* at 148.
[112] U.S. CONST. amend. VI (emphasis added).
[113] 127 U.S. 540 (1888).
[114] *See id.* at 548–50.
[115] U.S. CONST. art. I, § 2 (emphasis added).
[116] 18 U.S. (5 Wheat) 317 (1820).
[117] *Id.* at 325.
[118] *Id.* at 322–24.
[119] U.S. CONST. art. III, § 2 (emphasis added).
[120] 6 U.S. (2 Cranch) 445 (1805).
[121] *See id.* at 452–53.

in states but not to citizens living in the District.[122] And he observed that, while the Constitution did not itself extend diversity jurisdiction to the District, "this is a subject for legislative, not for judicial consideration."[123]

Indeed, in *National Mutual Insurance Co. v. Tidewater Transfer Co.*,[124] the Supreme Court upheld congressional legislation extending the federal courts' diversity jurisdiction to the District.[125] Two members of the five-to-four majority would have overruled *Hepburn* outright,[126] while three others focused on Congress's exclusive legislative authority over the District as the basis for their conclusion.[127] As the Court had done in *Loughborough* and again in *Hepburn*, the plurality held that while the Constitution did not itself extend diversity jurisdiction to the District, Congress could do so by treating the District as a state for this purpose.[128] Thus, "[t]he significance of *Tidewater* is that the five justices concurring in the result believed either that the District was a state under the terms of the Constitution or that the District Clause authorized Congress to enact legislation treating the District as a state."[129]

In *District of Columbia v. Carter*,[130] the Supreme Court held that since "the commands of the [Fourteenth] Amendment are addressed only to the State or to those acting under color of its authority" and "since the District of Columbia is not a 'State' within the meaning of the [Fourteenth] Amendment . . . neither the District nor its officers are subject to its restrictions."[131] Congress could not, therefore, use its authority to enforce the Fourteenth Amendment[132] as the basis for legislation applying its restrictions on state authority to the District. The Court suggested, however, that Congress's separate and exclusive legislative authority over the District would be a sufficient basis for such legislation.[133] In other words, just as it had done in *Loughborough*, *Hepburn*, and *Tidewater*, the Court held that Congress

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[122] *Id.* at 453.

[123] *Id.*

[124] 337 U.S. 582 (1949).

[125] *See id.* at 603–04 (upholding Act of April 20, 1940, ch. 117, 54 Stat. 143).

[126] *See id.* at 617–18 (Rutledge, J., concurring).

[127] *See id.* at 603.

[128] *See id.* at 588–89.

[129] *Voting Representation Hearing*, *supra* note 19, at 13 (statement Viet D. Dinh and Adam Charnes). For more extended analysis of this decision, see *Providing Voting Rights Hearing*, supra note 25, at 11–12 (statement of Viet D. Dinh). *See also* Franchino II, *supra* note 3, at 393–403; Memorandum from Richard P. Bress and Ali I. Ahmad to Walter Smith, *supra* note 41, at 3–4; Memorandum from Rick Bress and Kristen E. Murray to Walter Smith, *supra* note 94, at 9–10.

[130] 409 U.S. 418 (1973).

[131] *Id.* at 423–24.

[132] U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

[133] *See Carter*, 409 U.S. at 428–31. Congress used that authority for this purpose, amending 42 U.S.C. § 1983 in 1979 to cover the District. Pub. L. No. 96-170, 93 Stat. 1284 (1979). The constitutionality of this statute has never been challenged.

could, through legislation, apply to the District what the Constitution applies to states.

Another endorsement of this principle, and the most relevant for the present discussion, is the decision in *Adams v. Clinton*.[134] In *Adams*, District residents argued, as Delegate Norton had when she introduced her first bill on District representation, that the Constitution granted them the right to vote in congressional elections.[135] A three-judge panel of the district court disagreed, holding that the Constitution granted representation to residents of "states" and, as the Supreme Court had done in *Hepburn*, observed that the District is not a state.[136]

The court did not, however, hold that the Constitution precludes Congress, acting under its extraordinary and plenary authority over the District, from providing for such representation through legislation. To the contrary, the court applied the Supreme Court's reasoning in *Tidewater* that Congress in that case had used "its Article I power to legislate for the District" to provide for District residents what the Constitution had provided for state residents.[137] Following the Supreme Court's example in *Loughborough*, *Hepburn*, *Tidewater*, and again in *Carter*, the court said that, while it lacked "authority to grant plaintiffs the relief they seek," they could "plead their cause in other venues,"[138] including "the political process."[139] The Supreme Court affirmed this decision,[140] suggesting that Congress can permissibly use its legislative authority to provide the District with congressional representation.

Some have read *Adams* too narrowly and failed to make the distinction, which the Supreme Court has made for nearly two centuries, between what the Constitution itself does directly and what Congress may do legislatively. One Congressional Research Service report, for example, characterizes *Adams* as deciding "whether, the Constitution, as it stands today, *allows* such representation."[141] The Bush administration's Statement of Administration Policy on S. 1257 makes a similar argument, quoting from *Adams* the statement that "the Constitution does not *contemplate* that the District may serve as a state for purposes of the apportionment of congressional representa-

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[134] 90 F. Supp. 2d 35 (D.D.C. 2000), *aff'd*, 531 U.S. 941 (2000).
[135] *See id.* at 37–38.
[136] *Id.* at 55–56.
[137] *Id.* at 54–55.
[138] *Id.* at 72.
[139] *Id.* at 73.
[140] Adams v. Clinton, 531 U.S. 941 (2000).
[141] KENNETH R. THOMAS, CONG. RESEARCH SERV., THE CONSTITUTIONALITY OF AWARDING THE DELEGATE FOR THE DISTRICT OF COLUMBIA A VOTE IN THE HOUSE OF REPRESENTATIVES OR THE COMMITTEE OF THE WHOLE 4 (2007). Mr. Thomas presented similar conclusions in testimony before the Senate Judiciary Committee on May 23, 2007. *Ending Taxation Without Representation: Hearing on S. 1257 Before the S. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Kenneth R. Thomas, Legislative Attorney, Cong. Research Serv.) (emphasis added).

tives."[142] The holding in *Adams*, however, was far narrower than these statements suggest. The court denied relief on the basis that the Constitution does not itself grant such representation.[143] This conclusion is clearly correct, but it does not address whether Congress may grant House representation under its authority to legislate for the District. Former U.S. Solicitor General and U.S. Circuit Judge Kenneth Starr explained in Senate testimony that legislation to grant District residents congressional representation "presents an entirely and altogether different set of issues" from the claim rejected in *Adams*.[144] He explained that "[w]hile the Constitution may not affirmatively grant the District's residents the right to vote in congressional elections, the Constitution *does* affirmatively grant Congress plenary power to govern the District's affairs."[145] Indeed, Congress has used its power under the District Clause "to enact hundreds of other statutes . . . under which the District is treated like a state . . . ."[146]

These and other similar court decisions[147] suggest two important considerations for the present analysis. First, the word "states" in various constitutional provisions has not always been given its literal meaning, but has often been construed to include the District. Second, and more importantly, even when giving "states" its literal meaning in the constitutional text, courts have not held that this construction prohibits Congress from accomplishing through legislation what the Constitution does not itself grant. Decisions such as *Loughborough*, *Hepburn*, *Tidewater*, *Clinton*, and *Adams* support the proposition that even if the word "states" is not deemed to include the District, Congress may use its unique and plenary legislative authority over the District to provide for its residents what the Constitution provides for state residents.

These considerations have convinced me that neither a constitutional amendment nor statehood is necessary for the District's residents to be granted representation in the House. I come to a different conclusion, however, with regard to granting the District representation in the Senate. Article I, section 3, of the Constitution provides that the Senate shall be composed

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[142] EXECUTIVE OFFICE OF THE PRESIDENT, *supra* note 93, at 1 (quoting *Adams*, 90 F. Supp. 2d at 46–47) (emphasis added).

[143] *See Adams*, 90 F. Supp. 2d at 72–73.

[144] *Voting Representation Hearing*, *supra* note 19, at 5–6 (statement of Kenneth W. Starr).

[145] *Id.*

[146] Memorandum from Richard Bress and Kristen E. Murray to Walter Smith, *supra* note 94, at 10; *see also id.* ("These statutes range from the Federal Election Campaign Act, the federal copyright statute, the Racketeer Influenced and Corrupt Organizations Act, to the federal civil rights and equal employment opportunity statute, and the federal crime victim compensation and assistance statute.") (citations omitted).

[147] *See, e.g.*, Hobson v. Tobriner, 255 F. Supp. 295, 297 (D.D.C. 1966) ("Although the District of Columbia is not regarded as a state for many purposes, it is clear that it is a part of the United States so as to afford the residents certain rights and privileges, such as trial by jury, presentment by grand jury, and the protections of due process of law."); *Voting Representation Hearing*, *supra* note 19, at 15–17 (statement of Viet D. Dinh and Adam Charnes); Hatch, *supra* note 18, at 501 n.92.

of two Senators "from each State."[148] The Seventeenth Amendment changed how those Senators would be chosen, so that today Senators are chosen "by the people" rather than "by the Legislature" of each state.[149] But that Amendment did not change the fundamental difference in the nature of House and Senate representation: the House was designed to represent people, whereas the Senate was designed to represent states.[150] Representative Davis argues that "a more historically correct reading recognizes that the Founders intended that [the House] represent all enfranchised people in America" and that "at the time the section was drafted, the residents of what would only later become the District of Columbia were among the people of the several states."[151] The difference in representation between the House and Senate was central to the so-called Great Compromise, which balanced the interests of large and small states in the construction of our bicameral national legislature,[152] and it remains fundamental to the structure of our political system today. The District's current status as a non-state, therefore, does not bar representation in the House, which is designed to represent population, but does bar representation in the Senate, which is designed to represent states.

Moreover, I have long believed that granting Senate representation for the District would interfere with the Constitution's grant of "equal suffrage" for the states in the Senate.[153] In 1978, I argued that giving non-state entities a share of representation in the body designed to represent states would diminish that equal suffrage.[154] Others, such as Professor Raven-Hansen, have developed theories such as "nominal statehood" to support legislative provision for District representation in both the House and Senate.[155] Professor Raven-Hansen argues that "by the principle of nominal statehood, the District *is* a state for the purpose of representation," and that granting the District representation in both houses therefore would not interfere with the

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[148] U.S. CONST. art I, § 3.

[149] U.S. CONST. amend. XVII.

[150] *See Providing Voting Rights Hearing*, *supra* note 25, at 2 (statement of Sen. Orrin G. Hatch); *Voting Representation Hearing*, *supra* note 19, at 13 n.57 (statement of Viet D. Dinh and Adam Charnes); Hatch, *supra* note 18, at 504–05; *see also* Wesberry v. Sanders, 376 U.S. 1, 9 (1964) ("[I]t was population which was to be the basis of the House of Representatives."). I disagree with some proponents of District representation that "this original sharp dichotomy between the people's chamber and the states' chamber has been muted, if not completely wiped away, by the Seventeenth Amendment." Raskin, *supra* note 34, at 58–59.

[151] H.R. REP. NO. 110-52, at 30 (2007).

[152] *See* ROYCE CROCKER, CONG. RESEARCH SERV., THE HOUSE OF REPRESENTATIVES APPORTIONMENT FORMULA: AN ANALYSIS OF PROPOSALS FOR CHANGE AND THEIR IMPACT ON STATES 3 (2001). This was "one of the great debates at the Constitutional Convention." Montana v. U.S. Dep't of Commerce, 775 F. Supp. 1358, 1368 (D. Mont. 1991) (O'Scannlain, J., concurring in part and dissenting in part).

[153] *See* U.S. CONST. art. V.

[154] 124 CONG. REC. 26,371 (1978) (statement of Sen. Hatch); *see also* BEST, *supra* note 16, at 43–51; STEPHEN MARKMAN, STATEHOOD FOR THE DISTRICT OF COLUMBIA 31 (1988); Hatch, *supra* note 18, at 515–17.

[155] *See* Raven-Hansen, *supra* note 16, at 189.

equal suffrage of the states.[156] But this sort of theory is insufficient for supporting District representation in the Senate, where *actual* statehood is what is constitutionally relevant. And legislation such as S. 1257, which grants only House representation and treats the District as a congressional district rather than as a state, avoids this constitutional conflict.

The courts have settled the question of whether the Constitution itself provides House representation for District residents.[157] It does not, and I do not dispute that conclusion. This observation, however, begins rather than ends the inquiry. The remaining question is the most important one: whether Congress may do what the Constitution does not. The considerations outlined above[158] convince me that the answer is yes. America's founders did not intend to suspend the principle of representative self-government for one group of citizens by permanently disenfranchising District residents. To the contrary, they provided for congressional representation even though these citizens no longer lived within a state. Indeed, "the intent of the Founding Fathers appears to favor national suffrage for the District."[159] Consistent with two centuries of judicial precedent, Congress may do what the Constitution does not by providing for House representation by legislation.

Candidly, my position regarding House representation has changed even though my opposition to Senate representation for the District remains the same. Most of the concerns about House Joint Resolution 554 that I expressed in 1978 are not relevant today because, as I will describe below, S. 1257 does not contain that proposed amendment's most problematic provisions. But during the floor debate on House Joint Resolution 554, I stated: "The Constitution refers only to 'States' as having representation in the Senate and the House of Representatives. There is no language to suggest that any other political entity could qualify for voting representation *in either Chamber*."[160] Upon further reflection, I have come to believe that my prior position failed sufficiently to account for the overarching constitutional principle of self-government, the specific actions of America's founders when they established the District, the relevant judicial precedents, the full extent

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[156] *Id.*; *see also* BOYD, *supra* note 42, at 16 (setting forth a similar theory of "virtual statehood" for the District).

[157] *See* Adams v. Clinton, 90 F. Supp. 2d 35 (D.D.C. 2000), *aff'd*, 531 U.S. 941 (2000).

[158] *See supra* notes 95–108 and accompanying text. Other commentators and advocates have offered additional arguments that the Constitution allows Congress to provide congressional representation for the District through legislation. *See, e.g.*, Frankel, *supra* note 16, at 1690–705; Memorandum from Walter Smith & L. Elise Dietrich to Del. Eleanor Holmes Norton, Anthony Williams, Mayor, District of Columbia, Linda Cropp, Chairman, D.C. City Council, and Robert Rigsby, Counsel, D.C. Corp. 7–8 (May 22, 2002), http://www.dcappleseed.org/projects/publications/smithsimplelegmemo052202.pdf. Others have argued that the Constitution actually requires that District residents have the national franchise. *See generally, e.g.*, Raskin, *supra* note 34 (arguing that the lack of District representation violates residents' rights to due process and equal protection).

[159] Franchino II, *supra* note 3, at 388, 411; *see also id.* ("'National representation' in the District existed during the transitional period 1790–1800.").

[160] 124 CONG. REC. 26,371 (1978) (statement of Sen. Hatch) (emphasis added).

of Congress's legislative authority over the District, and the distinction between the nature of representation in the House and the Senate. Properly weighing these considerations has led me now to believe that Congress has the power to provide House representation for District residents through legislation.

IV. Congress Should Give the District Representation in the House

Having established that Congress *may* pass legislation such as S. 1257, the question remains whether it *should* do so. I believe that it should. I agree with the conclusion of the U.S. Court of Appeals in *Adams v. Clinton* that there is a "contradiction between the democratic ideals upon which this country was founded and the exclusion of District residents from Congressional representation."[161] One of my predecessors as a Senator from Utah, George Sutherland, was later appointed to the Supreme Court and wrote for the Court in 1933:

> The District was made up of portions of two of the original states of the Union, and was not taken out of the Union by the cession. Prior thereto its inhabitants were entitled to all the rights, guaranties, and immunities of the Constitution . . . . We think it is not reasonable to assume that the cession stripped them of these rights.[162]

Certainly suffrage tops the list of rights.

This is not a new position for me. As I expressed three decades ago during debate on House Joint Resolution 554, "District residents should enjoy all the privileges of American citizenship."[163] These include "the privilege of participating in the electoral process."[164] District residents, I said then and continue to believe today, "should have voting rights."[165] Explaining my opposition to that amendment proposal in a more scholarly setting, I wrote similarly that I did not oppose House Joint Resolution 554 "out of opposition to providing the citizens of the District with a direct voice in the affairs of the national government."[166] In fact, I suggested as an alternative providing the District "with voting representation in the House of Repre-

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[161] 90 F. Supp. 2d at 72.

[162] O'Donoghue v. United States, 289 U.S. 516, 540 (1933).

[163] 124 Cong. Rec. 26,370 (1978) (statement of Sen. Hatch). During the 1978 debate, I made "very clear" that "I supported the intent of the amendment." *Id.*

[164] *Id.*

[165] *Id.* at 26,371.

[166] Hatch, *supra* note 18, at 480; *see also id.* at 533 ("Most congressional opponents of H.J. Res. 554, including this author, were not opposed in principle to providing the citizens of the District with a direct voice in the affairs of the national government.").

sentatives alone."[167] For me, the question has never been about the desirable ends, but about the appropriate means.

The most appropriate means would provide genuine congressional representation for District residents while maintaining other constitutional imperatives. I co-sponsored S. 1257 because I believe it meets this standard. This legislation would use Congress's constitutional authority to provide House representation without disturbing the essential constitutional and political structure of our system of government.

In doing so, S. 1257 would avoid the problematic features of House Joint Resolution 554, which drew my opposition in 1978. During the 1978 floor debate I said that section 1 of that resolution was "at the heart of the difficulty."[168] Section 1 read: "For the purpose of representation in the Congress, election of the President and Vice President, and article V of this Constitution, the District constituting the seat of government of the United States shall be treated as though it were a State."[169] It thus would have provided for Senate, as well as House, representation. As explained above, I continue to oppose Senate representation for the District, and S. 1257 disclaims any basis for such representation. The Senate Homeland Security and Governmental Affairs Committee adopted an amendment to S. 1257, offered by Senator Susan Collins (R-Me.), stating that the District "shall not be considered a State for purposes of representation in the United States Senate."[170]

There can be no dispute that America's founders intended for the District to be a political entity separate from the states. In addition, as I have explained in this Article, I believe that they did not intend that District residents be disenfranchised in establishing the District. I support both of these objectives today. For that reason, I continue to oppose both statehood and Senate representation for the District.[171] Having reconsidered the factors outlined in this Article, I now support House representation for the District, a position that addresses the essential "political disability which has no constitutional rationale."[172]

While the Constitution guarantees each state at least one House member,[173] that number grows as a state's population grows. Each congressional district, however, is represented by a single House member. Under S. 1257, the District would be treated not as a state but as a congressional district for purposes of House representation, guaranteeing and limiting that representa-

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[167] *Id.* at 537.

[168] 124 CONG. REC. 26,370 (1978) (statement of Sen. Hatch).

[169] *Id.* at 26,372.

[170] S. REP. NO. 110-123, at 5 (2007).

[171] *See* Hatch, *supra* note 18, at 504–07, 515–17 (arguing against Senate representation for the District).

[172] Raven-Hansen, *supra* note 16, at 185 (referring to the disenfranchisement of District residents in Congress).

[173] U.S. CONST. art. 1, § 2.

tion to one member.[174] In addition, S. 1257 would make no change to the District's role in electing the President and Vice President[175] and would have no effect on its participation in the constitutional amendment process under Article V. In sum, S. 1257 is a narrowly focused bill that accomplishes a single important objective through a solidly constitutional means.

Nor has S. 1257 involved the procedural flaws that helped make House Joint Resolution 554 controversial. During the debate in 1978, I criticized the tactics that had been used in bringing the bill to the Senate floor.[176] These included being "asked to consider the flawed House version without having the opportunity to correct some of the provisions which make it unacceptable to a number of us."[177] Multiple House and Senate committees held public hearings on the present legislation, and S. 1257 itself was introduced precisely because the House version contained an important flaw, requiring that the new House seat for Utah be elected at-large.[178]

Ultimately, therefore, I believe that S. 1257 meets the goal that I set forth in 1978. I said then that "I would like to see . . . remedied" the fact that District residents "may not vote for voting representatives" in Congress, but that House Joint Resolution 554 "is not the way to remedy it."[179] Having changed my view regarding the constitutionality of providing for House representation through legislation, I believe that the present legislation is the proper way to remedy an injustice that has lasted far too long. Without a clear constitutional command to the contrary, Americans in the District should be allowed to participate in selecting a representative, which the Supreme Court has called "the essence of a democratic society" and "the heart of representative government."[180]

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[174] *See* S. 1257 § 2, 110th Cong. (2007). This limitation to a single House member poses no conflict with the Supreme Court's requirement that the population of congressional districts be "as mathematically equal as reasonably possible." White v. Weiser, 412 U.S. 783, 790 (1973). Based on the current United States population of approximately 304 million, each congressional district has an average population of 699,000. U.S. Census Bureau, *supra* note 97. The District of Columbia's estimated population of about 588,000 is well below this level. *See* U.S. Census Bureau, National and State Population Estimates 2000 to 2007, http://www.census.gov/popest/states/NST-ann-est.html (last visited Apr. 12, 2008). However, the District's population exceeds that of Wyoming, which has one congressional district. *See id.*

[175] H.R.J. Res. 554, 95th Cong. (1978) would have repealed the Twenty-Third Amendment, which grants the District participation in electing the President and Vice President by appointing a number of electors "in no event more than the least populous State." U.S. CONST. amend. XXIII. While I continue to support House representation for the District, and have come to believe that legislation to that end is constitutional, I also continue to oppose the notion, as I argued three decades ago, that "all distinctions between the states and the District of Columbia [should] be removed." Hatch, *supra* note 18, at 501.

[176] 124 CONG. REC. 26,371 (1978) (statement of Sen. Hatch).

[177] *Id.*; *see also* Hatch, *supra* note 18, at 484 ("H.J. Res. 554 was placed immediately upon the calendar of the Senate, in circumvention of the normal committee processes, by means of a highly unusual expediting procedures [sic] invoked by the Senate Majority Leader . . . .").

[178] See supra notes 65–67 and accompanying text.

[179] 124 CONG. REC. 26,371 (1978) (statement of Sen. Hatch).

[180] Reynolds v. Sims, 377 U.S. 533, 555 (1964).

This conclusion is reinforced by the fact that Congress today has provided that Americans living outside of the United States may vote in congressional elections. The Uniformed and Overseas Citizens Absentee Voting Act[181] allows Americans to vote by absentee ballot in "the last place in which the person was domiciled before leaving the United States,"[182] as Congress did for District residents between 1790 and 1800. As such, "the Act permits voting in federal elections by persons who are not citizens of any state."[183] Similarly, the Supreme Court has held that residents of a federal enclave within Maryland have a constitutional right to congressional representation.[184] As has been noted, "[i]f residents of federal enclaves and Americans living abroad can thus be afforded voting representation, Congress should be able to extend the same to District residents."[185] The right to vote in congressional elections "belong[s] to the voter in his or her capacity as a citizen of the United States"[186] and respects the "relationship between the people of the Nation and their National Government."[187] That is as true about Americans living in the District as it is about Americans living in Utah. Legislation such as S. 1257, granting the District a full voting member of the House, supports both the imperative of self-government and the essential structure on which our political system is built. On Constitution Day, 2006, former U.S. Circuit Judges Kenneth Starr and Patricia Wald wrote in the *Washington Post* that such legislation "is consistent with fundamental constitutional principles; it is consistent with the language of Congress's constitutional power; and it is consistent with the governing legal precedents."[188]

In conclusion, I offer the closing paragraph from a column published one year later in the *Washington Post* that I authored along with Sen. Lieberman, Rep. Davis, and Delegate Norton:

> We do not believe that the nation's Founders, fresh from fighting a war for representation, would have denied representation to the residents of the new capital they established. Some of these residents of Maryland and Virginia were undoubtedly veterans of the Revolutionary War, and residents of both states had voting representation. When accepting the land for the District, the First Congress honored a covenant to these first residents to observe

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[181] Pub. L. No. 99-410, 100 Stat. 924 (1986) (codified at 42 U.S.C. § 1973ff (2000)).

[182] 42 U.S.C. § 1973ff-6.

[183] *Voting Representation Hearing*, *supra* note 19, at 18 (statement of Viet D. Dinh & Adam Charnes).

[184] *See* Evans v. Cornman, 398 U.S. 419, 419, 426 (1970).

[185] Memorandum from Richard Bress and Kristen E. Murray to Walter Smith, *supra* note 94, at 12.

[186] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 844 (1995) (Kennedy, J., concurring).

[187] *Id.* at 845.

[188] Kenneth Starr & Patricia Wald, Op-Ed., *Congress Has the Authority to Do Right by D.C.*, WASH. POST, Sept. 17, 2006, at B8.

> existing laws of the donor states. They pledged that, when jurisdiction passed to Congress, it would "by law provide" for preserving the residents' rights. It is time to fulfill that promise by passing our historic bill.[189]

The authors of this statement serve in different houses of Congress, are members of different political parties, and often have different political goals that reflect different ideologies. Yet we are the principal sponsors of S. 1257 because we believe Congress may and should provide House representation for the District.

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[189] Orrin G. Hatch, Joe Lieberman, Tom Davis & Eleanor Holmes Norton, Op-Ed., *A Vote the District Deserves*, WASH. POST, Sept. 12, 2007, at A19.

Deseret News

D.C. voting act is best way to ensure that Utah gets its 4th seat

By Orrin G. Hatch

Published: January 25, 2009

Utahns, more than most, know the importance of the right to vote. The Supreme Court has said that "no right is more precious in a free country" than participating in the election of those who govern us. I agree and support legislation that would provide that right more fully to Utahns and for the first time to Americans in the District of Columbia

The District of Columbia House Voting Rights Act would give Utah its long-overdue fourth House seat. Only one state has a higher number of residents per House member, and that state, Montana, has a single at-large member representing the entire state. Utah's ratio is 30 percent above the national average. We need and deserve a fourth House seat and thought the 2000 census would provide it. That experience, however, showed the danger of putting all our representation eggs in the census basket.

I certainly hope the 2010 census gets it right and that the reapportionment process provides Utah a fourth House seat. It is not, however, a sure thing. Utah is the fastest-growing state since 2007, but not since the last census. Projections and hopes are, in the end, simply speculation. Because we must do as much as we can to get the representation Utah deserves, we need a Plan B.

Some say this bill is unconstitutional. The Constitution states that the House of Representatives "shall be composed of members chosen by the people of the several states." Merely observing that the District is not a state, however, begins rather than ends the matter. Let me mention a few additional factors to consider.

First, the District did not even exist when the Constitution described House composition in terms of "states." Representation and voting rights are the very core of the American political system. There is no evidence that America's founders intended to exclude some Americans from participation in self-government.

Second, America's founders did what the bill would do today. Virginia and Maryland ceded land for the District in 1788. Until the District was formally established in 1800, Congress treated Americans living on that land as if they still lived in a state so they could be represented in Congress. The bill today would do exactly the same thing, treating the District as a congressional district so that Americans living there can be represented in Congress. That land was no more part of a state in 1790 than the District is today. No one argued then that such legislation violated the Constitution they had written. If Congress could provide voting rights for District residents by legislation then, Congress can do so today.

Third, courts have ruled for more than 200 years that constitutional provisions framed in terms of "states" can nonetheless be applied to the District. The original Constitution, for example, provided that direct taxes be apportioned among "the several states." Article I gives Congress authority to regulate commerce "among the several states." Article III gives federal courts authority to consider lawsuits "between citizens of different states."

If the word "states" necessarily excludes the District, then the District cannot be taxed, its commerce cannot be regulated and its residents may not sue in federal court. Instead of those absurd results, the courts have ruled that Congress can use its legislative authority over the District "in all cases whatsoever"

to accomplish there what the Constitution accomplishes for states.

Some have suggested giving most of the District back to Maryland. While I agree that the idea has some appeal, it does not address Utah's need for a fourth House seat and is simply not going to happen. The 1846 retrocession of land to Virginia shows why. That effort was launched by District residents who wanted to return to Virginia and succeeded only when the Virginia Legislature concurred. Those residents had never felt a part of the District, either economically or culturally. Today, however, the District has become a unified jurisdiction and residents oppose retrocession by at least a three-to-one margin.

The retrocession bills introduced in the last 20 years prove the point. They each state that retrocession will occur only "after the State of Maryland enacts legislation accepting the retrocession." Maryland will not do so. Retrocession will not, and should not, be imposed upon citizens and states who oppose it. I find it odd that some who oppose Congress imposing upon Utah how it should elect a fourth House member want Congress to impose upon Maryland that it accept retrocession.

I think Utah would be best served to pursue constitutional legislation that is likely to become law and will, in fact, provide the fourth seat Utah deserves.

Orrin G. Hatch is Utah's senior senator.

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Mr. DAVIS. First of all, I want to recognize my former colleague, Eleanor Holmes Norton, and Mayor Fenty and the long march that we have had on this issue together, culminating in approval in the last Congress in the House of Representatives.

We have taken great pains over the years to dispel some substantial myths surrounding the founding of Washington, DC. The idea of for the Federal district rose out of an incident that took place in 1783 while the Continental Congress was in session in Philadelphia.

When a crowd of Revolutionary War soldiers, who had not been paid, gathered to protest outside the building, that Congress requested help from the Philadelphia militia. The state refused, and that Congress was forced to adjourn and reconvene in New Jersey.

It was after that incident the framers concluded there was a need for a Federal district under solely Federal control for the protection of the Congress and the territorial integrity of the District.

That is the limit of what the framers had to say about the Federal district in the Constitution, that there should be one, and it should be under congressional authority.

After ratification of the Constitution, one of the first issues to face the new Congress was where to place the Federal district. Some wanted at a New York. Others wanted it in Philadelphia, and others on the banks of the Potomac.

These factions started a fierce political battle to decide the matter, because they believed they were founding a great city, a new Rome. They expected that this new city to have all the benefits of the great capitals of Europe. They never once talked about denying the city's inhabitants the right to vote.

Finally, Jefferson brokered a deal that allowed the city to be placed on the banks of the Potomac in exchange for Congress paying the Revolutionary War debt. New York got the debt paid. Philadelphia got the capital for 10 years, and then as now, political decisions were shaped by the issues of the day.

In 1790 Congress passed the Residence Act, giving those people residing in the District of Columbia the right to vote for Congress. And they did. There was even a Member of Congress, who resided in the District during that time, the Virginia side voting with Virginia, the Maryland side of the District voting with Maryland.

That continued until the seat of government formally shifted to Washington in 1800. Since no records survive, we may never know why Congress then passed a stripped down version of a bill offered by Virginia Congressman "Light Horse Harry" Lee, which simply stated that laws of Virginia and Maryland have been in effect, having been superseded in the District, would apply.

But there is absolutely no evidence the founding fathers, who had just put their lives on the line to forge a representative government, then decided the only way to secure that government was to deny representation for some of their fellow citizens.

One history aptly described the process as a "rushed and improvised accommodation to political reality necessitated by the desperate logic of lame duck political maneuvering." But the inelegant compromise ultimately adopted left a decidedly undemocratic accident in its wake. District residents had no vote in Congress.

After answering the political question and dispelling historical myth, we move on to address whether Congress, independent of a constitutional amendment, has the authority to give the city a right to vote.

And I have put in the record testimony from Ken Starr and Orrin Hatch. You are going to hear from Viet Dinh from the Bush Justice Department later.

Some legal scholars would disagree, but the courts have never struck down a congressional exercise of the District Clause in the Constitution. And there is no reason to think the courts would act now.

Those opposing the bill ignore 200 years of case law and clear instruction from the courts that this is a congressional matter requiring congressional solution.

When you read the Constitution, it says "of the several states," as my friend has commented, but the Federal Government—if you go under that, the Federal Government would not be allowed to impose Federal taxes on District residents, because it says "of the several states," but we did by statute.

District residents have no right to a jury trial. You would have to be from a state to have that right, under the strict reading of the Constitution. D.C. residents would have no right to sue people from outside D.C., diversity jurisdiction in Federal courts. Only people "of the states" have that right under the written word.

The full faith and credit clause would not apply to D.C. That applies only to states. And the District would be able to pass laws which interfere with interstate commerce, because the commerce clause only allows Congress to regulate commerce among the states.

But because Congress used the District Clause over time and applied that to the District, there is no reason they couldn't do that for voting. In each of those cases the Supreme Court held that Congress can consider the district and state for purposes of applying these fundamental provisions.

If Congress had the authority to do so regarding these granted rights and duties, there should be no question we have the same authority for the most sacred right of every American to live and participate in a representative republic.

It is now essentially a matter of political will as to whether D.C. receives a voting Member of Congress are not. And I would add in Congresses that I have served in, we have stretched these limits on partial-birth abortion, line item veto and FISA.

All these issues have gone up to the courts, where they were arguable—some cases struck down, because we thought it was the right thing to do. I hope this Congress will take the same step for the votes of the District of Columbia.

[The prepared statement of Mr. Davis follows:]

PREPARED STATEMENT OF THE HONORABLE TOM DAVIS,
A FORMER REPRESENTATIVE IN CONGRESS

Thank you, Chairman Nadler and Ranking Member Sensenbrenner, for inviting me to testify this morning on legislation near and dear to me. I also want to thank full Committee Chairman Conyers for his steadfast commitment to this legislation, and of course my friend, Delegate Eleanor Holmes Norton, with whom I've marched for D.C. voting rights for many years now.

I think the bill before the Subcommittee continues to be a unique and creative legislation solution to a vexing and patently unjust problem. It's a solution that provides a win-win opportunity for the Congress, and I'm pleased the Subcommittee has decided to consider it again at the very start of the 111th Congress.

For 207 years the citizens of the District of Columbia have been denied the right to elect their own fully empowered representative to the nation's legislature. This historical anomaly has happened for a number of reasons: inattention, misunderstanding, a lack of political opportunity, and a lack of will to compromise to achieve the greater good. I think the stars are aligning in a way that makes those reasons moot.

I have long stated it is simply wrong for the District to have no directly elected national representation. How can you argue with a straight face that the Nation's Capital shouldn't have a voting Member of Congress? For more than two centuries, D.C. residents have fought in 10 wars and paid billions of dollars in federal taxes. They have sacrificed and shed blood to bring democratic freedoms to people in distant lands. Today, American men and women continue fighting for democracy in Baghdad, but here in the Nation's Capital, residents lack the most basic democratic right of all.

What possible purpose does this denial of rights serve? It doesn't make the federal district stronger. It doesn't reinforce or reaffirm congressional authority over D.C. affairs. In fact, it undermines it and offers political ammunition to tyrants around the world to fire our way.

In spite of my concerns, I was long frustrated by the lack of a politically acceptable solution to this problem. That all changed after the 2000 census, when Utah missed picking up a new seat by less than a thousand people. Utah, as you know, contested this apportionment and lost in court. As I looked at the situation, I realized the predominance of Republicans in Utah and Democrats in the District offered the solution that had been evading us.

The D.C. House Voting Rights Act would permanently increase the size of Congress by two Members. It's intended to be partisan-neutral. It takes political concerns off the table, or at least it should.

We also took great pains over the years to dispel some substantial myths surrounding the founding of Washington, D.C. The idea for a federal district arose out of an incident that took place in 1783 while the Continental Congress was in session in Philadelphia. When a crowd of Revolutionary War soldiers, who had not been paid, gathered in protest outside the building, the Congress requested help from the Pennsylvania militia.

The state refused, and the Congress was forced to adjourn and reconvene in New Jersey. After that incident, the Framers concluded there was a need for a Federal District, under solely federal control, for the protection of the Congress and the territorial integrity of the capital. So the Framers gave Congress broad authority to create and govern such a District. That is the limit of what the Framers had to say about a Federal District in the Constitution—that there should be one and that it should be under congressional authority.

After ratification of the Constitution, one of the first issues to face the new Congress was where to place this Federal District. Some wanted it in New York. Others wanted it in Philadelphia, and others on the Potomac. These factions fought a fierce political battle to decide the matter because they believed they were founding a great city, a new Rome. They expected this new city to have all the benefits of the great capitals of Europe. They never once talked about denying that city's inhabitants the right to vote.

Finally, Jefferson brokered a deal that allowed the city to be placed on the banks of the Potomac in exchange for Congress paying the Revolutionary War debt. New York got the debt paid and Philadelphia got the capital for ten years. Then as now, political decisions were shaped by the issues of the day.

In 1790, Congress passed the Residence Act, giving those residing in the new District the right to vote. But while the capital was being established, those living here were permitted to continue voting where they had before, in Virginia or Maryland.

That continued until the seat of government officially moved to Washington in 1800. Since no records survived, we may never know why Congress then passed a stripped down version of a bill authored by Virginia Congressman "Light Horse" Harry Lee, which simply stated the laws of Virginia and Maryland then in effect, having been superseded in the District, would still apply.

But there is absolutely no evidence the Founding Fathers—who had just put their lives on the line to forge a representative government—then decided the only way to secure that government was to deny representation to some of their fellow citizens. One historian aptly described the process as a "rushed and improvised accommodation to political reality, necessitated by the desperate logic of lame duck polit-

ical maneuvering." But the inelegant compromise ultimately adopted left a decidedly undemocratic accident in its wake. District residents had no vote in Congress.

After answering the political question, and dispelling historical myths, we moved on to address whether Congress, independent of a constitutional amendment, had the authority to give the District a voting Member. Through hearing testimony and expert opinions, we have established the soundness of that congressional authority.

As Ken Starr, a former appeals court judge here in the District, wrote and testified, the authority of Congress with respect to the District is "awesome." We also received the expert opinion of Viet Dinh, the renowned Georgetown law professor and former Assistant Attorney General, asserting the power of Congress to do this legislatively. You will have the pleasure of hearing from Professor Dinh today.

Some legal scholars will disagree, but the courts have never struck down a congressional exercise of the District Clause. There is no reason to think the courts would act differently in this case.

By now, virtually every Member is aware of the constitutional arguments for and against. I ask that those who are new to this legislation—let's fact it, both chambers look a little different than they did when we started down this road—I ask that they think carefully about what they hear today, and moving forward. Every first year law student in the country learns that you can't just read the Constitution once-over to figure out what it means. But that's where the other side's argument usually stops and starts on this issue.

Those opposing this bill ignore 200 years of case law and clear instruction from the court that this is a congressional matter requiring a congressional solution. Under opponents' reading of the Constitution:

- The federal government would not be allowed to impose federal taxes on District residents—the Constitution says direct taxes shall be apportioned among the several states;
- District residents would have no right to a jury trial—you have to be from a state to have that right;
- D.C. residents would have no right to sue people from outside D.C. in the federal courts—only people from states have that right;
- The Full Faith and Credit clause would not apply to D.C.—that applies only between the states; and,
- The District would be able to pass laws which interfere with interstate commerce—the Commerce Clause only allows Congress to regulate commerce among the several states.

But in each of those cases the Supreme Court has held that Congress can consider the District a "state" for purposes of applying these fundamental provisions. If Congress has the authority to do so regarding those constitutionally granted rights and duties, there should be no question it has the same authority to protect the most sacred right of every American—to live and participate in a representative republic.

It is now essentially a matter of political will as to whether D.C. receives a voting Member of Congress or not—whether the D.C. delegate becomes D.C.'s representatives. Six years after starting this effort with my friend, Eleanor Holmes Norton, and countless others, I think that will has reached critical mass. We've reached this point because, quite simply, it's the right and fair thing to do.

Thank you again, Mr. Chairman and Members of the subcommittee, for giving this recently-retired Member of Congress an opportunity to testify, and thank you for giving this legislation the early hearing it deserves.

Mr. CONYERS. [Presiding.] I thank the gentleman.

And without objection, I ask for the following items to be placed in the record: the testimony of Congressman Dana Rohrabacher, the testimony of District of Columbia At-large Councilmember Kwame Brown, and a letter from the government of Utah, Jon Huntsman.

Without objection, so ordered.

[The information referred to follows:]

Testimony of Kwame R. Brown

Councilmember

District of Columbia Council

United States House of Representatives

Committee on the Judiciary

Hearing on H.R. 157

January 27, 2009

Mr. Chairman, Congresswoman Eleanor Holmes Norton, members of the Committee, thank you for the opportunity to submit testimony for this important hearing. I request that my full statement be made a part of the public record.

The nearly 600,000 residents of the District of Columbia are good American citizens. We are welcoming neighbors who were friendly and open to all of our fellow Americans who came for the historic inauguration of President Barack Obama just one week ago. Just like all of our American citizens, we pay federal taxes, serve on federal juries and have served our country in every conflict since the District was created.

The nearly 600,000 residents of the District of Columbia are my constituents, neighbors, relatives and childhood friends. I grew up in the District and am fortunate enough to represent a world class city. Unfortunately, just like my neighbors, I am relegated to second class citizen in the eyes of the federal government. While District residents pay federal taxes, we have no say how our federal dollars are spent. Our local legislative body cannot pass laws without the approval of Congress. In fact, we are unable to spend our own city revenue without Congressional approval. Does any other

state legislature or city council in the country require such approval or bear such a burden?

In fact, the more than half million residents of the District of Columbia, my neighbors, are the tax base for a city whose infrastructure must support millions of Virginia and Maryland residents who drive on our streets and use our public facilities everyday without paying into our local income tax base. Unlike other cities with large percentages of suburban workers such as New York or Chicago, by law we do not have the ability to use tax revenues from other jurisdictions. For example, the New York/New Jersey Port Authority collects money from New York state, New Jersey and Connecticut commuters to ensure that the infrastructure needs of New York City can be met. But by law such an agreement can not occur with the District. Thus, we have half a million people paying for roads that up to 3 million people drive on every day.

While New Yorkers can call up their Senator to express their concerns about anything ranging from their feelings on the national stimulus package, which I support, to immigration or whether or not we go to war, we in the District are void of such representation.

We could, in theory, receive funds from the federal government to pay for our infrastructure needs. But as most of you know, the best way to get your projects funded is to go through your House or Senate representative. Unfortunately for the over half million tax paying residents of the District of Columbia, we don't have voting members of Congress to give voice to our local needs.

Despite all the limitations of her office, and despite the fact that she represents a District with more than a half a million second class American citizens, Eleanor Holmes

Norton has found a nonpartisan solution as a first step to providing the District with full voting representation. I support Delegate Norton's legislation and hope voting members of Congress will see the urgent need to expedite its passage.

As you are all aware, one of the other discussions being held in these halls this week is regarding the size and shape of President Obama's stimulus package. While the voting representatives of all the other states are pulling together their delegations and meeting with their representatives to advocate for stimulus projects, the District is left at a disadvantage in a time of economic crisis.

This is a time for change. This is the right time to take the first step towards full voting rights for District residents. I urge you to support this legislation and support a more equal and representative democracy.

Testimony of Rep. Dana Rohrabacher

before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties

of the House Committee on the Judiciary

January 27, 2009

Mr. Chairman, the denial of federal voting rights to the residents of the District of Columbia is an injustice that has persisted for over 200 years, and which must be remedied. However, the remedy that is fashioned must not violate the Constitution of the United States. That is where I believe that H.R. 157 fails the test. As you will hear from Prof. Jonathan Turley, the Constitution is clear that Representatives can only come from states, not from federal enclaves under the authority of Congress.

Thus, although it appears that with the new lineup in Washington that H.R. 157 will be passed by the House and Senate and will be signed into law by our new President, it has virtually no chance of surviving the scrutiny of the U.S. Supreme Court. So the main point of my testimony today is not to argue against the passage of H.R. 157, which appears to be a foregone conclusion, but to present to the subcommittee the benefits of my "Plan B", otherwise known as H.R. 665, the District of Columbia Voting Rights Restoration Act of 2009.

H.R. 665, is a "Plan B" that's actually better than "Plan A". H.R. 665 would restore the rights that D.C. residents had to vote in Maryland's federal elections after the creation of the District of Columbia, but prior to Congress fully exercising its power of "exclusive legislation" over the District in 1800. By doing so, H.R. 665 provides not just voting representation in the House, but in the Senate as well, and gives D.C. residents the ability to swing 11 Maryland electoral votes, rather than the 3 they now have to themselves. And since H.R. 665 provides federal representation through the state of Maryland, it complies with the Constitution's requirement that federal representatives come through states.

Although getting to vote for federal representatives without voting for state officials seems unusual, it is not unprecedented, and precedent shows it is within congressional authority. The Uniformed and Overseas Citizens Absentee Voting Act requires states to allow their former residents (and children of former residents) living abroad to vote in their federal (but not state and local) elections. The UOCAVA remains unchallenged on constitutional grounds. Another example is the federal law that permitted 18-year-olds to vote. After a constitutional challenge, the portion of the law that required states to allow 18-year-olds to vote in their federal elections was upheld, while the portion that required states to allow such voting in their state and local elections was found unconstitutional. That court decision led to the quick ratification of the 26th Amendment, permitting 18-year-olds to vote in all elections.

Mr. Chairman, when this subcommittee revisits the issue of D.C. federal representation after H.R. 157,is found to be unconstitutional, H.R. 665 will still be available as a solution. I hope at that time that the subcommittee will give it greater consideration than it will give it today.

STATE OF UTAH

JON M. HUNTSMAN, JR.
GOVERNOR

OFFICE OF THE GOVERNOR
SALT LAKE CITY, UTAH
84114-2220

GARY R. HERBERT
LIEUTENANT GOVERNOR

January 26, 2009

The Honorable John Conyers, Jr., Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

This letter serves to express my strong support for legislation to increase the size of the House of Representatives by two seats, granting one seat to the District of Columbia and the other to Utah, the State that should have received an additional seat in the wake of the 2000 census.

When I say that Utah "should have received" the additional seat following the 2000 census, I am referring to two separate errors committed by the Census Bureau in the year 2000, each of which improperly deprived our State of a fourth seat. The first such error involved the Bureau's use of a statistical procedure known as "hot-deck imputation," which I believe violated the spirit, if not the letter, of the Census Act. *See* 13 U.S.C. Sec 195 (prohibiting "the use of the statistical method known as 'sampling' in carrying out the provisions of this title"); *but see Utah v. Evans,* 536 U.S. 452, 473 (2002) (holding that "the statutory phrase 'the statistical method known as sampling' does not cover the [Census] Bureau's use of imputation"); *see also id.* At 480 (O'Connor, J., dissenting) ("I would find that the Bureau's use of imputation constituted a form of sampling and thus was prohibited by Sec 195 of the Census Act.").

The second error involved in the Bureau's decision to count federal employees residing temporarily overseas, while arbitrarily refusing to count other, similarly situated Americans living outside the United States. [1] Although this bill does not address either of the errors directly, it addresses both of them indirectly by awarding Utah the seat it should have received in 2002.

The loss of that seat has cost Utah in many ways over the last eight years. In spite of the fact that we are large enough to merit a fourth member of Congress, the state has been spread thin with only three members to represent the state's ever growing population. That extra member would have been able to serve on other House Committees and begin the process of gaining seniority and influence within the House.

The Census Bureau certified our state's apportionment population to be 2,236,714. This population would have been divided among four members instead of three. Obviously the citizens of Utah would be better served if each member had to serve 559,178 citizens instead of 745,571 citizens they currently serve.

Utah remains one of the nation's fastest growing states. Especially in these difficult economic times, this continued rapid growth presents our state with a very challenging matrix of problems. Schools, transportation infrastructure and even emergency services can become stressed very rapidly in this environment. In each of these areas, having a fourth Member of Congress would greatly aid the state in delivering its message to the federal government in Washington.

Additionally, at the insistence of some in Congress during 2006, the state did; in fact, go through the not insignificant task of drawing a new four-seat map, only to have Congress fail to enact the legislation.

Obviously, with the passage of two years since I, along with the Attorney General of Utah, testified before the Judiciary Committee in support of similar legislation, some may argue that, with the 2010 census only two years away, Utah should simply wait to gain the 4th congressional seat that reapportionment will presumably create. I reject that argument for a variety of reasons. First, with every vote cast on important issues in the House, Utah is currently "under-represented" proportionate to our population. Likewise, even a year or two of seniority gained in the House and on committees by a fourth Member of Congress is important to our state. Simply waiting for the representation we have, in fact, deserved since 2000 is not acceptable.

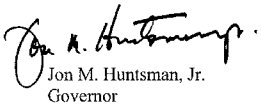
In short, passing legislation this year to give Utah a fourth seat rights the wrongs that were committed in the 2000 census, benefits those who suffered most as a result of those wrongs, and does so in a way that makes sense.

Also, based upon the manner in which Utah was treated by the Federal Government in the reapportionment following the 2000 census, you will forgive our hesitance to place complete confidence in that same bureaucracy and its process to treat us fairly in 2010. By enacting legislation to grant both the District of Columbia and Utah seats they deserve, Congress has an opportunity to remove any doubt that justice and fairness will prevail.

I also want to add this point. I have not extensively studied the constitutionality of the D.C. Voting Rights Act; however, I am impressed and persuaded by the scholarship represented in this legislation. The people of Utah have expressed outrage over the loss of one Congressional seat for the last six years. I share their outrage. I can't imagine what it must be like for American citizens to have no representation at all for more two hundred years. Passage of legislation giving a seat to D.C. and a fourth seat to Utah is a chance for you to do the right thing and I hope you don't miss that opportunity.

Thank you for the Committee's timely consideration of this legislation. The State of Utah deserves and welcomes the opportunity to gain the additional seat in the House of Representatives.

Sincerely,



Jon M. Huntsman, Jr.
Governor

Cc: The Honorable Lamar Smith, Ranking Republican
Senator Orrin Hatch
Senator Robert Bennett
Congressman Jim Matheson
Congressman Rob Bishop
Congressman Jason Chaffetz

[1] Had the Bureau treated all temporary expatriates alike by simply (a) not limiting its overseas enumeration to federal employees, or (b) excluding all non-U.S. residents from the census, Utah would have had a fourth seat beginning in 2002.

Mr. CONYERS. Knowing that all of you have important commitments to get to, this Subcommittee excuses you with our thanks for being with us today. And I thank you.

We will now proceed with our second panel. And I would ask the witnesses to take their places.

And while they are taking their places, let me mention the following. As we ask questions of our witnesses on the second panel after their opening statements, the Chair will recognize Members in the order of their seniority on the Subcommittee, alternating between majority and minority, provided that the Member is present when his or her turn arrives.

Members who are not present when they are turned begins will be recognized after the other Members have had the opportunity to ask their questions. The Chair reserves the right to accommodate a Member who is unavoidably late are only able to be with us for a short time.

I would now like to introduce the distinguished witnesses of our second panel.

Wayne Henderson is president and CEO of the Leadership Conference on Civil Rights. He is also professor of public interest law at the University of the District of Columbia School of Law, as well as a lifelong Washingtonian.

Mr. Henderson and LCCR work with this Committee on numerous matters. We are happy to have him join us today on the issue of District of Columbia voting rights.

U.S. Army Guard Captain Yolanda Lee began her military career when she enlisted in the District of Columbia National Guard on March 2nd, 1993. Captain Lee's military awards and decorations include the Bronze Star, the National Defense Service Medal, the Overseas Service Ribbon, and the Iraqi Campaign Medal. Captain Lee is a native Washingtonian.

Professor Jonathan Turley joined the George Washington School of Law faculty in 1990 and serves as a professor of public interest law. He is also the director of the Environmental Law Advocacy Center and the executive director of the Project for Older Prisoners.

Professor Turley has testified before the Judiciary Committee on this proposal in the last Congress, and I might add before this Committee on many other matters in the past, and we thank him for appearing before the Committee again today.

Professor Viet Dinh is a professor of law at the Georgetown University Law Center and the founder and principal of Bankrupt Associates. He also served as U.S. assistant attorney general for legal policy at the U.S. Department of Justice from 2001 until 2003.

Professor Dinh has also appeared before the Judiciary Committee on this issue in the past.

I am pleased to welcome all of you. Your witness statements will be made part of the record in its entirety. I would ask you—each of you—to summarize your testimony in 5 minutes or less.

To help you stay within that time, there is a timing light at your table. When 1 minute remains, the light will switch from green to yellow, and then read what the 5 minutes are up.

Mr. Henderson, you may proceed.

TESTIMONY OF WADE HENDERSON, PRESIDENT & CEO, LEADERSHIP CONFERENCE ON CIVIL RIGHTS

Mr. HENDERSON. Well, good morning and thank you, Chairman Nadler, Chairman Conyers, Ranking Member Sensenbrenner, Members of the Subcommittee. Thank you for the opportunity to speak today in support of the D.C. House Voting Rights Act.

There is much to be said in support of the DCHVRA, but you will be pleased to note that I will not attempt to say it all today. Suffice it to say that from a policy standpoint, there is little that can overcome the contradiction of the world's greatest democracy denying the fundamental right to vote to the citizens of its Nation's capital.

And yet as a native Washingtonian, as you have acknowledged, and on behalf of the many longtime residents of this great city, this bill means a great deal more to it than meets the eye. And so if you will indulge me briefly, I would like to speak about the DCHVRA in very personal terms.

Now, as a civil rights advocate, I have devoted much of my life to speaking out on Capitol Hill on behalf of my fellow Americans. And throughout the course of my career, I have seen changes that have made our Nation a better, stronger place, a Nation that more fully is more fully aligned with its founding principles.

Together, we continue to break down barriers to equality and opportunity for Americans from all walks of life.

Late last year, for example, with the help of this Committee, Congress reauthorized the Americans with Disabilities Act, the equivalent of the Civil Rights Act of 1964, to persons with disabilities.

Just last week, for example, the Senate completed what the House began with the passage of the Lilly Ledbetter Fair Pay Act, a single accomplishment for which we should all be proud.

And now more than ever, especially as evidenced by the profoundly moving and historic presidential inauguration of last Tuesday, our government at all levels continues to progress toward extending equal opportunity to all.

Indeed, we have seen great progress in Washington, DC, as well. When I was born in the old Freedman's Hospital on Howard University's campus, the city's hospitals were segregated along racial lines by law. That is no longer the case.

Ledroy Park, where I grew up in the shadow of the Capitol and where I now own a home, was once an all-Black neighborhood by law and by custom. Today, though, my neighbors include people of all races and from all around the world.

Even the public accommodations in this city that we now take for granted—the hotels, the theaters, the restaurants, the private museums, the things that make Washington a wonderful city—were once off-limits to those of us born on the other side of the color line.

Thankfully, and I say this quite proudly, we have moved beyond that time. Yes, Washington, DC, has become a great American city. Yet in spite of all of the progress we have seen, one thing still has yet to change, and it is something that brings us here today.

I have never had an opportunity on Capitol Hill to have someone on Capitol Hill with the real ability to speak out on my own behalf. For over 200 years my hundreds of thousands of neighbors in this city and I have been mere spectators to American democracy.

Even though we pay Federal taxes, fight courageously in wars, and fulfill all of the other obligations of citizenship, we still have no say when Congress makes decisions for the entire Nation on matters like war and peace, taxes and spending, health care, education, immigration policy or the environment.

And while we D.C. residents understand the unique nature of our city and American government, and we recognize Congress' role, we are not even given the simple dignity of a single vote, even in decisions that affect only D.C. residents.

Without as much as a single vote cast by any of us, Congress decides matters like which judges will hear purely local disputes under our city's laws or how our D.C. government will spend local tax revenues, and even the words that the city is allowed to print on the license plates of its residents' cars.

We were not even able to cast a vote when Congress decided in recent years to prevent our city officials from using our own tax dollars to advocate for a meaningful voice in America's democracy. It is enough to drive people to jump crates of tea in the Potomac River.

From a broader civil and human rights perspective, the continued disenfranchisement of D.C. residents before Congress stands out as one of the most blatant violations of the most important civil rights that Americans have: the right to vote.

Without it, without the ability to hold our leaders accountable, all of our other rights are illusory. Our Nation has made great progress throughout its relatively young history in expanding the right to vote, and in the process it has become a genuine role model for the rest of the world.

In addition to several constitutional amendments expanding the franchise, the Voting Rights Act of 1965 has long been the most effective law we have to enforce that right, and it has resulted in a presidency and the Congress that are undoubtedly more representative.

Its overwhelmingly bipartisan renewal in 2006 under the then leadership of Chairman Sensenbrenner and Ranking Member Conyers stands out as one of Congress finest moments.

But in spite of this progress, one thing remains painfully clear. Voting is the language of democracy. If you don't vote, you don't count. And until D.C. residents have a vote in Congress, from a purely political standpoint, they will not be substantially better off than African-Americans in the South were prior to 1965.

I see, Mr. Chairman, my time is up, but I do want to make two additional points. And I will be very quick.

First, I know that Professor Dinh is going to speak about the constitutional framework in support of this bill, so I won't dwell on that. I would like to include, however, in the record a letter from 25 additional constitutional scholars in support of this bill and its constitutionality.

Mr. NADLER. [Presiding.] Without objection.

[The information referred to follows:]

March 12, 2007

25 Legal Scholars Support Constitutionality of DC Voting Rights

Dear Representative:

DC residents pay federal income taxes, serve on juries and die in wars to defend American democracy, but they do not have voting representation in the Congress.

This lack of representation is inconsistent with our nation's core democratic principles. Justice Hugo Black put it well in *Wesberry v. Sanders* in 1964:

> *No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.*

Congress is currently considering granting voting rights to Americans living in Washington, DC. Lawmakers have been faced with questions about the constitutionality of extending the right to vote to residents of a "non-state."

As law professors and scholars, we would like to address these questions and put to rest any concerns about the constitutionality of extending the right of representation to residents of the District.

While the language of the Constitution *literally* requires that House members be elected "by the People of the Several states," Congress has not always applied this language so literally. For example, the Uniformed and Overseas Citizens Absentee Voting Act allows U.S. citizens living abroad to vote in congressional elections in their last state of residence – *even if* they are no longer citizens there, pay any taxes there, or have any intent to return.

To fully protect the interests of people living in the capital, the Framers gave Congress extremely broad authority over all matters relating to the federal district under Article I, § 8, clause 17 (the "District Clause"). Courts have ruled that this clause gives Congress "extraordinary and plenary power" over DC and have upheld congressional treatment of DC as a "state" for purposes of diversity jurisdiction and interstate commerce, among other things. Article III provides that courts may hear cases "between citizens of different states" (diversity jurisdiction). The Supreme Court initially ruled that under this language, DC residents could not sue residents of other states. But in 1940, Congress began treating DC as a state for this purpose – a law upheld in *D.C. v. Tidewater Transfer Co.* (1949).

The Constitution also allows Congress to regulate commerce "among the several states," which, literally, would exclude DC. But Congress' authority to treat DC as a "state" for Commerce Clause purposes was upheld in *Stoughtenburg v. Hennick* (1889).

(*over, please*)

We believe, under the same analysis of the Constitution, that Congress has the power through "simple" legislation to provide voting representation in Congress for DC residents.

Sincerely,

Sheryll D. Cashin
Georgetown University Law Center

Viet D. Dinh
Georgetown University Law Center

Charles J. Ogletree
Harvard Law School

Jamin Raskin
American University Washington College of Law

Samuel R. Bagenstos
Washington University Law School

Brian L. Baker
San Joaquin College of Law

William W. Bratton
Georgetown University Law Center

Richard Pierre Claude
University of Maryland

Sherman Cohn
Georgetown University Law Center

Peter Edelman
Georgetown University Law Center

James Forman Jr.
Georgetown University Law Center

David A. Gantz
The University of Arizona James E. Rogers College of Law

Michael Gottesman
Georgetown University Law Center

Michael Greenberger
University of Maryland

Pat King
Georgetown University Law Center

Charles R. Lawrence III
Georgetown University Law Center

Paul Steven Miller
University of Washington School of Law

James Oldham
Georgetown University Law Center

Christopher L. Peterson
University of Florida, Levin College of Law

Robert Pitofsky
Georgetown University Law Center

David Schultz
University of Minnesota

Girardeau A. Spann
Georgetown University Law Center

Ronald S. Sullivan Jr.
Yale Law School

Roger Wilkins
George Mason University

Wendy Williams
Georgetown University Law Center

Mr. HENDERSON. I should also point out that under constitutional construction, the nature of a constitutional amendment itself is a rare step only to be taken when in fact all other considerations for amended or addressing an injustice have been tried.

Surely, there has been no dispute here this morning on the nature of the injustice. The nature of the dispute is on the remedy to be required. And that is why we believe that the Federal courts should decide its constitutionality.

And lastly, there is a poll, which you see beside me today. To the extent that public opinion does have some impact on the deliberations of this Committee, let me say that a Washington Post poll in 2007, considered to be one of the most objective ever taken, points to 61 percent of the American people supporting the notion of providing voting rights for D.C. residents by way of legislation.

Thank you, Mr. Chairman, for the opportunity to be with you today.

[The prepared statement of Mr. Henderson follows:]

PREPARED STATEMENT OF WADE HENDERSON

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STATEMENT OF
WADE HENDERSON, PRESIDENT & CEO,
LEADERSHIP CONFERENCE ON CIVIL RIGHTS

HEARING ON H.R. 157, THE "DISTRICT OF COLUMBIA HOUSE VOTING RIGHTS ACT OF 2009

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

JANUARY 27, 2009

Chairman Nadler, Ranking Member Sensenbrenner, and members of the Subcommittee, I am Wade Henderson, President and CEO of the Leadership Conference on Civil Rights (LCCR). I appreciate the opportunity to speak before you today regarding LCCR's strong support for providing voting rights to the District of Columbia, in general, and for H.R. 157, the "District of Columbia House Voting Rights Act of 2009" ("DC VRA"), in particular.

LCCR is the nation's oldest and most diverse coalition of civil rights organizations. Founded in 1950 by Arnold Aronson, A. Philip Randolph, and Roy Wilkins, the Leadership Conference seeks to further the goal of equality under law through legislative advocacy and public education. LCCR consists of approximately 200 national organizations representing persons of color, women, children, organized labor, persons with disabilities, the elderly, gays and lesbians, and major religious groups. I am privileged to represent the civil and human rights community in submitting testimony for the record to the Committee – and I want to express my strong gratitude to you for today's hearing and also for your support over the years in the effort to give DC residents a meaningful voice in Congress.

In organizing legislative hearings such as this, I know that it is common to distinguish between expert witnesses, on one hand, and affected individuals, or what Congressional staffers sometimes refer to as "victims," for lack of a better term, on the other. Interestingly enough, I feel as though I can speak before you today as both kinds of witnesses. So with my twin roles in mind, I would like to proceed by discussing what I see as the two basic, fundamental questions that have brought us here today: first, why this issue? And second, why this approach?

Why this issue?

In answering the first question, I would like to begin on a personal level. As a lifelong civil rights advocate, I have always spoken out on Capitol Hill on behalf of my fellow Americans. And throughout the course of my career, I have seen changes that have made the nation a better, stronger place, one that is more aligned with its founding principles. We continue to break down

barriers to equality and opportunity for Americans from all walks of life, and now more than ever, especially in light of the profoundly historical and moving occurrence that the world witnessed here on Capitol Hill just last Tuesday, our government at all levels continues to more closely reflect the make-up of our great nation.

I have seen great progress in the District of Columbia as well. When I was born in the old Freedman's Hospital, on Howard University's campus, the city's hospitals were segregated along racial lines by law. That is no longer the case.

LeDroit Park, where I grew up and where I now own a home, was once an all-black neighborhood by law and by custom. Today, however, people of all races and from all around the world live in the area as my neighbors and friends. Gone, too, are the remnants of the system of *de jure* separate schooling that sent me to an all-black elementary school, despite the fact that I started grade school after the landmark ruling in *Brown v. Board of Education* had officially outlawed racial segregation.

Yet one thing still has yet to change for me as a lifelong resident of Washington: in spite of all of the progress we have seen, and in spite of all of my efforts to speak out on Capitol Hill on behalf of other Americans, I have never had anyone on Capitol Hill with a meaningful ability to speak out on my own behalf. For over 200 years, my hundreds of thousands of neighbors in this city and I have been mere spectators to our democracy. Even though we pay federal taxes, fight courageously in wars, and fulfill all of the other obligations of citizenship, we still have no voice when Congress makes decisions for the entire nation on matters as important as war and peace, taxes and spending, health care, education, immigration policy, or the environment.

And while we DC residents understand the unique nature of our city in the American constitutional system, and we recognize Congress' expansive powers in operating the seat of our federal government, we are not even given a single vote in decisions that affect DC residents and DC residents alone. Without as much as a single vote cast on behalf of DC residents, Congress decides which judges will hear purely local disputes under our city's laws, how it will spend local tax revenues, and even the words the city is allowed to print on the license plates of its residents' cars. Adding insult to injury, we were not even able to cast a single vote when Congress has decided, in recent years, to prevent our elected city officials from using our own tax dollars to advocate for a meaningful voice in our democracy.

It is enough to make people feel like dumping crates of tea into the Potomac River.

From a broader civil and human rights perspective, the continued disenfranchisement of DC residents before Congress continues to stand out as the most blatant violation of the most important civil right that Americans have: the right to vote. Without it, without the ability to hold our leaders accountable, all of our other rights are illusory.

Our nation has certainly made tremendous progress throughout history in expanding this right, including through the 15th, 19th, and 26th Amendments; and in the process, it has become more and more of a role model to the rest of the world. The Voting Rights Act of 1965 has long been the most effective law we have to enforce that right, and it has resulted in a Congress that

increasingly looks like the nation it represents. Its overwhelmingly bipartisan renewal in 2006, under the leadership of then-Chairman Sensenbrenner and then-Ranking Member Conyers, stands out as one of Congress' finest moments in many years.

In spite of this progress, however, one thing remains painfully clear: the right to vote is meaningless if you cannot put anyone into office. Until DC residents have a vote in Congress, they will not be much better off than African Americans in the South were prior to August 6, 1965, when President Johnson signed the Voting Rights Act into law – and until then, the efforts of the civil rights movement will remain incomplete.

Their situation will also undermine our nation's moral high ground in promoting democracy and respect for human rights in other parts of the world. Indeed, the international community has been taking notice. In December of 2003, for example, a body of the Organization of American States (OAS) declared the U.S. in violation of provisions of the American Declaration of the Rights and Duties of Man, a statement of human rights principles to which the U.S. subscribed in 1948.[1] In 2005, the Organization for Security and Cooperation in Europe, of which the U.S. is a member, also weighed in. It urged the United States to "adopt such legislation as may be necessary" to provide DC residents with equal voting rights.[2]

Extending voting rights to DC residents is one of the highest legislative priorities of the Leadership Conference on Civil Rights this year, and will remain so every year, until it is achieved.

Why this approach?

Mr. Chairman, I must admit that when former Representative Tom Davis (R-VA) first proposed pairing a first-ever vote in the House for the District of Columbia with an additional House seat for Utah, a state that was shortchanged in the last reapportionment of Congressional seats in 2001, I was skeptical. While I greatly appreciated Rep. Davis' creative effort, I testified before his committee in 2004 about two concerns that I had with his approach.

First, his bill would have required a mid-decade redrawing of Utah's federal legislative districts, a move that I believed raised constitutional concerns and that could set a dangerous precedent for diluting the votes of racial and ethnic minorities. Second, unlike the "No Taxation Without Representation Act" that Delegate Eleanor Holmes Norton (D-DC) had sponsored in previous years, I was concerned about the fact that the DC VRA would only provide DC residents with a vote in the House, stopping short of providing the full representation that DC deserves.

A few things have changed, however. For one, in 2006, the Supreme Court settled the issue of whether mid-decade redistricting is constitutional, by upholding the 2003 redrawing of Texas' congressional map in *League of United Latin American Citizens v. Perry*.[3] In addition, as the

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[1] Inter-American Commission on Human Rights, *Statehood Solidarity Committee/United States*, Report No. 98/03, Case 11.204 (Dec. 29, 2003).
[2] OSCE Parliamentary Authority, Washington, *DC Declaration and Resolutions Adopted at the Fourteenth Annual Session*, July 1-5, 2005.
[3] 126 S. Ct. 2594 (2006).

District of Columbia House Voting Rights Act picked up momentum in the 109th and 110th Congresses, the Governor and the legislature of Utah showed extraordinary care in proposing Congressional districts that would avoid the kinds of problems that had made me and LCCR so skeptical of mid-decade redistricting in the first place.

I am also less troubled than I was before about the fact that the DC VRA only provides DC with representation in the House. To be sure, LCCR still strongly supports the full representation for District of Columbia residents in both the House and the Senate. At the same time, I have been pleasantly surprised at the attention that the debate over the DC VRA has brought to not only the issue of DC disenfranchisement but also to the more recent unfair dilution of the votes of Utah citizens, and at the number of new – and in some cases unexpected – allies we have recruited along the way. While any political compromise involves the risk that it will reduce the momentum for future progress, I have grown more optimistic that the enactment of this legislation will mark the beginning of the debate, rather than the end.

At the same time, I recognize that the bill is still not without its critics, and I would like to address some of the other concerns that have been raised about it. During the last debate over the DC VRA on the House floor in 2007, I must say I was profoundly disappointed in the objections that several Members raised. For example, one member referred to the bill as a "cynical political exercise,"[4] while another labeled it "a raw power grab by the new Democrat majority."[5]

To anyone who would resort to such harsh rhetoric in criticizing the approach taken by the DC VRA, I would simply ask: what is your alternative, and what have you been doing to turn it into law? Sadly, only a very small number of Members who have opposed the DC VRA would be able to provide a credible answer to that question. Some opponents have called for returning most of DC to the state of Maryland, a legitimate but complicated option that I will discuss below.[6] Yet when opponents were given two separate opportunities to offer alternative language that would give DC residents the representation they deserve, through the "motion to recommit" procedure, retrocession never came up.

Putting aside the more reckless arguments that have been made against the DC VRA, other opponents have argued that while DC residents deserve Congressional representation, Congress does not have the power to treat DC as a "state" for the purpose of giving it that representation. While I anticipate that Professor Dinh will respond to this argument more thoroughly, I would like to respond with two brief points.

First, when the District of Columbia was first envisioned, it was primarily created in order to keep any one state from controlling and possibly harming the seat of the federal government. The creation of a "no man's land," where the most important civil right we have in a democratic

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[4] Rep. Pete Sessions (R-TX), Congressional Record, 110th Cong., 1st Session at H3569 (Apr. 19, 2007).
[5] Rep. Patrick McHenry (R-NC), Congressional Record, 100th Cong., 1st Session at H3574 (Apr. 19, 2007).
[6] Former Rep. Ralph Regula (R-OH), to his credit, proposed retrocession for a number of years. Only a very small number of his colleagues, however, have supported his efforts. In April 2007, three days before the House last attempted to bring the DC VRA to a vote on final passage, Rep. Louie Gohmert (R-TX) introduced a similar counter-proposal. Rep. Dana Rohrabacher (R-CA) has also offered a constructive – albeit highly-complicated – alternative to retrocession.

system would simply not apply, was not necessary to this end. While there was some debate over the issue of whether residents of the new district would be represented in Congress, and while those opposed to initially granting DC representation certainly prevailed with the passage of the Organic Act of 1801, the decision at the time involved an important trade-off that no longer applies: long before such developments as the telephone, air travel, and the Internet made it far easier for citizens across the nation to communicate with their legislators, the very small population that resided in the District in 1801 did enjoy greater access to Congress than other citizens had, even in the absence of actual voting representation.[7] Over the past two centuries, however, particularly after the abolition of slavery, the size and the relative influence of the native DC population has changed so drastically that the assumptions made in 1801 simply no longer apply.

Second, while Article 1, Section 2 of the Constitution does indeed provide that House members shall be chosen "by the people of the several States," there is room for disagreement over how narrowly or broadly the word "state" should be interpreted. In a number of other contexts, the use of the term "state" in the Constitution has been interpreted to include the District of Columbia. While there were competing justifications given, a majority of the Supreme Court in 1949 ruled, in *National Mutual Insurance Co. v. Tidewater Transfer Co.*,[8] that the District could be treated as a state for the purpose of federal diversity jurisdiction. Few people if any would argue that the right to a "speedy and public trial" under the Sixth Amendment, or the Equal Protection clause, does not apply in the District of Columbia, even though their text refers to the actions of a "state."

Given these examples, and given the principles on which the then-recent American Revolution had been based, it is certainly plausible – at the very least – that our Founding Fathers would have wanted Congress to have maximum leeway in preventing the evil of "taxation without representation" from ever being imposed on citizens again. In fact, given the current size and relative political weakness of the DC population today, they most likely would be horrified that Congress had not addressed it a long time ago.

Because some opponents of the DC VRA remain unconvinced that Congress has the authority to provide DC representation in the House, I fully expect that they will begin mounting a constitutional challenge before the ink from President Obama's signature pen has had a chance to dry. While I have certainly had my differences of opinion with a number of rulings by the Roberts Court, I for one do not shy away from such a challenge. Indeed, I believe that it would be appropriate for judicial review to occur on an expedited basis,[9] to remove all doubt about the

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[7] *See, e.g.*, remarks of Rep. Huger in 1803: "Gentlemen, in looking at the inconvenience attached to the people of the Territory, do not sufficiently regard the superior convenience they possess. Though the citizens may not possess full political rights, they have a greater influence upon the measure of the Government than any equal number of citizens in any other part of the Union." Annals of Congress 489 (Feb. 1803).

[8] 337 U.S. 582 (1949).

[9] I believe that 28 U.S.C. 2284 would already provide for expedited judicial review of the DC VRA. Some opponents have argued, however, that 28 U.S.C. 2284 is not directly applicable to a case in which voting representation is allocated to the District of Columbia, and that Congress should expressly provide jurisdiction for expedited review. While I believe it is unnecessary, Congress could adopt language similar to what was offered as a "motion to recommit" during the April 19, 2007 House debate on H.R. 1905, the 110th Congress' version of the DC VRA.

bill's constitutionality as quickly as possible. I also believe that while the existence of constitutional standing under Article III must ultimately be determined by the courts, Congress could appropriately indicate in the bill that it wished Members to have standing to mount a challenge to it.

Finally, I would like to discuss two alternatives that DC VRA opponents have frequently raised in past debates over this legislation. While both of them have their merits, and both certainly represent good-faith contributions to the broader debate over DC representation, they are also accompanied by serious practical and legal hurdles that would need to be addressed before LCCR could support either approach.

One alternative is to amend the Constitution to provide DC with Congressional representation. LCCR would certainly support an effort to amend the Constitution, if it is ultimately deemed necessary. However, our nation has an extensive legal and political tradition of amending the Constitution, our nation's most precious document, only as a last resort when other efforts to address the problem at hand have been tried and have failed. With regard to DC representation, and in light of the fact that the Supreme Court has yet to rule definitively on Congress' authority to provide representation, I do not believe we are at that point yet.

Retrocession, or returning most of what is currently the District of Columbia to its former home in Maryland, is another option that has been under discussion for a number of years. The federal government would retain a small and essentially uninhabited area of DC as a "National Capital Service Area," and current DC residents would be given full voting rights as new citizens of Maryland.

It is also a legitimate topic of discussion, and because Congress returned another portion of the original District of Columbia to Virginia in 1846, there is also clear legislative precedent for such an approach. At the same time, however, retrocession would require the consent of Maryland, and achieving the political consensus necessary to return the District to Maryland could be all but impossible – and I am inherently wary of the notion that the most important civil right possessed by more than half a million Americans should depend on the permission of state government. Furthermore, the political and economic consequences of the move would be dramatic and far-reaching for the populations of both DC and Maryland. It also could not be undertaken through legislation alone: Congress and the states would still need to amend the Constitution in order to repeal the 23rd Amendment. Given the drastic nature of the approach, I believe that retrocession is premature, and it would require extensive further study.

Ultimately, I believe the DC VRA is the best approach for Congress to take on behalf of the residents of both DC and Utah. It presents a politically neutral approach, it has a solid chance of surviving constitutional scrutiny, and unlike the above two options, it can be passed and signed into law this year. The residents of both DC and Utah have already waited far too long.

This concludes my prepared remarks. Again, I want to thank you for the opportunity to speak before your committee today. I look forward to answering any questions you may have.

Mr. NADLER. Thank you.

And I now recognize Captain Lee for 5 minutes.

TESTIMONY OF YOLANDA O. LEE, U.S. ARMY GUARD CAPTAIN, DISTRICT OF COLUMBIA NATIONAL GUARD

Captain LEE. Thank you, Chairman Nadler and Ranking Member Sensenbrenner, for permitting me to testify on the District of Columbia House Voting Rights Act.

My name is Captain Yolanda Lee, and I have been a soldier in the D.C. Army National Guard for all of my adult life. I am here today to ask you to approve the D.C. Voting Rights Act that would allow me, my family and fellow soldiers and residents of my hometown to have a voting representative in the U.S. House of Representatives.

I believe the best way to let you know how much the vote in the House means to me is to tell my story as a resident who was born and raised in the Nation's capital.

My family are lifelong Washingtonians. I am a fourth generation resident on my father's side and a third generation through my mother. I attended D.C. public schools and graduated from Ballou Senior High School in Southeast Washington, DC, in 1993.

I am a graduate of the University of the District of Columbia, where I majored in criminal justice. During college, I served in the Army Reserve ROTC program through Howard—Howard University Consortium Program, because UDC did not have a ROTC.

Upon commissioning, I had the option of leaving the D.C. National Guard, but I chose to stay and serve as a part-time soldier for 2 years and then became a full-time Guardsman.

I am proud to speak to you this morning as a career soldier for the last 15 years. In 2004, I was deployed to Iraq, where I served in-country from January 1, 2005, through November 20, 2005.

In Iraq, I was assigned to a Guard transportation unit from Minnesota, the 50th Main Support Battalion, which transported people, supplies and equipment.

As a transportation unit in the middle of what, at the time, was called a civil war, we were an inviting target for enemy attacks. On June 28, 2005, I was the combat logistical patrol commander for a 17-vehicle convoy transporting concrete security barriers. The lead convoy vehicle was hit by a vehicle-borne improvised explosive device. At the same time, our convoy was attacked by small-arms fire.

I gave the order to return fire on the target and sent a gun truck to capture the two enemy combatants believed to have been the trigger of the explosive device, who were attempting to run into a nearby village.

While my unit was exchanging fire with the enemy, I ordered them to arrange their vehicles as to protect the soldiers in the vehicle that had been struck by the explosive device, which was then in flames, and I ordered soldiers to approach the vehicle and pull out the body of the gunner, who was dead, and a injured passenger, who survived.

Our unit then surrounded the nearby village and took two enemy combatants. I was awarded a Bronze Star for my service in Iraq.

One of the reasons we were sent to Iraq was to help bring democracy to that country. In the United States and all over the world,

the right of all Iraqi citizens to vote in the new Iraqi legislature was taken to be the most important sign of the democracy that had come to the Iraqi people.

In my first month in Iraq, on January 30, 2005, Iraq held its first free elections in 50 years. Iraqis were able to elect members of the transitional National Assembly.

For Iraqis, the right to vote for the representatives who decided the most important issues for the Iraqi people and for their country was so important that Iraqis overseas, including those born in this country, were given the franchise to those elections.

Iraqis who believed in the District of—excuse me—Iraqis who lived in the District of Columbia, even those who were born in this country had no right to a voting representative in the Nation's capital, were given the right to vote in that election, and continued to vote as well in the election of the permanent legislature, the Council of Representatives, that took place less than a month after I left Iraq.

The first resident of the District of Columbia to die in the Iraq war was Specialist Daryl Dent, a 21-year old member of the D.C. National Guard. Specialist Dent gave his life in service to our country, but his sacrifice also helped Iraqi citizens get the voting representation he did not live to see for himself.

After I came home to the District, I voted in the next national election. Although I was proud to see the Iraqis exercise their right to vote for voting representation in their new democracy, I could not vote for such a representative to the U.S. House of Representatives in our country.

Four generations of my family have lived without this right. I am proud to be an American. I am proud to be a Washingtonian. And I am proud to be a soldier. That will never change.

But I ask you to change my status as an American citizen, who pays taxes and serves in war and peace, but is entitled only to a non-voting delegate in the U.S. House of Representatives.

I ask you to support the D.C. Voting Rights Act. Thank you.

[The prepared statement of Captain Lee follows:]

PREPARED STATEMENT OF YOLANDA O. LEE

Thank you Chairman Nadler and Ranking Member Sensenbrenner for permitting me to testify on the District of Columbia House Voting Rights Act. My name is Captain Yolanda Lee, and I have been a soldier in the D.C. National Guard for all of my adult life. I am here today to ask you to approve the D.C. House Voting Rights Act that would allow me, my family, my fellow soldiers, and the residents of my hometown to have a voting representative in the U.S. House of Representatives. I believe that the best way to let you know how much the vote in the House means to me is to tell you my story as a resident who was born and raised in the nation's capital. My family are life-long Washingtonians. I am a 4th generation resident on my father's side and 3rd generation through my mother. I attended D.C. public schools, and graduated from Ballou Senior High School in Southeast Washington in 1993. I am a graduate of the University of the District of Columbia (UDC), where I majored in criminal justice. During college, I served in the Army Reserve Officers' Training Corps (ROTC) through the Howard University Consortium Program, because UDC does not have a ROTC program. Upon commissioning, I had the option of leaving the D.C. National Guard, but I chose to stay and serve as a part-time soldier for two years and then became a full-time Guardsman. I am proud to speak to you this morning as a career soldier for the last 15 years.

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plies and equipment. As a transportation unit in the middle of what, at the time, some called a civil war, we were an inviting target for enemy attacks. On June 28, 2005, I was the combat logistical patrol commander for a 17-vehicle convoy transporting concrete security barriers. The lead convoy vehicle was hit by a vehicle-borne improvised explosive device. At the same time, our convoy was attacked by small-arms fire. I gave the order to return fire on the target and sent a gun truck to capture the two enemy combatants believed to have triggered the explosive device, who were attempting to run to a nearby village. While my unit was exchanging fire with the enemy, I ordered them to arrange their vehicles so as to protect the soldiers in the vehicle that had been struck by the explosive device, which was then in flames, and I ordered soldiers to approach that vehicle and pull out the body of the gunner, who was dead, and one injured passenger, who survived. Our unit then surrounded the nearby village and took two enemy combatants. I was awarded a Bronze Star for my service in Iraq.

One of the reasons we were sent to Iraq was to help bring democracy to that country. In the United States and all over the world, the right of all Iraqi citizens to vote for the new Iraqi legislature was taken to be the most important sign that democracy had come to the Iraqi people. In my first month in Iraq, on January 30, 2005, Iraq held its first free elections in 50 years. Iraqis were able to elect members to the transitional National Assembly. For Iraqis, the right to vote for the representatives who decide the most important issues for the Iraqi people and for their country was so important that Iraqis overseas, including those born in this country, were given the franchise in those elections. Iraqis who lived in the District of Columbia, even those who were born in this country and had no right to a voting representative in the nation's capital, were given the right to vote in that election, and continued to vote as well in the election of the permanent legislature, the Council of Representatives, that took place less than a month after I left Iraq. The first resident of the District of Columbia to die in the Iraq war was Specialist Daryl Dent, a 21-year old member of the D.C. National Guard. Specialist Dent gave his life in service to our country, but his sacrifice also helped Iraqi citizens get the voting representation he did not live to see for himself.

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Mr. NADLER. I thank you, Captain Lee.

I now recognize Professor Turley for 5 minutes.

TESTIMONY OF JONATHAN TURLEY, J.B. & MAURICE SHAPIRO PROFESSOR OF PUBLIC INTEREST LAW, GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

Mr. TURLEY. Thank you, Chairman Nadler, Ranking Member Sensenbrenner, Members of the Committee.

It is a great honor to appear before you today and to appear with Professor Henderson and Professor Dinh, and a particular honor to appear with Captain Lee.

I have many friends on the other side of this debate, including, I am happy to say, Delegate Eleanor Holmes Norton, who has tirelessly and brilliantly represented this District. And regardless of the problems that I have with the constitutionality of this bill, it is to her credit and her effort that we have gotten so far.

I think that we can all agree, and I think we have agreed, that a great wrong has been done to the District. As Westberry said—as the Supreme Court said in Westberry, there is no right more precious than the one we are speaking of today.

But great wrongs are not righted by violating the Constitution. I have testified for both parties in this Committee on various subjects, various issues. Those issues are very often close questions.

Despite my respect for the people on the other side of this argument, I do not believe this is a close question. I believe this law is flagrantly unconstitutional and represents a dangerous and destabilizing act for this institution and for our country.

This is not a debate about the ends of the legislation, but the means. And in our system of law, in any system that is committed to the rule of law, it is often as important how we do something then what we do.

But that doesn't mean that it is not frustrating. Our Constitution is very frustrating, particularly when great injustices demand quick action and our principles stand in the way of our passions.

But standing the way they do here, because there is a way to do things, there is a way to get a vote for the District, this is not one of those ways, because in order to do what the Congress appears about to do, you will manipulate the definition of what is a voting member in the United States House of Representatives.

There are very few acts quite as dangerous as that. More importantly, the framers specifically warned against what you are about to do, because the very stability of our system depends upon who votes within our Congress.

Now, some may find this obnoxious. Some at the time did. But the framers did understand what they were doing when they created the Federal enclave. It certainly seems illogical. It seems un-American that you would create a country that has a capital that has unrepresented people.

I share that view. But there were reasons, and they were clearly articulated.

It is very much the case that the mutiny in 1783 caused a concern about the status of the capital, and indeed they fled to Princeton. They eventually ended up in New Jersey. And it was very much on their mind in Philadelphia in 1787. They did not want that to happen again, and they did not want the security of our Nation's legislature in doubt.

James Madison and James Iredell spoke clearly about that, but it is not true that that was the last word the framers had on the subject. I respect Tom Davis a great deal, but it is simply not true that the framers said nothing more about the District. The record is filled with statements about the District, its status and these problems.

Now, you may wish to ignore those in the sense that you view them as having very little weight. But you can't ignore the fact that the framers did articulate the vision, a vision that many of us now may find obnoxious.

And there were other reasons. They didn't want it to be a state, because they were afraid of the influence that the state would have, as being the home of the capital. They didn't like the fact that one state or particular voting members would have the honor of representing the capital.

They were afraid of the concentration of power. They were afraid of developing a capital like London. All of those things were discussed by the framers.

Now, there is much talk about the District Clause, but this issue will be decided on the Composition Clause, not the District Clause.

Article I, Section 2 states clearly what the composition of Congress will be. The District Clause was never meant to trump the Composition Clause. The Composition Clause is essential to the apparatus, to the structure of the House of Representatives.

Now, states are mentioned about 120 times in the Constitution, and it is true that sometimes states have different meanings. But the vast majority of those references to states mean exactly what it says, a political unit known as a state.

Now, between the time of my last testimony and the current testimony, I will note the Supreme Court has ruled on Heller. And in Heller, the Supreme Court said quite clearly in referencing the specific language of several states and each state, in quotations, that is found in this provision and saying that means a state unit.

The issue at the heart of this debate was answered in Heller. And I know my time has expired, and what I will say is that I think that this is a truly Faustian bargain.

We now have the votes to do something about the District residents. I think they should have full representation, not partial representation. But let us not lose this opening, this opportunity by going down the route of the most unpromising and ill-conceived litigation strategy.

And I submit the rest of my statement for the record. Thank you.

[The prepared statement of Mr. Turley follows:]

PREPARED STATEMENT OF JONATHAN TURLEY

STATEMENT FOR THE RECORD
JONATHAN TURLEY
SHAPIRO PROFESSOR OF PUBLIC INTEREST LAW
GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

THE DISTRICT OF COLUMBIA
HOUSE VOTING RIGHTS ACT OF 2009

JANUARY 27, 2009

COMMITTEE ON THE JUDICIARY
THE UNITED STATES HOUSE

SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND CIVIL LIBERTIES

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I.
INTRODUCTION

Chairman Nadler, Ranking Member Sensenbrenner, members of the Subcommittee, it is an honor to appear before you today to discuss the proposed legislative creation of a non-state voting member for the first time in the United States House of Representatives. H.R. 157 is the latest effort to legislatively mandate such a vote and my view of this proposal remains unchanged: the legislative creation of a voting non-state member is a flagrant violation of the Constitution and would create a dangerous precedent for this institution and this country.

I have many friends on the other side of this debate, including the Hon. Eleanor Holmes Norton who has tirelessly and brilliantly represented the District of Columbia for many years. Like many, I believe that it is a terrible injustice for the District residents not to have a vote in Congress. As Justice Black stated in *Wesberry v. Sanders*:[1] "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." However, the great wrong done to the District residents cannot be righted through the violation of the Constitution itself.

This is not a debate about the ends of legislative action but the means. In a nation committed to the rule of law it is often as important how we do something as what we do. This is the wrong means to a worthy end.

In a prior hearing on this proposal in the Senate, Del. Norton told Committee members that if they are going to vote against this bill, "do not blame the Framers blame Jonathan Turley."[2] However, I can take neither blame nor credit for the structure and limitations of our Constitution. It is the world's most successful constitutional framework because it is carefully balanced with limited powers between the three branches. It is a design that can be frustrating at times when injustices demand quick action. Yet, the very stability and integrity of our system demands that we remain faithful to its provisions, even when our principles stand in the way of our passions.

Just as there is no debate over the need for a vote for the District, there is no debate that such a vote can be obtained by other means. Indeed, there is no longer any claim to be made that the District (or the Democratic Party) lacks the votes needed to take

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[1] 376 U.S. 1, 17-18 (1964).

[2] *Equal Representation in Congress: Providing Voting Rights to the District of Columbia*, Hearing on S. 1257 Before the S. Comm. on Homeland Sec. & Gov't Operations, 110th Cong. (2007) [hereinafter Homeland Sec. Hearing] (testimony of Del. Eleanor Holmes Norton, D-D.C.), available at http://hsgac.senate.gov/_files/ 051507Norton.pdf.

a constitutional course. The political realities and expediencies that gave raise to this idea no longer exist. With control of both houses and the White House, the sponsors can secure a lasting and unassailable vote in the House of Representatives through either retrocession or a constitutional amendment. Indeed, some republicans have expressed their support for a constitutional amendment that would allow a voting House member for the District.

I have often appeared as a witness for both the Democrats and the Republicans on constitutional and statutory issues. There are many such issues that present close questions. This is not, in my view, one of them. I continue to consider this proposal to be one of most premeditated unconstitutional acts by Congress in decades.

While some may view it as obnoxious (and indeed some at the time held the same view), the Framers most certainly did understand the implications of creating a federal enclave represented by Congress as a whole. I must respectfully but strongly disagree with the constitutional analysis offered to Congress by Professor Viet Dinh,[3] and the Hon. Kenneth Starr.[4] The interpretations of Messrs. Dinh and Starr are based on uncharacteristically liberal interpretations of the text of Article I, which ignore the plain meaning of the word "states" and the express intent of the Framers. Like others, including the independent Congressional Research Service, [5] I believe that this Congress cannot legislatively amend the Constitution by re-defining a voting member of this house. Of course, the language of this legislation is strikingly similar to a 1978 constitutional amendment that failed after being ratified by only 16 states.[6] Indeed, in both prior successful and unsuccessful amendments[7] (as well as in arguments made in court),[8] the

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[3] This analysis was co-authored by Mr. Adam Charnes, an attorney with the law firm of Kilpatrick Stockton, LLP. Viet Dinh and Adam Charnes, "The Authority of Congress to Enact Legislation to Provide the District of Columbia with Voting Representation in the House of Representatives," Nov. 2004 found at http://www.dcvote.org/pdfs/congress/vietdinh 112004.pdf. This analysis was also supported recently by the American Bar Association in a June 16, 2006 letter to Chairman James Sensenbrenner.

[4] Testimony of the Hon. Kenneth W. Starr, House Government Reform Committee, June 23, 2004.

[5] Congressional Research Service, The Constitutionality of Awarding the Delegate for the District of Columbia a Vote in the House of Representatives or the Committee of the Whole, January 24, 2007, at i (concluding "that case law that does exist would seem to indicate that not only is the District of Columbia not a 'state' for purposes of representation, but that congressional power over the District of Columbia does not represent a sufficient power to grant congressional representation.").

[6] Likewise, in 1993, a bill to create the State of New Columbia failed by a wide margin.

[7] *See* U.S. Const. XXIII amend. (mandating "[a] number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled *if it were a State.*")

Congress has conceded that the District is not a State for the purposes of voting in Congress. Now, unable to pass a constitutional amendment, sponsors hope to circumvent the process laid out in Article V[9] by claiming the inherent authority to add a non-state voting member to the House of Representatives.

The language of the Constitution is clear and unambiguous. Absent an amendment to the Constitution, only states may vote on the floor of the United States House of Representatives. This text is consistent with the constitutional and legislative history connected with the federal enclave. The textual and historical evidence is laid out in my academic study, "*Too Clever By Half: The Unconstitutionality of Partial Representation of the District of Columbia in Congress*," which I have attached to this statement as part of my testimony today. I will not try to reproduce this extensive record, but I would like to highlight some of the more salient points in my testimony today, including a recent Supreme Court decision that further undermines the legal arguments supporting this legislation.

I.
THE ORIGINAL PURPOSE OF CREATING A CAPITOL IN A FEDERAL ENCLAVE

Today, the notion of a nation with a capitol without voting representation seems illogical and un-American. However, at the time, the idea of a capitol represented by Congress as a whole held great practical and symbolic meaning. To understand the purpose underlying Article I, Section 8, one has to consider the events that led to the first call for a separate federal district.

On January 1, 1783, Congress was meeting in Philadelphia when they were surprised by a mob of Revolutionary War veterans demanding their long-overdue back pay. It was a period of great discontentment with Congress and the public of Pennsylvania was more likely to help the mob than to help suppress it. Indeed, when Congress called on the state officials to call out the militia, they refused. To understand the desire to create a unique non-state enclave, it is important to consider the dangers and lasting humiliation of that scene as it was recorded in the daily account from the debates:

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[8] *Michel v. Anderson*, 14 F.3d 623, 630 (D.C. Cir. 1994) ("despite the House's reliance on the revote mechanism to reduce the impact of the rule permitting delegates to vote in the Committee of the Whole, [the government] concede[s] that it would be unconstitutional to permit anyone but members of the House to vote in the full House under any circumstances.").

[9] U.S. Const. Article V ("The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States or by Conventions in three fourths thereof . . .").

> On 21 June 1783, the mutinous soldiers presented themselves, drawn up in the street before the state-house, where Congress had assembled. [Pennsylvania authorities were] called on for the proper interposition. [State officials demurred and explained] the difficulty, under actual circumstances, of bringing out the militia . . . for the suppression of the mutiny . . . . [It was] thought that, without some outrages on persons or property, the militia could not be relied on . . . . The soldiers remained in their position, without offering any violence, individuals only, occasionally, uttering offensive words, and, wantonly pointing their muskets to the windows of the hall of Congress. No danger from premeditated violence was apprehended, but it was observed that spirituous drink from the tippling-houses adjoining, began to be liberally served out to the soldiers, and might lead to hasty excesses. None were committed, however, and, about three o'clock, the usual hour, Congress adjourned; the soldiers, though in some instances offering a mock obstruction, permitting the members to pass through their ranks. They soon afterwards retired themselves to the barracks.[10]

Congress was forced to flee, first to Princeton, N.J., then to Annapolis and ultimately to New York City.[11]

When the Framers gathered again in Philadelphia in the summer of 1787 to draft a new constitution, the flight from that city five years before was still prominent in their minds. Madison and others called for the creation of a federal enclave or district as the seat of the federal government – independent of any state and protected by federal authority. Only then, Madison noted, could they avoid "public authority [being] insulted and its proceedings . . . interrupted, with impunity."[12] Madison believed that the physical control of the Capitol would allow direct control of proceedings or act like a Damocles' Sword dangling over the heads of members of other states: "How could the general government be guarded from the undue influence of particular states, or from insults, without such exclusive power? If it were at the pleasure of a particular state to control the sessions and deliberations of Congress, would they be secure from insults, or the influence of such a state?"[13] James Iredell raised the same point in the North Carolina ratification convention when he asked, "Do we not all remember that, in the year 1783, a band of soldiers went and insulted Congress?"[14] By creating a special area free of state control, "[i]t is to be hoped that such a disgraceful scene will never happen again; but that, for the future, the national government will be able to protect itself."[15]

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[10] 25 Journals of the Continental Congress 1774-1789, at 973 (Gov't Printing Office 1936) (1783).

[11] Turley, *supra*, at 8.

[12] The Federalist No. 43, at 289 (Madison, J.) (James E. Cooke ed., 1961).

[13] 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787 433 (Madison, J.) (Jonathan Elliot, ed., 2d ed. 1907).

[14] 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution, *supra*, reprinted in 3 The Founders' Constitution 225 (Philip B. Kurland & Ralph Lerner eds., 1987).

[15] *Id.*

In addition to the desire to be free of the transient support of an individual state, the Framers advanced a number of other reasons for creating this special enclave.[16] There was a fear that a state (and its representatives in Congress) would have too much influence over Congress, by creating "a dependence of the members of the general government."[17] There was also a fear that symbolically the honor given to one state would create in "the national councils an imputation of awe and influence, equally dishonorable to the Government and dissatisfactory to the other members of the confederacy."[18] There was also a view that the host state would benefit too much from "[t]he gradual accumulation of public improvements at the stationary residence of the Government."[19] Finally, some Framers saw the capitol city as promising the same difficulties that London sometimes posed for the English.[20] London then (and now) often took steps as a municipality that challenged the national government and policy. This led to a continual level of tension between the national and local representatives.

The District was, therefore, created for the specific purpose of being a non-State without direct representatives in Congress. The original motivating purposes behind the creation of the federal enclave no longer exist. Madison wanted a non-state location for the seat of government because "if any state had the power of legislation over the place where Congress should fix the general government, this would impair the dignity, and hazard the safety, of Congress."[21] There is no longer a cognizable "hazard [to] safety" but there were clearly articulated reasons – both security and symbolic – that motivated the current status for the District.

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16 The analysis by Dinh and Charnes places great emphasis on the security issue and then concludes that, "[d]enying the residents of the District the right to vote in elections for the House of Representatives was neither necessary nor intended by the Framers to achieve this purpose." Dinh & Charnes, *supra*. However, this was not the only purpose motivating the establishment of a federal enclave. Moreover, the general intention was the creation of a non-state under complete congressional authority as a federal enclave. The Framers clearly understood and intended for the District to be represented derivatively by the entire Congress.

17 The Federalist No. 43, at 289 (Madison, J.) (James E. Cooke ed., 1961).

18 *Id.*

19 *Id.*

20 Kenneth R. Bowling, The Creation of Washington, D.C.: The Idea and Location of The American Capitol 76 (1991).

21 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787 89 (Madison, J.) (Jonathan Elliot ed., 2d ed. 1907).

II.
THE CONSTITUTIONAL FRAMEWORK

In my view, this current debate should begin and end with the text of the Constitution, which clearly bars the creation of a new form of voting member in Congress.

1. *The Composition Clause.* Article I, Section 2 is the most obvious and controlling provision in this controversy – not the District Clause. The Framers defined the voting membership of the House in that provision as composed of representatives of the "several States." Conversely, the District Clause was designed to define the power of Congress *within* the federal enclave.

The language of Article I, Section 2 is a model of clarity:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch in the States Legislature.[22]

An interpretation of the Composition Clause clearly turns on the meaning of "states." A review of the Constitution shows that this term is used 120 times in the Constitution. It is true that the reference to "states" can have different meanings in the Constitution. *See District of Columbia v. Heller*, 128 S. Ct. 2783, 2800 (2008). However, that does not mean that any reference to "states" is therefore devoid of a fixed meaning. To the contrary, the Supreme Court has repeated stressed that most of these references refer to the actual state unit. Indeed, only a handful of references to "states" have been given an alternative meaning. Recently, in *Heller*, the Court stressed that "several states" are references to the actual state unit and proceeded to include the references to "each state" as having that same meaning. *Id.* (noting that "the reference is to the several States – 'each state,' 'several states,' 'any state,' 'that state,' 'particular states,' 'one state,' 'no state.'"). The Court's opinion in *Heller* directly contradicts arguments made by supporters in prior hearings that the reference to "several states" and "each State" could be read to apply to territories and federal enclaves.

On its face, the reference to "the people of the several states" is a clear restriction of the voting membership to actual states. The reference to "states" is repeated in the section when the Framers specified that each representative must "when elected, be an inhabitant of that State in which he shall be chosen." Moreover, the reference to "the most numerous Branch in the States Legislature" clearly distinguishes the state entity from the District. The District had no independent government at the time and currently has only a city council. Indeed, Congress is considered the legislature for the District and retains such authority even after delegating Home Rule authority. If the District is a state for the purposes of the Composition Clause, the interpretation produces a bizarre

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[22] U.S. Const. Art. I, Sec.2.

meaning where both the District government and Congress would be able to set qualifications for members. It would also allow Congress to dictate the qualifications of this one member as opposed to the other 435 members.

In Article I, the drafters refer repeatedly to states or several states as well as state legislatures in defining the membership of the House of Representatives. As the Court has noted, "[a] state, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed."[23]

The District's position is not helped by the fact that it appears to define itself as a state or a non-state depending on the circumstances and objectives of the moment. In the *Parker* case, for example, the District insisted that it could not be viewed as a state for the purposes of an individual's right to bear arms. This argument was particularly alarming since there is universal agreement that the individual rights contained in the Bill of Rights apply to citizens of the District as citizens of the United States. Yet, while arguing before Congress that it must be considered the equivalent of a state and citing the bill of rights in support of that claim, the District was a few blocks away arguing that it cannot be considered a state for the purposes of the Second Amendment. While it lost this case before both the D.C. Circuit[24] and the Supreme Court, it prevailed in convincing the dissenting judge in the D.C. Circuit. It was a Pyrrhic victory to be sure. In an opinion directly undermining its current position, Judge Karen Lecraft Henderson wrote:

> The Supreme Court has long held that "State" as used in the Constitution refers to one of the States of the Union . . . In fact, the Constitution uses "State" or "States" 119 times apart from the Second Amendment and in 116 of the 119, the term unambiguously refers to the States of the Union. Accepted statutory construction directs that we give "State" the same meaning throughout the Constitution.

Parker v. District of Columbia, 478 F.3d 370, 408 (D.C. Cir. 2007); *see also id.* at 408 ("In its origin and operation . . . the District is plainly not a 'State' of the Union."). Thus, while the majority ruled that the second amendment applied to all citizens as an individual right, the only judge to rule for the District based her decision squarely on the fact that the District is not within the meaning of a state under the Constitution.

A fluid definition of "several states" under the Composition Clause to include non-states makes various provisions unintelligible or unworkable. For both the composition of the House and Senate, the defining unit was that of a state with a distinct government, including a legislative branch. For example, before the 17th Amendment in 1913, Article I read: "The Senate of the United States shall be composed of two Senators

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[23] *Texas v. White*, 74 U.S. (7 Wall.) 700, 721 (1868).

[24] The D.C. Circuit did not rule that the District was a state, but that this is a right held by all citizens under the Bill of Rights.

from each state, chosen by the Legislature thereof . . ." For much of its history, the District did not have an independent government, let alone a true state legislative branch.

There is also the Qualification Clause under which members must have "the Qualifications requisite for Electors of the most numerous Branch of the State legislature" in Article I, Section 2. Obviously, the District has no state legislature and was never intended to have such a state-like structure. Moreover, as noted below, if Congress can manipulate the meaning of the Qualifications, it can change not just the voting members of Congress but their basic qualifications to serve in that capacity.

The drafters also referred to the "executive authority" of states in issuing writs for special elections to fill vacancies in Article I, Section 2. Like the absence of a legislative branch, the District did not have a true executive authority.

Article I also requires that "[n]o person shall be a Representative who shall not . . . be an Inhabitant of that state in which he shall be chosen." The drafters could have allowed for inhabitants of federal territories or the proposed federal district. Instead, they chose to confine the qualification for service in the House to being a resident of an actual state.

In the conduct of elections under Article I, Section 4, the drafters again mandated that "each state" would establish "[t]he Times, Places, and Manner." This provision specifically juxtaposes the authority of such states with the authority of Congress. The provision makes little sense if a state is defined as including entities created and controlled by Congress.

Article I also ties the term "several states" to the actual states making up the United States. The drafters, for example, mandated that "Representatives and direct Taxes shall be apportioned among the several states which may be included within this union, according to their respective Numbers." The District was neither subject to taxes at the beginning of its existence nor represented as a member of the union of states.

Article I, clause 3 specifies that "each state shall have at Least one Representative." If the Framers believed that the District was a quasi-state under some fluid definition, the District would have presumably had a representative and two Senators from the start. At a minimum, the Composition Clause would have referenced the potential for non-state members, particularly given the large territories such as Ohio, which were yet to achieve state status. Yet, there is no reference to the District in any of these provisions. It is relegated to the District Clause, which puts it under the authority of Congress.

The reference to "states" obviously extends beyond Article I. Article II specified that "the Electors [of the president] shall meet in their respective States" and later be "transmit[ted] to the Seat of the Government of the United States," that is, the District of Columbia. When Congress wanted to give the District a vote in the process, it passed the 23rd Amendment. That amendment expressly distinguishes the District from the meaning

of a state by specifying that District electors "shall be considered, for the purposes of the election of President and Vice President, to be electors by a state."

Notably, just as Article I refers to apportionment of representatives "among the several states," the later Fourteenth Amendment adopted the same language in specifying that "Representatives shall be apportioned among the several States according to their respective numbers." Thus, it is not true that the reference to states may have been due to some unawareness of the District's existence. The Fourteenth Amendment continued the same language in 1868 after the District was a major American city. Again, the drafters used "state" as the operative term– as with Article I – to determine the apportionment of representatives in Congress. The District was never subject to such apportionment and, even under this bill, would not be subject to the traditional apportionment determinations for other districts.

Likewise, when the Framers specified how to select a president when the Electoral College is inconclusive, they used the word "states" to designate actual state entities. Pursuant to Article II, Section 1, "the Votes shall be taken by States the Representation from each State having one Vote."

Conversely, when the drafters wanted to refer to citizens without reference to their states, they used fairly consistent language of "citizens of the United States" or "the people." This was demonstrated most vividly in provisions such as the Tenth Amendment, which states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."[25] Not only did the drafters refer to the two common constitutional categories for rights and powers (in addition to the federal government), but it cannot be plausibly argued that a federal enclave could be read into the meaning of states in such provisions.

2. The District Clause

The second relevant provision is the District Clause found in Article I, Section 8, which gives Congress the power to "exercise exclusive Legislation in all Cases whatsoever, over such District." Notably, the use of "in all cases whatsoever" emphasizes the administrative and operational character of the power given to Congress. It was a power to dictate the internal conditions and operations of the federal enclave. On its face, this language is not a rival authority to the Composition Clause or structural provisions for Congress. Adding a member to Congress is not some "case" or internal matter of the District, it is changing the structure of Congress and the status of the several states.

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[25] *See generally Lee v. Flintkote Co.*, 593 F.2d 1275, 1278 n.14 (D.C. Cir. 1979) ("[t]he District, unlike the states, has no reserved power to be guaranteed by the Tenth Amendment."). The same can be said of the Eleventh Amendment. *See LaShawn v. Barry*, 87 F.3d 1389, 1394 n.4 (D.C. Cir. 1996) ("The District of Columbia is not a state . . . Thus, [the Eleventh Amendment] has no application here.").

The obvious meaning of this section is supported by a long line of cases that repeatedly deny the District the status of a state and reaffirm the intention to create a non-state entity. This status did not impair the ability of Congress to impose other obligations of citizenship. Thus, in *Loughborough v. Blake*,[26] the Court ruled that the lack of representation did not bar the imposition of taxation. Lower courts rejected challenges to the imposition of an unelected local government. The District was created as a unique area controlled by Congress that expressly distinguished it from state entities. This point was amplified by then Judge Scalia of the D.C. Circuit in *United States v. Cohen*:[27] the District Clause "enables Congress to do many things in the District of Columbia which it has no authority to do in the 50 states. There has never been any rule of law that Congress must treat people in the District of Columbia exactly as people are treated in the various states."[28]

The District Clause itself magnifies the distinction from actual states. It is referred to as the "Seat of Government" and subject to the same authority that Congress would exercise "over all Places purchased by the Consent of the Legislature of the State . . ." Under this language, the District as a whole was delegated to the United States. As the D.C. Circuit stressed recently in *Parker,* "the authors of the Bill of Rights were perfectly capable of distinguishing between "the people," on the one hand, and "the states," on the other." Likewise, when the drafters of the Constitution wanted to refer to the District, they did so clearly in the text. This was evident not only with the original Constitution and the Bill of Rights, but much later amendments. For example, the Twenty-Third Amendment giving the District the right to have presidential electors expressly distinguishes the District from the States in the Constitution and establishes, for that purpose, the District should be treated like a State: mandating "[a] number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled *if it were a State*."[29] This amendment makes little sense if Congress could simply bestow the voting rights of states on the District. Rather, it reaffirmed that, if the District wishes to vote constitutionally as a State, it requires an amendment formally extending such parity.

These textual references illustrate that the drafters knew the difference between the nouns "state," "territory," and "the District" and used them consistently. If one simply takes the plain meaning of these terms, the various provisions produce a consistent and logical meaning. It is only if one inserts ambiguity into these core terms that the provisions produce conflict and incoherence.

When one looks to the District Clause, the context belies any suggested reservation of authority to convert the district into a voting member of either house. Instead of being placed in the structural section with the Composition Clause, it was relegated to the same section as other areas purchased or acquired by the federal

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26 18 U.S. (5 Wheat.) 317, 324 (1820).
27 733 F.2d 128, 140 (D.C. Cir. 1984).
28 *Id.*
29 U.S. Const. XXIII amend. Sec. 1.

government. Under this clause, Congress is expressly allowed "to exercise like Authority [as over the District] over all Places purchased . . . for the Erection of Forts, Magazines, Arsenals, dock-yards, and other needful buildings." If this clause gives Congress the ability to make the federal district into a voting member, then presumably Congress could exercise "like Authority" and give the Department of Defense ten votes in Congress.

The context of the District Clause shows that it is a provision crafted for administrative purposes as opposed to the structural provisions of Section 2. Indeed, the argument of unlimited powers under the District Clause parallels a similar argument under the Election Clause. Some argued that the Framers gave states[30] or Congress authority to manipulate the qualifications for members. In the latter case, the clause provides that "Congress may at any time by law make or alter such regulations" that related to the time, place and manner of federal elections."[31] Section 4 of Article I, however, was viewed by the Court as a purely procedural provision despite the absence of limiting language. As the Ninth Circuit noted in *Schaefer v. Townsend*, the Court has rejected "a broad reading of the Elections Clause and held the balancing test inapplicable where the challenged provision supplemented the Qualifications Clause."[32] It is the Composition Clause (and, as noted below, the Qualifications Clause) that determine the prerequisites for congressional office.

The effort to focus on the District Clause rather than the Composition Clause is unlikely to succeed in court. The context of this language reinforces the plain meaning of the text itself. The District Clause concerns the authority of Congress over the internal affairs of the seat of government. To elevate that clause to the same level as the Composition Clause would do great violence to the traditions of constitutional interpretation.

III.
ORIGINAL UNDERSTANDING OF THE COMPOSITION, QUALIFICATIONS, AND DISTRICT CLAUSES

I will largely leave the historical record on the meaning of the Composition and District Clauses to the attached article. However, I want to stress that it is manifestly untrue that the Framers did not understand or contemplate the meaning of these clauses as they related to the District.

The intent behind the Composition Clause was clear throughout the debates as a vital structural provision. The Framers were obsessed with the power of the states and the structure of Congress. Few matters concerned the Framers more than who could vote in Congress and how they were elected. Indeed, some delegates wanted the House to be

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[30] U.*S. Term Limits*, 514 U.S. at 832-33 ("the Framers intended the Elections Clause to grant States authority to create procedural regulations, not to provide States with license to exclude classes of candidates from federal office.").

[31] U.S. Cong. Art. I, sec. 4.

[32] *Schaefer v. Townsend*, 215 F.3d 1031, 1038 (9th Cir. 2000).

elected by the state legislatures, as was the Senate.[33] This proposal was not adopted, but the clear import of the debate was that representatives would be elected from the actual states. The very requirement of qualifications being set by "state legislature" was meant to reaffirm that the composition of Congress would be controlled by states.

The Composition Clause was vital to securing the votes of reluctant members, particularly Antifederalists. Madison emphasized this point in *Federalist No. 45* when he pointed out that "each of the principal branches of the federal government will owe its existence more or less to the favor of the State governments, and must consequently feel a dependence."[34]

In his first comments after the Constitutional Convention, James Wilson emphasized the Composition Clause and the requirement that members be elected by actual states. In an October 6, 1787 speech, Wilson responded to Anti-Federalists who feared the power of the new Congress – a speech described at the time as "the first authoritative explanation of the principles of the NEW FEDERAL CONSTITUTION."[35] Wilson stressed that Congress would be tethered closely to the states and that only states could elect members:

> [U]pon what pretence can it be alleged that it was designed to annihilate the state governments? For, I will undertake to prove that upon their existence, depends the existence of the foederal plan. For this purpose, permit me to call your attention to the manner in which the president, senate, and house of representatives, are proposed to be appointed. . . . The senate is to be composed of two senators from each state, chosen by the legislature; and therefore if there is no legislature, there can be no senate. The house of representatives, is to be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature,--*unless therefore, there is a state legislature, that qualification cannot be ascertained*, and the popular branch of the foederal constitution must likewise be extinct. From this view, then it is evidently absurd to suppose, that the annihilation of the separate governments will result from their union; or, that having that intention, the authors of the new system would have bound their connection with such indissoluble ties.[36]

Wilson's comments, in what was billed at the time as the first public defense of the draft Constitution by a Framer, illustrate how important the Composition Clause of Article I, Section 2 was to the structure of government.[37] It was not some ambiguity but the very cornerstone for the new federal system. It is safe to say that the suggestion that the

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[33] 1 Records of the Federal Convention of 1787, at 359 (Max Farrand ed., rev. ed. 1966)

[34] The Federalist No. 45, at 220 (J. Madison).

[35] 13 Documentary History of the Ratification of the Constitution 337, 342 (John P. Kaminski & Gaspare J. Saladino, eds., 1981)

[36] *Id.*

[37] *Id.*

District could achieve equal status to states in Congress would have been viewed as absurd, particularly given the fact that there could be no state legislature for the federal city. Wilson and others made clear that voting members of Congress would be reserved to the representatives of the actual states.

Equally probative is the intent behind the Qualifications Clause of Section 2 of Article I. If Congress changes the meaning of the Composition Clause, it could also change the meaning of the Qualifications Clause, which refers to the fixed criteria for eligibility to the House of Representatives, including the condition of being a resident of a state.

It is not simply the reference to a state that makes the Qualifications Clause material to this debate. The Framers wrote this provision in the aftermath of the controversy over John Wilkes.[38] Wilkes had publicly attacked the peace treaty with France and, in doing so, earned the ire of Crown and Parliament. After he was convicted and jailed for sedition, the Parliament moved to declare his ineligible for service in the legislature. He served anyway and eventually the Parliament rescinded the legislative effort to disqualify him. It was deemed as violative of a center precept of the Parliament that it could not manipulate the qualifications needed for entry or service.

The Wilkes controversy was referenced in the Constitutional Convention as members called for a rigid and fixed meaning as to the qualifications for Congress. Unless Congress was prevented from manipulating its membership, history would repeat itself. James Madison noted "[t]he abuse [the British Parliament] had made of it was a lesson worthy of our attention."[39] Madison warned if Congress could engage in such manipulation it would "subvert the Constitution."[40]

This debate was largely triggered by proposals to allow for congressional authority to add qualifications or to expressly require property prerequisites to membership. These efforts failed, however, on a more general opposition to allowing Congress to change its membership. In a quote later cited by the Supreme Court, Alexander Hamilton noted that "[t]he qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, are *defined and fixed* in the Constitution, and are *unalterable* by the legislature."[41]

As opposed to either the Composition or Qualifications Clauses, the District Clause was not part of the debate or the provisions relating the structure of the government itself. It was contained with a list of enumerated powers of Congress in Section 8 that cover everything from creating post offices to inferior courts. It was notably placed in the same clause as the power of the Congress over "the Erection of

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38 *Powell*, 395 U.S. at 535
39 *Id.* (quoting 2 Farrand 250).
40 *Id.*
41 The Federalist No. 60, at 371 (emphasis added).

Forts, Magazines, Arsenals, dock-yards, and other needful buildings." Nevertheless, the creation of a seat of government was an issue of interest and concern before ratification.

As noted above, the status of the federal district was also clearly understood as a non-state entity. The Supreme Court has observed that "[t]he object of the grant of exclusive legislation over the district was . . . national in the highest sense, and the city organized under the grant became the city, not of a state, not of a district, but of a nation."[42] While Madison conceded that some form of "municipal legislature for local purposes" might be allowed, the district was to be the creation of Congress and maintained at its discretion.[43]

It has been repeatedly asserted by defenders of this legislation that the Framers simply did not consider the non-voting status of District residents and could not possibly have intended such a result. This argument is clearly and irrefutably untrue. The political status of the District residents was a controversy then as it is now. The Federal Farmer captured this concern in his January 1788 letter, where he criticized the fact that there was not "a single stipulation in the constitution, that the inhabitants of this city, and these places, shall be governed by laws founded on principles of Freedom."[44]

The absence of a vote in Congress was clearly understood as a prominent characteristic of a federal district. However, being a resident of the new capitol city was viewed as compensation for this limitation. Indeed, it was the source of considerable competition and jealousy among the states.[45] In the Virginia Ratification Convention, Patrick Henry observed with unease how they have been

> told that numerous advantages will result, from the concentration of the wealth and grandeur of the United States in one happy spot, to those who will reside in or near it. Prospects of profits and emoluments have a powerful influence on the human mind.[46]

Since residence would be voluntary within the federal district, most viewed the representative status as a *quid pro quo* for the obvious economic and symbolic benefit.

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[42] *O'Donoghue*, 289 U.S. at 539-40.

[43] The Federalist No. 43, at 280 (J. Madison).

[44] Letters from the Federal Farmer to the Republican, XVI (January 20, 1788) reprinted in 2 The Complete Anti-Federalist 327 (Herbert J. Storing, ed., Univ. of Chicago Press 1981); *see also* The Founders' Constitution, *supra*, at 220.

[45] Notably, during the Virginia Ratification Convention, when Grayson describes the District as "detrimental and injurious to the community, and how repugnant to the equal rights of mankind," he is not referring to the lack of voting rights but the anticipated power that District residents would wield over the rest of the nation due to "such exclusive emoluments." The Founders' Constitution, *supra,* at 190.

[46] *Id.*

It is true that there was little consideration of how residents would fare in terms of taxation, civil rights, conscription and the like.[47] There is a very good reason for this omission: the drafters understood that these conditions would depend entirely on Congress. Since these matters would be left to the discretion of Congress, the details were not relevant to the constitutional debates. However, the *status* of the residents was clearly debated and understood: residents would be represented by Congress as a whole and would not have individual representation in Congress.

During ratification, various leaders objected to the disenfranchisement of the citizens in the district. In New York, Thomas Tredwell objected that the non-voting status of the District residents "departs from every principle of freedom . . . subjecting the inhabitants of that district to the exclusive legislation of Congress, in whose appointment they have no share or vote."[48]

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[47] Various references were made to potential forms of local governance that might be allowed by Congress. Madison noted that:

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

The Federalist Papers No. 43, *supra*, at 280 The drafters correctly believed that the "inducements" for ceding the land would be enough for residents to voluntarily agree to this unique status. Moreover, Madison correctly envisioned that forms of local government would be allowed – albeit in varying forms over the years.

[48] 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787, at 402 (Jonathan Elliot ed., 1888). The whole of Thomas Tredwell's comments merit reproduction:

> The plan of the federal city, sir, departs from every principle of freedom, as far as the distance of the two polar stars from each other; for, subjecting the inhabitants of that district to the exclusive legislation of Congress, in whose appointment they have no share or vote, is laying a foundation on which may be erected as complete a tyranny as can be found in the Eastern world. Nor do I see how this evil can possibly be prevented, without razing the foundation of this happy place, where men are to live, without labor, upon the fruit of the labors of others; this political hive, where all the drones in the society are to be collected to feed on the honey of the land. How dangerous this city may be, and what its operation on the general liberties of this country, time alone must discover; but I pray God, it may not prove to this western world what the city of Rome, enjoying a similar constitution, did to the eastern.

Some delegates even suggested amendments that would have addressed the problem. One such amendment was offered by Alexander Hamilton, who wanted the District residents to be able to secure representation in Congress once they grew to a reasonable size.[49] On July 22, 1788, Hamilton asked that the District Clause be amended to mandate that "the Inhabitants of the said District shall be entitled to the like essential Rights as the other inhabitants of the United States in general."[50] These efforts to give District residents conventional representation failed despite the advocacy of no less a person than Alexander Hamilton.[51]

Notably, in at least one state convention, the very proposal to give the District a vote in the House but not the Senate was proposed. In Massachusetts, Samuel Osgood sought to amend the provision to allow the residents to be "represented in the lower House."[52] No such amendment was enacted. Instead, some state delegates like William Grayson distinguished the District from a state entity in Virginia. Repeatedly, he stressed that the District would not have basic authorities and thus "is not to be a fourteenth state."[53]

Objections to the political status of the District residents were unpersuasive before ratification. The greatest concern was that the District could become create an undue concentration of federal authority and usurp state rights. In order to quell fears of the power of the District, supporters of the Constitution emphasized that the exclusive authority of Congress over the District would have no impact on states, but was only a power related to the *internal* operations of the seat of government. This point was emphasized by Edmund Pendleton on June 16, 1788 as the President of the Virginia Ratification Convention. He assured his colleagues that Congress could not use the District Clause to affect states because the powers given to Congress only affected District residents and not states or state residents:

> Why oppose this power? Suppose it was contrary to the sense of their constituents to grant exclusive privileges to citizens residing within that place; the effect would be directly in opposition to what he says. It could have *no operation without the limits* of that district. Were Congress to make a law granting them an

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[49] 5 The Papers of Alexander Hamilton 189 (Harold C. Syrett & Jacob E. Cooke eds., 1962).

[50] *Id.*

[51] This is not to say that the precise conditions of the cessation were clear. Indeed, some states passed Amendments that qualified their votes – amendments that appear to have been simply ignored. Thus, Virginia ratified the Constitution but specifically indicated that some state authority would continue to apply to citizens of the original state from which "Federal Town and its adjacent District" was ceded. Moreover, Congress enacted a law that provided that the laws of Maryland and Virginia "shall be and continue in force"[51] in the District – suggesting that, unless repealed or amended, Maryland continues to have jurisdictional claims in the District.

[52] *Id.*

[53] The Founders' Constitution, *supra*, at 223.

> exclusive privilege of trading to the East Indies, it could have no effect the moment it would go without that place; for their exclusive power is confined to that district. . . . This exclusive power is limited to that place solely for their own preservation, which all gentlemen allow to be necessary ...[54]

Pendleton's comments capture the essence of the problem then and now. Congress has considerable plenary authority over the District, but that authority is lost when it is used to change the District's status vis-à-vis the states. Such external use of District authority is precisely what delegates were assured could not happen under this clause.

As noted in the attached article, the clear meaning of theses clauses was reaffirmed in the retrocession debates and later congressional debates over the inclusion of non-voting members. The District's status has been consistently defined from its creation to the present day. The prior effort to secure a constitutional amendment reflected the weight of this precedent. In order to succeed, the courts would have to abandon over two hundred years of precedent in the interpretation of the Constitution. It is obviously unlikely to do so. The result is that, at the very time that District residents have the ability to secure a lasting change in their status, Congress will enact legislation that is likely to be overturned over course of year of litigation. When this matter returns to Congress, this window of opportunity may have closed due to an ill-advised gamble on changing constitutional precedent.

IV.
MANIPULATING THE DEFINITION OF A VOTING MEMBER IS A DANGEROUS AND DESTABILIZING ACT FOR A REPRESENTATIVE DEMOCRACY.

The current approach to securing partial representation for the District is fraught with dangers. What is striking is how none of these dangers have been addressed by advocates on the other side with any level of detail. Instead, members are voting on a radical new interpretation with little thought or understanding of its implications for our constitutional system. The Framers created clear guidelines to avoid creating a system on a hope and a prayer. It would be a shame if our current leaders added ambiguity where clarity once resided in the Constitution on such a question. The burden should be on those advocating this legislation to fully answer each of these questions before asking for a vote from Congress. Members cannot simply shrug and leave this to the Court. Members have a sacred duty to oppose legislation that they believe is unconstitutional. While many things may be subject to political convenience, our constitutional system should be protected by all three branches with equal vigor.

Once again, I will rely on the attached article to fully explore the dangers of Congress manipulating the meaning of a voting member in the House of Representatives. However, these concerns include the following:

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[54] The Founders' Constitution, *supra*, at 180.

i. Partisan Manipulation of the Voting Body of Congress. By adopting a liberal interpretation of the meaning of states in Article I, the Congress would be undermining the very bedrock of our constitutional system. The obvious and traditional meaning of "states" deters legislative measures to create new forms of voting representatives or shifting voters among states.[55] By taking this approach, the current House could award a vote to District residents and a later majority could take it away. The District residents would continue to vote, not as do other citizens, but at the whim and will of the Congress like some party favor that can be withdrawn with the passing fortunes of politics.

ii. Creation of New Districts Among Other Federal Enclaves and Territories. If successful, this legislation would allow any majority in Congress to create other novel seats in the House. This is not the only federal enclave and there is great potential for abuse and mischief in the exercise of such authority. Under Article IV, Section 3, "The Congress shall have Powers to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . ." Roughly thirty percent of land in the United States (over 659 million acres) is part of a federal enclave regulated under the same power as the District.[56] There are literally millions of people living in these areas, including Puerto Rico (with a population of 4 million people -- roughly eight times the size of the District). Advocates within theses federal enclaves and territories can (and have)[57] cited the same interpretation for their own representation in Congress.

iii. Expanded Senate Representation. While the issue of Senate representation is left largely untouched by supporters of this legislation, there is no obvious principle that would prevent a majority from expanding its ranks with two new Senate seats for the District. Two Senators and a member of the House would be a considerable level of representation for a non-state with a small population. Yet, this analysis would suggest that such a change could take place without a constitutional amendment. When asked about the extension of the same theory to claiming two Senate seats in the last hearing before the House Judiciary Committee, Professor Dinh once again said that he had not given it much thought. Yet, since his first report in 2004, this issue has been repeatedly raised to Dinh without a response. In the last hearing, Dinh ventured to offer a possible limitation that would confine his interpretation to only the House. He cited Article I,

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[55] This latter approach was raised by Judge Leval in *Romeu v. Cohen*, 265 F.3d 118, 128-30 (2d Cir. 2001) when he suggested that Congress would require each state to accept a certain proportion of voters in territories to give them a voice in Congress. This view has been rejected, including in that decision in a concurring opinion that found "no authority in the Constitution for the Congress (even with the states' consent) to enact such a provision." *Id.* at 121 (Walker, Jr., C.J., concurring); *see also Igartua-De La Rosa v. United States*, 417 F.3d 145, 154 n9 (1st Cir. 2005). According to Chief Judge Walker, there are "only two remedies afforded by the Constitution: (1) statehood . . ., or (2) a constitutional amendment." *Id.* at 136.

[56] *See* http://www.gsa.gov/gsa/cm_attachments/GSA_DOCUMENT/FRPR_5-30_updated_R2872-m_0Z5RDZ-i34K-pR.pdf

[57] *Id.*

Section 3 and (as he had in his 2004 report) noted that "quite unlike the treatment of the House of Representatives, the constitutional provisions relating to composition of the Senate additionally specifies that there shall be two senators 'from each State.'" However, as I pointed out in prior hearings, Section 2 has similar language related to the House, specifying that "each State shall have at Least one Representative." It remains unclear why this language does not suggest that same "interests of states qua states" for the House as it does for the Senate.

iv. *One Person, One Vote.* This legislation would create a bizarre district that would not be affected by a substantial growth or reduction in population. The bill states that "the District of Columbia may not receive more than one Member under any reapportionment of Members."[58] Thus, whether the District of Columbia grew to 3 million or shrank to 30,000 citizens, it would remain a single congressional district – unlike other districts that must increase or decrease to guarantee such principles as one person/one vote. Since it is not a state under Article I, Section 3 (creating the minimum of vote representative per state), this new District would violate principles of equal representation. Likewise, if it grew in population, citizens would be underrepresented and Congress would be expected to add a district under the same principles – potentially giving the District more representatives than some states. The creation of a district outside of the apportionment requirements is a direct contradiction of the Framers' intent.[59]

v. *Qualification issues.* Delegates are not addressed or defined in Article I, these new members from the District or territories are not technically covered by the qualification provisions for members of Congress. Thus, while authentic members of Congress would be constitutionally defined,[60] these new members would be legislatively defined – allowing Congress to lower or raise such requirements in contradiction to the uniform standard of Article I. Conversely, if Congress treats any district or territory as "a state" and any delegate as a "member of Congress," it would effectively gut the qualification standards in the Constitution by treating the title rather than the definition of "members of Congress" as controlling.

vi. *Faustian Bargain.* This legislation is a true Faustian bargain for District residents who are about to effectively forego true representation for a limited and non-guaranteed district vote in one house. This legislation would only serve to delay true representational status for district residents. On a practical level, this bill would likely extinguish efforts at full representation in both houses. During the pendency of the litigation, it is highly unlikely that additional measures would be considered – delaying reforms by many years. Ultimately, if the legislation is struck down, it would leave the campaign for full representation frozen in political amber for many years. When the

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[58] S. 1257, Sec. 2.

[59] Wesberry, 376 U. S. at 8-11.

[60] *See* Art. I, Sec. 2 ("No Person shall be a Representative who shall not have attained to the age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.")

matter returns to Congress, the District may have lost this unique opportunity to forge an unassailable and constitutional resolution of its status. The long awaited change in the status of the District is now within the reach of its resident. To fritter away that opportunity on an ill-conceived and unlikely legal claim is a tragedy in the making.

V.
CONCLUSION

Since this hearing concerns the constitutionality of H.R. 157, I will not discuss the alternatives to this course. These alternatives include the "modified retrocession plan" that I have proposed in past years. That plan is detailed in the attached article and prior testimony. What needs to be stressed is that members have options that are consistent with the Constitution and would afford residents full, rather than partial, representation.

Despite the best of motivations, the bill is fundamentally flawed on a constitutional level and would only serve to needlessly delay true reform for District residents.[61] Indeed, considerable expense would likely come from an inevitable and likely successful legal challenge -- all for a bill that would ultimately achieve only partial representational status. The effort to fashion this as a civil rights measure ignores the fact that it confers only partial representation without any guarantee that it will continue in the future. It is the equivalent of allowing Rosa Parks to move halfway to the front of the bus in the name of progress. District residents deserve full representation and, while this bill would not offer such reform, there are alternatives, including a three-phased proposal that I have advocated in the past.

Not only is this approach facially unconstitutional, but the outcome of this legislation, even if sustained on appeal, would not be cause for celebration. Indeed, this legislation would replace one grotesque constitutional curiosity in the current status of the District with new curiosity. The creation of a single vote in the House (with no representation in the Senate) would create a type of half-formed citizens with partial representation derived from residence in a non-state. It is an idea that is clearly put forward with the best of motivations but one that is shaped by political convenience rather than constitutional principle.

Thank you again for the honor of speaking with you today and I would be happy to answer any questions that you might have. I would also be happy to respond to any questions that Members may have after the hearing on the constitutionality of this legislation or the alternatives available in securing full voting rights for District residents.

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[61] In this testimony, I will not address the constitutionality of giving the District of Columbia and other delegates the right to vote in the Committee of the Whole. *See Michel v. Anderson*, 14 F.3d 623 (D.C. Cir. 1994) (holding that "Article I, §2 . . . precludes the House from bestowing the characteristics of membership on someone other than those 'chosen every second year by the People of the several States."). The most significant distinction that can be made is that the vote under this law is entirely symbolic since it cannot be used to actually pass legislation in a close vote.

ATTACHMENT

Too Clever By Half: The Unconstitutionality of Partial Representation of the District of Columbia in Congress

Jonathan Turley*

Introduction

When the Democratic majority took control of the 110th Congress, one of the first matters on the agenda was one of its the oldest controversies: the representational status of the District of Columbia in Congress. In a bipartisan effort, sponsors proposed giving the District of Columbia a vote in the House of Representatives, but not the Senate. To satisfy political necessities, the sponsors agreed to add a presumptively Republican seat for Utah to balance the presumptively Democratic seat in the District of Columbia. Suddenly, a majority of members in the House had a stake in securing a vote for the District and the bill moved swiftly through the House in a newfound campaign for "equal representation." It was the very model of how political convenience can be the enemy of constitutional principle. Members have shown little patience with constitutional language and case law that bars them from creating this new form of voting member. Although the future remains uncertain, it is clear that only a few votes are needed to pass the bill in the Senate and override a possible presidential veto. It is the closest the District has come in decades to a true congressional vote, albeit half representation in only one house.[1] The understandable excitement over such a potentially historic change, however, has distracted many from the serious constitutional implications of the plan. Allowing Congress to create a new form of voting member would threaten not only the integrity of the House but the stability of the legislative branch in the carefully balanced tripartite system.

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* J.B. & Maurice C. Shapiro Professor of Public Interest Law at The George Washington University Law School. This Article is based on prior congressional testimony given before the 109th and 110th Congresses on various bills offered to secure a voting member for the District of Columbia in the House of Representatives while adding a new seat for the State of Utah.

1 Johanna Neuman, *Senate Says No D.C. Voice in Congress*, L.A. TIMES, Sept. 19, 2007, at A14 (noting that passage failed by only three votes and that a renewed effort is planned by sponsors).

The passions surrounding this debate have been intense and, not surprisingly, many of the arguments have been distorted or dismissed by advocates on both sides. In reality, this is not a debate between people who want District residents to have the vote and those who do not. There is universal agreement that the current nonvoting status of the District is fundamentally at odds with the principles and traditions of our constitutional system. As Justice Black stated in *Wesberry v. Sanders*:[2] "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."[3]

Thus, although significant differences remain on the means, everyone in this debate agrees on the common goal of ending the glaring denial of basic rights to the citizens of the District.[4] Yet, after decades of disenfranchisement, there is a tendency to personalize the barriers to such representation and to ignore any countervailing evidence in the constitutional debates. While attributing the failure to secure passage to those of us objecting to its constitutionality,[5] Delegate Eleanor Holmes Norton insisted that it is "slander" to claim that the Framers intended to leave District residents without their own representatives in Congress.[6] In reality, I have long argued for *full* representation for

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2 Wesberry v. Sanders, 376 U.S. 1 (1964).

3 *Id.* at 17.

4 For purposes of full disclosure, I was counsel in the successful challenge to the Elizabeth Morgan Act, Department of Transportation and Related Agencies Appropriations Act of 1997, Pub. L. No. 104-205, § 350, 110 Stat. 2951, 2979 (1996) (codified at D.C. CODE § 11-925 (2001)). Much like this proposal, a hearing was held to address whether Congress had the authority to enact the law, which allowed intervention into a single family custody dispute. I testified at that hearing as a neutral constitutional expert and strongly encouraged the members not to move forward on the legislation, which I viewed as a rare example of a "bill of attainder" under Sections 9 and 10 of Article I. *See generally The Elizabeth Morgan Act: Hearing on H.R. 1855 Before the H. Comm. on Gov't Reform & Oversight*, 104th Cong. (1995) (testimony of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School). I later agreed to represent Dr. Eric Foretich on a pro bono basis to challenge the Act, which was struck down as a bill of attainder by the Court of Appeals for the District of Columbia Circuit. *See* Foretich v. United States, 351 F.3d 1198, 1226 (D.C. Cir. 2003). The current bill is another example of Congress exceeding its authority, although now under Sections 2 and 8 (rather than Sections 9 and 10) of Article I.

5 In a Senate hearing, Delegate Norton told Senators that if they are going to vote against this bill, "do not blame the Framers blame Jonathan Turley." *Equal Representation in Congress: Providing Voting Rights to the District of Columbia: Hearing on S. 1257 Before the S. Comm. on Homeland Sec. & Gov't Operations*, 110th Cong. (2007) [hereinafter *Homeland Sec. Hearing*] (testimony of Del. Eleanor Holmes Norton, D-D.C.), *available at* http://hsgac.senate.gov/ files/ 051507Norton.pdf.

6 *Id.* In the same hearing, Secretary Jack Kemp noted: "I would hate to be my friend Jonathan Turley." *Id.* On that sentiment, at least, we may be in agreement.

the District and abhor the status of its residents.[7] As to slandering the Framers, truth remains an absolute defense to defamation and the record in this case refutes suggestions that the status of the District was some colossal oversight by the Framers. While some may view it as obnoxious, the Framers clearly understood the implications of creating a federal enclave represented by Congress as a whole. It is a subject worthy of academic debate and one that has received surprisingly little scholarly attention. This Article is intended to offer a foundation for such a debate by presenting one view of the weight of historical and legal sources on this question.[8]

Despite the best of motivations, the current effort to legislatively create a voting member in the House for the District is fundamentally flawed on a constitutional level.[9] Considerable expense would likely come from an inevitable and likely successful legal challenge, all for a bill that would achieve only partial representational status. District residents deserve full representation and although this bill would not offer such reform, there are alternatives, including a three-phased proposal that I have advocated in the past.[10]

As I detailed in my prior testimony on this proposal before the 109th Congress[11] and the 110th Congress,[12] I respectfully, but strongly,

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[7] *See, e.g.*, *District of Columbia Fair and Equal House Voting Rights Act of 2006: Hearing on H.R. 5388 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 51–76 (2006) [hereinafter *Hearing on H.R. 5388*] (testimony of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School).

[8] In this Article, I will not address the constitutionality of giving the District of Columbia and other delegates the right to vote in the Committee of the Whole. *See* Michel v. Anderson, 14 F.3d 623, 630 (D.C. Cir. 1994) (holding that "Article I, § 2 . . . . precludes the House from bestowing the characteristics of membership on someone other than those 'chosen every second year by the People of the several States'"). The most significant distinction that can be made is that the vote under this law is entirely symbolic because it cannot be used to actually pass legislation in a close vote. In 1993, Congress allowed such voting for the delegates from the District of Columbia, American Samoa, Guam, and the United States Virgin Islands as well as Puerto Rico's resident commissioner on the condition that such votes could not be determinative passing legislation. This rule was changed in 1994 but then reinstated again in 2007. *See* Voting by Delegates and Resident Commissioner in Committee of the Whole, H.R. Res. 78, 110th Cong. (2007).

[9] *See* Jonathan Turley, *Right Goal, Wrong Means*, WASH. POST, Dec. 5, 2004, at B8 (noting that current proposals would "subvert the intentions of the Founders by ignoring textual references to 'states' in the Constitution"); Jonathan Turley, *Too Clever By Half: The Unconstitutional D.C. Voting Rights Bill*, ROLL CALL, Jan. 25, 2007, at 8 (noting that the Constitution clearly limits House voting Members solely to states).

[10] *See infra* Part VII.

[11] *Hearing on H.R. 5388*, *supra* note 7, at 49, 53 (testimony of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School).

[12] *Ending Taxation Without Representation: The Constitutionality of S. 1257: Hearing on S. 1257 Before the S. Comm. on the Judiciary*, 110th Cong. 4 (2007) [hereinafter *Ending Taxation*

disagree with the constitutional analysis offered to Congress by Professors Viet Dinh[13] and Charles Ogletree,[14] as well as Judges Kenneth Starr[15] and Patricia Wald.[16] Notably, since my first testimony on this issue, the independent Congressional Research Service joined those of us who view this legislation as facially unconstitutional.[17] Likewise, the White House recently disclosed that its attorneys have reached the same conclusion and found this legislation to be facially unconstitutional.[18] President Bush has also indicated that he will veto the legislation on constitutional grounds.

The drafters of this legislation have boldly stated that "[n]otwithstanding any other provision of law, the District of Columbia shall be considered a Congressional district for purposes of repre-

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Hearing] (prepared statement of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School), *available at* http://judiciary.senate.gov/pdf/05-23-07 Turleytestimony.pdf; *Homeland Sec. Hearing*, *supra* note 5 (testimony of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School); *District of Columbia House Voting Rights Act of 2007: Hearing on H.R. 1433 Before the H. Comm. on the Judiciary*, 110th Cong. 40 (2007) [hereinafter *Judiciary Comm. Hearing*] (same).

13 *See Judiciary Comm. Hearing*, *supra* note 12, at 8–28 (testimony of Viet Dinh, Professor of Law and Co-Director Asian Law & Policy Studies Georgetown University Law Center). This analysis was coauthored by Mr. Adam Charnes, an attorney with the law firm of Kilpatrick Stockton LLP. Viet D. Dinh & Adam H. Charnes, The Authority of Congress to Enact Legislation to Provide the District of Columbia with Voting Representation in the House of Representatives (Nov. 2004) (unpublished manuscript submitted to the H. Comm. on Gov't Reform, 108th Cong.), *available at* http://www.dcvote.org/pdfs/congress/vietdinh112004.pdf. This analysis was also supported recently by the American Bar Association in a June 16, 2006, letter to Chairman James Sensenbrenner, *available at* http://www.abanet.org/poladv/letters/109th/election/DC%20FAIR%20Act%20Ltr%20to%20House%20Jud%206-16-06%20web.pdf.

14 *See Ending Taxation Hearing*, *supra* note 12 (testimony of Charles J. Ogletree, Jesse Climenko Professor of Law, Harvard Law School), *available at* http://judiciary.senate.gov/testimony.cfm?id=2789&wit_id=6483.

15 *See Common Sense Justice for the Nation's Capital: An Examination of Proposals to Give D.C. Residents Direct Representation: Hearing Before the H. Comm. on Gov't Reform*, 108th Cong. 75–84 (2004) (testimony of Kenneth W. Starr, former Solicitor Gen. of the United States; former J., D.C. Cir.).

16 *Ending Taxation Hearing*, *supra* note 12 (testimony of Patricia M. Wald, former C.J., D.C. Cir.), *available at* http://judiciary.senate.gov/testimony.cfm?id=2789&wit_id=6482.

17 KENNETH R. THOMAS, CONG. RESEARCH SERV., THE CONSTITUTIONALITY OF AWARDING THE DELEGATE FOR THE DISTRICT OF COLUMBIA A VOTE IN THE HOUSE OF REPRESENTATIVES OR THE COMMITTEE OF THE WHOLE, CRS-20 (2007), *available at* http://assets.opencrs.com/rpts/RL33824_20070124.pdf (concluding "that case law that does exist would seem to indicate that not only is the District of Columbia not a 'state' for purposes of representation, but that congressional power over the District of Columbia does not represent a sufficient power to grant congressional representation").

18 *See* Christina Bellantoni, *Democrats Adjust Rules for D.C. Vote Bill*, WASH. TIMES, Apr. 19, 2007, at A5; Suzanne Struglinski, *House OKs a 4th Seat for Utah*, DESERET MORNING NEWS (Salt Lake City), Apr. 20, 2007, at A8.

sentation in the House of Representatives."[19] What this language really means is: "notwithstanding any provision of the Constitution."[20] Of course, Congress cannot set aside provisions of the Constitution absent a ratified constitutional amendment. The language of this legislation is strikingly similar to a 1978 constitutional amendment that failed after being ratified by only sixteen states.[21] Indeed, in both prior successful and unsuccessful amendments[22] (as well as in arguments made in court[23]), Congress has conceded that the District is not a state for the purposes of voting in Congress. Now, unable to pass a constitutional amendment, sponsors hope to circumvent the process laid out in Article V[24] by claiming the inherent authority to add a nonstate voting member to the House of Representatives.

The controversy over the District vote was joined by an equally controversial effort to add an at-large district to the State of Utah.[25]

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19 District of Columbia House Voting Rights Act, S. 1257, 110th Cong. § 2 (2007).

20 Indeed, even the title of one of the hearings revealed a fundamental rejection of the design and intent of the Framers, "Ending Taxation Without Representation." *See Ending Taxation Hearing*, *supra* note 12 (testimony of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School). The Framers did not leave the District "without representation" and would not view its current status as an example of the colonial scourge of "taxation without representation." Rather, they repeatedly stated that the District would be represented by the entire Congress and that members (as residents of or commuters to that District) would bear a special interest in its operations. Whatever the merits of that view, the District was and is represented in the fashion envisioned by the Framers.

21 *See* H.R.J. Res. 554, 95th Cong. (1978). Likewise, in 1993, a bill to create the State of New Columbia failed by a wide margin. *See* New Columbia Admission Act, H.R. 51, 103d Cong. (1993) (failing by a 153–277 vote).

22 *See* U.S. CONST. amend. XXIII (mandating "[a] number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled *if it were a State*" (emphasis added)).

23 *See* Michel v. Anderson, 14 F.3d 623, 630 (D.C. Cir. 1994) ("[D]espite the House's reliance on the revote mechanism to reduce the impact of the rule permitting delegates to vote in the Committee of the Whole, [the government] concede[s] that it would be unconstitutional to permit anyone but members of the House to vote in the full House under any circumstances.").

24 U.S. CONST. art. V ("The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Convention in three fourths thereof . . . .").

25 In my first testimony to the House on this matter, I expressed considerable skepticism over the legality of the creation of an at-large seat in Utah, particularly because of the "one-man, one-vote" doctrine established in *Wesberry v. Sanders*, 376 U.S. 1, 7–8, 18 (1964). *See Hearing on H.R. 5388*, *supra* note 7, at 53, 69 (testimony of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School). Although the Supreme Court has not clearly addressed the interstate implications of the "one person, one vote" doctrine, the earlier proposal would likely force it to do so. The Court has stressed that the debates over the

The Senate wisely changed the at-large provision for the Utah district to require the creation of new individual districts. This change left the constitutional question squarely on the District's member and the ability of Congress to manipulate its own rolls by adding a new form of voting member. This Article lays out the textual, historical, and policy arguments for why Congress lacks such authority.

I. The Original Purpose of a Federal Enclave and Its Continued Necessity in the Twenty-First Century

The nonvoting status of District residents remains something of a historical anomaly that should have been addressed more clearly at the drafting of the Constitution. Moreover, with the passage of time, there remains little necessity for a separate enclave beyond the symbolic value of "belonging" to no individual state. To understand the perceived necessity underlying Article I, Section 8, one has to consider the events that led to the first call for a separate federal district.

On January 1, 1783, Congress was meeting in Philadelphia when they were surprised by a mob of Revolutionary War veterans demanding their long-overdue back pay. It was a period of great discontentment with Congress, and the citizens of Pennsylvania were more likely to help the mob than to help suppress it. Indeed, when Congress called on the state officials to call out the militia, they refused.[26] To appreciate the desire to create a unique nonstate enclave, it is impor-

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Constitution reveal that "[o]ne principle was uppermost in the minds of many delegates: that, no matter where he lived, each voter should have a voice equal to that of every other in electing members of Congress." *Wesberry*, 376 U.S. at 10. Moreover, the Court has strongly indicated that there is no conceptual barrier to applying the *Wesberry* principles to an interstate rather than an intrastate controversy. Dep't of Commerce v. Montana, 503 U.S. 442, 461 (1992).

Awarding two representatives to each resident of Utah creates an obvious imbalance vis-à-vis other states. House members are expected to be advocates for this insular constituency. Here, residents of one state could look to two representatives to do their bidding whereas other citizens would be limited to one. The lifting of the 435-member limit on membership of the House, established in 1911, is also a dangerous departure for this Congress. Although membership was once increased to 437 on a temporary basis for the admission of Alaska and Hawaii, past members have respected this structural limitation. *See generally Ending Taxation Hearing*, *supra* note 12 (testimony of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School). After a casual increase, it will become much easier for future majorities to add members. Use of an at-large seat magnifies this problem by abandoning the principle of individual member districts of roughly equal constituencies. By using the at-large option, politicians can simply give a state a new vote without having to redistrict existing districts.

26 25 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 973 (Gov't Printing Office 1922) (1783).

tant to consider the dangers and lasting humiliation of that scene as it was recorded in the daily account from the debates:

> [On 21 June 1783,] [t]he mutinous soldiers presented themselves, drawn up in the street before the [s]tate [h]ouse, where Congress had assembled. [Pennsylvania authorities were] called on for the proper interposition. [State officials demurred and explained] the difficulty under actual circumstances, of bringing out the militia . . . for the suppression of the mutiny . . . . [It was] thought that without some outrages on persons or property, the temper of the militia could not be relied on . . . .
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> [T]he [s]oldiers remained in their position, without offering any violence, individuals only occasionally uttering offensive words and wantonly point[ing] their Muskets to the [w]indows of the [h]all of Congress. No danger from premeditated violence was apprehended, but it was observed that spirituous drink from the tippling houses adjoining began to be liberally served out to the Soldiers, [and] might lead to hasty excesses. None were committed however, and about [three o'clock], the usual hour [Congress] adjourned; the [s]oldiers, [though] in some instances offering a mock obstruction, permitt[ed] the members to pass through their ranks. They soon afterwards retired themselves to the [b]arracks.[27]

Congress was forced to flee, first to Princeton, N.J., then to Annapolis, and ultimately to New York City.[28]

When the Framers gathered again in Philadelphia in the summer of 1787 to draft a new constitution, the flight from that city five years before was still prominent in their minds.[29] Madison and others called for the creation of a federal enclave or district as the seat of the federal government, independent of any state and protected by federal authority.[30] Only then, Madison noted, could they avoid "public authority [being] insulted and its proceedings . . . interrupted, with impunity."[31] Madison believed that physical control of the Capital would

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27 *Id.*

28 Turley, *Right Goal, Wrong Means*, *supra* note 9, at B8.

29 *See, e.g.*, 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 433 [hereinafter ELLIOT DEBATES] (James Madison) (Jonathan Elliot ed., 2d ed. 1907).

30 *Id.*

31 THE FEDERALIST NO. 43, at 289 (James Madison) (Jacob E. Cooke ed., 1961).

allow direct control of proceedings or act like a Damocles Sword dangling over the heads of members of other states:

> How could the general government be guarded from the undue influence of particular states, or from insults, without such exclusive power? If it were at the pleasure of a particular state to control the sessions and deliberations of Congress, would they be secure from insults, or the influence of such a state?[32]

James Iredell raised the same point in the North Carolina ratification convention when he asked, "Do we not all remember that, in the year 1783, a band of soldiers went and insulted Congress?"[33] By creating a special area free of state control, "[i]t is to be hoped that such a disgraceful scene will never happen again; but that, for the future, the national government will be able to protect itself."[34]

In addition to the desire to be free from the transient support of an individual state, the Framers advanced a number of other reasons for creating this special enclave.[35] There was a fear that a state (and its representatives in Congress) would have too much influence over Congress, by creating "a dependence of the members of the general Government."[36] There was also a fear that symbolically the honor given to one state would create in "the national councils an imputation of awe or influence, equally dishonorable to the Government, and dissatisfactory to the other members of the confederacy."[37] There was also a view that the host state would benefit too much from "the gradual accumulation of public improvements at the stationary residence of the Government."[38] Finally, some Framers saw the capital

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32 3 ELLIOT DEBATES, *supra* note 29, at 433.

33 4 ELLIOT DEBATES, *supra* note 29, at 219–20, *reprinted in* 3 THE FOUNDERS' CONSITUTION 225 (Philip B. Kurland & Ralph Lerner eds., 1987) ("The sovereignty of the United States was treated with indignity. They applied for protection to the state they resided in, but could obtain none.").

34 *Id.*

35 The analysis by Dinh and Charnes places great emphasis on this security issue and then concludes that, "[d]enying the residents of the District the right to vote in elections for the House of Representatives was neither necessary nor intended by the Framers to achieve this purpose." Dinh & Charnes, *supra* note 13, at 7. This was not, however, the only purpose motivating the establishment of a federal enclave. The general intention was to create a nonstate under complete congressional authority as a federal enclave. *See generally Ending Taxation Hearing*, *supra* note 12 (testimony of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School). The Framers clearly understood and intended for the District to be represented derivatively by the entire Congress. *Id.*

36 THE FEDERALIST NO. 43, *supra* note 31, at 289.

37 *Id.*

38 *Id.*

city as promising the same difficulties that London sometimes posed for the English.[39] London then (and now) often took steps as a municipality that challenged the national government and policy.[40] This led to a continual level of tension between the national and local representatives.

The District was created, therefore, for the specific purpose of being a nonstate, a special enclave created and operated by Congress. Under the original design, the security and operations of the federal enclave would remain the collective responsibilities of the entire Congress, and so, of all the various states. The Framers, however, intentionally preserved the option to change the dimensions or even relocate the federal district.[41] Indeed, Charles Pinckney wanted the District Clause[42] to read that Congress could "fix and *permanently* establish the seat of the Government . . . ."[43] However, the Framers rejected the inclusion of the word "permanently" to allow for some flexibility.

What is most striking about this history is not just the clarity of the purpose in the creation of the District but the lack of any continuing need for such a "federal town." Since the Constitutional Conven-

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39 KENNETH R. BOWLING, THE CREATION OF WASHINGTON, D.C.: THE IDEA AND LOCATION OF THE AMERICAN CAPITAL 76 (George Mason Univ. Press 1991).

40 This included such famous confrontations as the impeachment of Sir Richard Gurney, lord mayor of London, in 1642, after he "thwarted Parliament's order to store arms and ammunition in storehouses." RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 71–73 (1973). Likewise, after John Wilkes was imprisoned by the King and tossed out of Parliament in the 1760s, he notably became Lord Mayor of London in 1774. David Johnson, *John Wilkes: The Scandalous Father of Civil Liberty*, HISTORY TODAY, Aug. 1, 2006, at 65 (book review).

The modern London mayors often assert the same independence from the Parliament and Prime Minister, with Ken Livingston as a typical example. *See* Marjorie Miller, *American Transit Expert Rides to the Rescue*, L.A. TIMES, Feb. 4, 2001, at 8 (discussing Mayor's successful campaign to stop ministry plans on mass transport); David White, *'Tube' Strike Highlights Transport Funding Troubles*, FIN. TIMES (London), Feb. 6, 2002, at 9 (same). "Red Ken" as he was called, became London's first elected mayor in 2000. Before that time, various governing units managed London, often in tension with the national government. This was the case with the Greater London Council, which Margaret Thatcher abolished in 1986 for continually harassing and mocking her government's policies. Kevin Cullen, *Veteran of Labor's Older War, Defying Blair, May Win London*, BOSTON GLOBE, Apr. 30, 2000, at 6.

41 U.S. CONST. art. I, § 2, cl. 17.

42 *Id.*

43 Peter Raven-Hansen, *The Constitutionality of D.C. Statehood*, 60 GEO. WASH. L. REV. 160, 168 (1991) (citing JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 420 (Gaillard Hund & James Brown Scott eds., 1920)).

tion, courts have recognized that federal, not state, jurisdiction governs federal lands. The Court stressed in *Hancock v. Train*:[44]

> Because of the fundamental importance of the principles shielding federal installations and activities from regulation by the States, an authorization of state regulation is found only when and to the extent there is "a clear congressional mandate," "specific congressional action" that makes this authorization of state regulation "clear and unambiguous."[45]

Although the state retains jurisdiction for some federal properties, this depends on the manner in which it was acquired or ceded.[46] Certainly, Congress has the ability through the Enclave Clause[47] to purchase such land and to establish exclusive jurisdiction.

Moreover, the federal government now has a large security force and is not dependent on the states. Finally, the position of the federal government vis-à-vis the states has flipped, with the federal government now the dominant party in this relationship. Thus, even though federal buildings or courthouses are located in the various states, they remain legally and practically separate from state jurisdiction, although enforcement of state criminal laws does occur in such buildings. Just as the United Nations has a special status in New York City and does not bend to the pressure of its host country or city, the federal government does not need a special federal enclave to exercise its independence from individual state governments.

The original motivating purposes behind the creation of the federal enclave, therefore, are no longer compelling. Madison wanted a nonstate location for the seat of government because "[i]f any state had the power of legislation over the place where Congress should fix the general government, this would impair the dignity, and hazard the safety, of Congress."[48] Today, there is no cognizable "hazard [to] safety," but there certainly remains the symbolic question of the impairment to the dignity of the several states by locating the seat of government in a specific state. As noted below,[49] I believe that the

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44 Hancock v. Train, 426 U.S. 167 (1976).

45 *Id.* at 179 (citations omitted); *see also* Paul v. United States, 371 U.S. 245, 263 (1963); Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110, 122 (1954); California *ex rel.* State Water Res. Control Bd. v. EPA, 511 F.2d 963, 968 (9th Cir. 1975), *rev'd on other grounds*, EPA v. California, 426 U.S. 200 (1976).

46 *See* Kleppe v. New Mexico, 426 U.S. 529, 543 (1976) ("Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory[.]").

47 U.S. CONST. art. I, § 8, cl. 17.

48 3 ELLIOT DEBATES, *supra* note 29, at 89 (James Madison).

49 *See infra* Part VII.

seat of the federal government should remain completely federal territory as an important symbol of the equality of all states in the governance of the nation. The actual seat of government, however, is a tiny fraction of the current federal district.

Putting aside the questionable need for a "federal town," the creation of this federal enclave was a matter of contemporary debate at the time, and from the first suggestion of a federal district to the retrocession of the Virginia territory, the only options for representation for District residents were viewed as limited to either a constitutional amendment or retrocession of the District itself.[50] Those remain the only two clear options today, though retrocession itself can take many different forms in its actual execution, as discussed below.[51]

II. The Several States: A Textual and Contextual Analysis of Article I

The current debate not only raises the meaning of various textual and historical sources, but more fundamentally, the weight to be given textual, historical, and policy considerations in the interpretation of the Constitution. Certainly, before turning to the text of Article I, it is important to acknowledge that plain meaning arguments have their inherent limitations. Some scholars and jurists have criticized the more simplistic uses of plain meaning when, as Judge Frank Easterbrook has noted, "[t]o invoke a plain meaning rule is to beg the central question of meaning, to sweep under the rug, to hide, the means by which meaning is established."[52] Indeed, it is impossible to state that a word has a plain meaning without considering its context and purpose within a constitution or statute.[53] Yet, though strict textualist interpretative schools have long been a subject of controversy, it is generally accepted that any interpretation must begin with the text and, when clear, the text should control in conflicts.

As shown below, the composition of Congress was one of the structural provisions to be fixed within our system, to be protected

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50 Efforts to secure voting rights in the courts have failed. *See* Adams v. Clinton, 90 F. Supp. 2d 35, 50, 55–56 (D.D.C. 2000).

51 *See infra* Part III.

52 Frank H. Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL'Y 87, 91 (1984).

53 *See* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 67 (1994) ("'Plain meaning' as a way to understand language is silly. In interesting cases, meaning is not 'plain'; it must be imputed; and the choice among meanings must have a footing more solid that [sic] a dictionary . . . .").

from opportunistic manipulation or creative realignment.[54] There are fundamental terms that serve as building blocks or structural elements to the Constitution. The word "states" is one such term. Both textually and contextually, the Framers used this term with a literal meaning and purpose.

The debate over the meaning of Article I recalls the admonishment of the Supreme Court that in constitutional interpretation "every word must have its due force, and appropriate meaning; . . . no word was unnecessarily used, or needlessly added."[55] More importantly, there is a tendency to ignore the plain meaning of text when it presents inconvenient barriers to contemporary goals. In his famous commentaries on the Constitution, Justice Story warned against the use of interpretation to avoid unpopular limitations in our constitutional system:

> [T]he Constitution of the United States is to receive a reasonable interpretation of its language and its powers, keeping in view the objects and purposes for which those powers were conferred. By a reasonable interpretation we mean, that, in case the words are susceptible of two different senses, the one strict, the other more enlarged, that should be adopted which is most consonant with the apparent objects and intent of the Constitution . . . .
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> . . . .
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> . . . On the other hand, a rule of equal importance is not to enlarge the construction of a given power beyond the fair scope of its terms merely because the restriction is inconvenient, impolitic, or even mischievous. If it be mischievous,

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[54] Stephen Carter made an analogous point in discussing structural provisions in the checks and balances of the Constitution:

> The specificity of these clauses is completely sensible if the authors were attempting to implement a particular conception of the way the government should work. Thus while we assume with respect to the entire Constitution that the Framers meant what they said, we may also assume that with respect to the Constitution's structural provisions they took care to say what they meant. The entire Constitution means something; the more determinate clauses mean something specific. After all, these structural provisions were meant to constitute a government comprising institutions that would interact, and it is difficult to design institutional interaction without a concrete image of what the institutions are. Because the structural provisions are relatively clear, moreover, important substantive biases held by the interpreters—the judges—cannot easily creep in and corrupt the process of adjudication.

Stephen L. Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 YALE L.J. 821, 854 (1985).

[55] Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 570–71 (1840).

> the power of redressing the evil lies with the people by an exercise of the power of amendment.[56]

Justice Story's concern about the distortive effect of contemporary politics on constitutional interpretation is vividly evident in the debate over a District vote.

A. The Text of the Composition and District Clauses

1. The Composition Clause

Any constitutional analysis necessarily begins with the text of two primary provisions, though others (as will be shown)[57] are illustrative of their meaning. Article I, Section 2 is the most obvious and controlling provision on this question, not the District Clause. The Framers defined the voting membership of the House in that provision as composed of representatives of the "several States."[58] Conversely, the District Clause was designed to define the power of Congress *within* the federal enclave.

On its face, the language of Article I, Section 2 would appear a model of clarity:

> The House of Representatives shall be composed of Members chosen every second Year by the *People of the several States*, and the Electors in *each State* shall have the Qualifications requisite for Electors of the most numerous Branch of the *State Legislature*.[59]

As with the Seventeenth Amendment determination of the composition of the Senate,[60] the text clearly limits the membership of the House to representatives of the several states.

The reference to "states" is repeated in the section when the Framers specified that each representative must "when elected, be an Inhabitant of that State in which he shall be chosen."[61] Notably, the reference to "the most numerous Branch of the State Legislature" clearly distinguishes the state entity from the District.[62] The District

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56 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 419, at 310, § 426, at 314 (4th ed. 1873).

57 *See* Part II.B.

58 U.S. CONST. art. 1, § 2, cl. 1.

59 *Id.* (emphasis added).

60 Though not directly relevant to S. 1257, the Seventeenth Amendment contains similar language mandating that the Senate shall be composed of two Senators of each state "elected by the people thereof." *Id.* amend. XVII.

61 *Id.* art. 1, § 2, cl. 2.

62 *Id.*

had no independent government at the time and currently has only a city council.

In Article I, the drafters refer repeatedly to states or several states, as well as state legislatures, in defining the membership of the House of Representatives. As the Supreme Court has noted, "[a] state, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed."[63] Notably, no one has seriously argued that the Framers had any other meaning in mind when they used the term "several States" beyond the conventional meaning of a state under Article I, Section 2, Clause 1.[64]

Beyond the textual reference to states, the reference to members in the Composition Clause has been cited as a clear distinction in the minds of the Framers between voting and nonvoting representatives. Professors John O. McGinnis and Michael B. Rappaport address this very point and note that the word "members" was meant to protect the essential structural role by guaranteeing that representatives of the states, and only the states, would vote in Congress:

> If the House could deprive Representatives from certain states of the right to vote on bills or *could assign that right to non-members of its choosing*, a majority of the House could circumvent the carefully crafted structure established by the Framers to govern national legislation. This structure maintained important compromises that were essential to the Constitution's creation, such as the equilibrium between large and small states. The structure also protected minorities by making it more difficult for unjust legislation to pass. It is inconceivable that the Framers would have permitted a majority of the House to subvert this arrangement.[65]

2. *The District Clause*

The second provision at issue is the District Clause found in Article I, Section 8, which gives Congress the power:

> To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may,

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63 Texas v. White, 74 U.S. (7 Wall.) 700, 721 (1868).

64 *See* Dinh & Charnes, *supra* note 13, at 9. *But see* Peter Raven-Hansen, *supra* note 43, at 168.

65 John O. McGinnis & Michael B. Rappaport, *The Rights of Legislators and the Wrongs of Interpretation: A Further Defense of the Constitutionality of Legislative Supermajority Rules*, 47 DUKE L.J. 327, 333 (1997) (emphasis added).

> 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 Buildings . . . .[66]

Notably, the use of "in all Cases whatsoever" emphasizes the administrative and operational character of the power given to Congress. As the Supreme Court noted, Congress exercises this power "in all cases where legislation is possible."[67] This Clause confers on Congress a power to dictate the internal conditions and operations of the federal enclave. On its face, this language is not a rival authority to the Composition Clause or the structural provisions for Congress articulated in the Constitution. Indeed, it is a power that remains "controlled by the provisions of the Constitution."[68] This includes those provisions that structure the legislative branch.

Missing from the references to the federal enclave is any language suggesting any representation other than the representation afforded by Congress as a whole. Indeed, the federal enclave is referred to as "the Seat of Government" and grouped with other forms of federal enclaves and territories, allowing Congress "to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings . . . ."[69] The text conveys a single obvious meaning: the Framers created various types of enclaves that would not be part of a state or subject to the provisions referencing states under the new constitutional system. These are nonstate entities set apart from the structural provisions concerning state entities such as the Composition and Qualification Clauses.

B. The Context of the Composition and District Clauses

In some cases, the language of a constitutional provision can change when considered in a broad context, particularly with similar language in other provisions. The Supreme Court has emphasized in matters of statutory construction (and presumably in constitutional in-

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66 U.S. CONST. art. I, § 8, cl. 17.

67 O'Donoghue v. United States, 289 U.S. 516, 539 (1933) (citation omitted).

68 Binns v. United States, 194 U.S. 486, 491 (1904).

69 U.S. CONST. art. I, § 8, cl. 17.

terpretation) that courts should "assume[ ] that identical words used in different parts of the same act are intended to have the same meaning."[70] This does not mean that there cannot be exceptions,[71] but such exceptions must be based on circumstances where the consistent interpretation would lead to conflicting or clearly unintentional results.[72]

An interpretation of the Composition Clause turns on the meaning of "states." A review of the Constitution shows that this term is ubiquitous. Within Article I, the word "states" is central to defining the Article's articulation of various powers and responsibilities. Indeed, if "several States" under the Composition Clause was intended to have a more fluid meaning to extend to nonstates like the District, various provisions become unintelligible.[73] For both the composition of the House and Senate, the defining unit was that of a state with a distinct government, including a legislative branch. For example, before the Seventeenth Amendment in 1913, Article I read: "The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof . . . ."[74] For much of its history, the District did not have an independent government, let alone a true state legislative branch.

There is also the Qualification Clause, under which members must have "the Qualifications requisite for Electors of the most numerous Branch of the State Legislature," as well as other criteria of residence, age, and other characteristics.[75] Obviously, the District has no state legislature and was never intended to have such a state-like structure. Moreover, as noted below, if Congress can manipulate the meaning of the qualifications, it can change not just the voting members of Congress, but also their basic qualifications to serve in that capacity.

The drafters also referred to the "Executive Authority" of states in issuing writs for special elections to fill vacancies in Article I, Section 2. Like the absence of a legislative branch, the District did not

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70 Sorenson v. Sec'y of the Treasury, 475 U.S. 851, 860 (1986) (internal quotations and citation omitted).

71 *See, e.g.*, District of Columbia v. Carter, 409 U.S. 418, 419 20 (1973) ("Whether the District of Columbia constitutes a 'State or Territory' within the meaning of any particular statutory or constitutional provision depends upon the character and aim of the specific provision involved.").

72 *See, e.g.*, Milton S. Kronheim & Co. v. District of Columbia, 91 F.3d 193, 198–99 (D.C. Cir. 1996) (holding that the Commerce Clause and the Twenty-First Amendment apply to the District even though "D.C. is not a state").

73 *See supra* notes 71–72 and accompanying text; *infra* notes 74–81 and accompanying text.

74 U.S. CONST. art. I, § 3, cl. 1 (amended 1913).

75 *Id.* § 2, cl. 1.

have a true executive authority and would not have been able to fulfill such a structural condition.[76]

Article I also requires that "[n]o Person shall be a Representative who shall not . . . be an Inhabitant of that State in which he shall be chosen."[77] The drafters could have allowed for inhabitants of federal territories or the proposed federal district. Instead, they chose to confine the qualification for service in the House to being a resident of an actual state.

In the conduct of elections under Article I, Section 4, the drafters again mandated that "each State" would establish "[t]he Times, Places, and Manner."[78] This provision specifically juxtaposes the authority of such states with the authority of Congress. The provision makes little sense if a state is defined as including entities created and controlled by Congress.

Article I also ties the term "several States" to the actual states making up the United States. The drafters, for example, mandated that "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . . ."[79] The District was neither subject to taxes at the beginning of its existence nor represented as a member of the union of states.

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[76] Indeed, the recent changes to the structure of the D.C. government would have likely been viewed as creating a de facto state-like system in conflict with the original model. The D.C. government now has a mayor and considerable independence from Congress. It has gradually grafted on the elements of a state government, including such important symbolic changes as the renaming of the former office of "corporate counsel" to be the "Office of Attorney General for the District of Columbia," a name that tracts the title for states rather than cities. This change was expressly linked to the claim of state status with the new Attorney General explaining:

> This name change comes at an important time in the District's history. In an era when the District struggles for voting rights and is compelled to bring a lawsuit for the right to tax nonresidents, a simple name change for the Office of the Corporation Counsel sends a strong message to our citizens that we are, indeed, a state in practice, if not in fact.

Press Release, District of Columbia Office of the Attorney General, Mayor Renames OCC to Office of the Attorney General for DC (May 26, 2004), *available at* http://occ.dc.gov/occ/ewp/view,a,11,q,614505,occNav_GID,1521.asp. Likewise, despite failing to pass the District voting legislation, Delegate Norton did succeed in getting the 110th Congress to pass another symbol of statehood: allowing the District to have its own quarter minted like the fifty states. Andrea Seabrook, *D.C. Scores Own Quarter* (NPR radio broadcast Dec. 23, 2007), *available at* http://www.npr.org/templates/story/story.php?storyId=17563859. Congress further agreed to the creation of a state-like stamp. *Id.* (interviewing Del. Eleanor Holmes Norton, D-D.C., who predicted that 2008 will see the vote follow the approval of a state-like stamp and quarter).

[77] U.S. CONST. art. I, § 2, cl. 2.

[78] *Id.* § 4, cl. 1.

[79] *Id.* § 2, cl. 3 (amended 1968).

Article I, Section 2, Clause 3 specifies that "each State shall have at Least one Representative."[80] Article I, Section 3 allots two Senators to "each State." If the Framers believed that the District was a quasi-state under some fluid definition, there would have been some provision or even discussion of a District representative and two Senators from the start. At a minimum, the Composition Clause would have referenced the potential for nonstate members, particularly given the large territories, such as Ohio, which were yet to achieve state status. Yet there is no reference to the District in any of these provisions. It is relegated to the District Clause, which puts it under the authority of Congress.

The reference to "states" obviously extends beyond Article I. Article II specified that "[t]he Electors [of the President] shall meet in their respective States" and later be "transmit[ted] . . . to the Seat of the Government of the United States," that is, the District of Columbia.[81] When Congress wanted to give the District a vote in the process, it passed the Twenty-Third Amendment. That Amendment expressly distinguishes the District from the meaning of a state by specifying that District electors "shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State . . . ."[82]

Notably, just as Article I refers to apportionment of representatives "among the several States,"[83] the later Fourteenth Amendment adopted the same language in specifying that "Representatives shall be apportioned among the several States according to their respective numbers . . . ."[84] Thus, it is not true that the reference to states may have been due to some unawareness of the District's existence. The Fourteenth Amendment continued the same language in 1868 after the District was a major American city. Again, the drafters used "state" as the operative term, as with Article I, to determine the apportionment of representatives in Congress. The District was never subject to such apportionment and, even under this bill, would not be subject to the traditional apportionment determinations for other districts.

Likewise, when the Framers specified how to select a President when the Electoral College is inconclusive, they used the word

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[80] *Id.*

[81] *Id.* art. II, § 1, cl. 3 (amended 1804).

[82] *Id.* amend. XXIII, § 1, cl. 2.

[83] *Id.* art. I, § 2, cl. 3 (amended 1968).

[84] *Id.* amend. XIV, § 2.

"states" to designate actual state entities. Pursuant to Article II, Section 1, "the Votes shall be taken by States, the Representation from each State having one Vote . . . ."[85]

Conversely, when the drafters wanted to refer to citizens without reference to their states, they used the fairly consistent language of "citizens of the United States" or "the people." This was demonstrated most vividly in provisions such as the Tenth Amendment, which declares that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[86] Not only did the drafters refer to the two common constitutional categories for rights and powers (in addition to the federal government), but it cannot be plausibly argued that a federal enclave could be read into the meaning of states in such provisions.

The District Clause itself magnifies the distinction of the District from actual states. It is referred to as the "Seat of Government" and subject to the same authority that Congress would exercise "over all Places purchased by the Consent of the Legislature of the State . . . ."[87] Under this language, the District as a whole was delegated to the United States. As the D.C. Circuit stressed recently in *Parker*, "the authors of the Bill of Rights were perfectly capable of distinguishing between 'the people,' on the one hand, and 'the states,' on the other."[88] Likewise, when the drafters of the Constitution wanted to refer to the District, they did so clearly in the text. This was evident not only with the original Constitution and the Bill of Rights, but also with the much later amendments. For example, the Twenty-Third Amendment, which gives the District the right to have presidential electors, expressly distinguishes the District from the states and establishes, for that purpose, that the District should be treated like a state, mandating "[a] number of electors of President and Vice President equal to the whole number of Senators and Representatives in Con-

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85 *Id.* art. II, § 1, cl. 3 (amended 1804).

86 *Id.* amend. X. *See generally* Lee v. Flintkote Co., 593 F.2d 1275, 1278 n.14 (D.C. Cir. 1979) ("[T]he District, unlike the states, has no reserved power to be guaranteed by the Tenth Amendment."). The same can be said of the Eleventh Amendment. *See* LaShawn v. Barry, 87 F.3d 1389, 1393–94 n.4 (D.C. Cir. 1996) ("The District of Columbia is not a state. . . . Thus, [the Eleventh Amendment] has no application here.").

87 U.S. CONST. art. I, § 8.

88 Parker v. District of Columbia, 478 F.3d 370, 382 (D.C. Cir. 2007). The Supreme Court has accepted the *Parker* case for review in 2008, a decision that could potentially reexamine the status of the District as well as clarify the meaning of the Second Amendment itself. *See generally* Jonathan Turley, *A Liberal's Lament: The NRA Might Be Right After All*, USA TODAY, Oct. 4, 2007, at 11A.

gress to which the District would be entitled *if it were a State* . . . ."[89] This Amendment makes little sense if Congress could simply bestow the voting rights of states on the District. Rather, it reaffirmed that, if the District wishes to vote constitutionally as a state, an amendment formally extending such parity is required.[90]

These references illustrate that the drafters knew the difference between the nouns "state," "territory," and "the District" and used them consistently. If one simply takes the plain meaning of these terms, the various provisions produce a consistent and logical meaning. It is only if one inserts ambiguity into these core terms that the provisions produce conflict and incoherence.

When one looks to the District Clause, the context belies any suggested reservation of authority to convert the District into a voting member of either house. Instead of being placed in the structural Section with the Composition Clause, the District Clause was relegated to the same Section as other areas purchased or acquired by the federal government. Under this Clause, Congress is expressly allowed "to exercise like Authority [as over the District] over all Places purchased . . . for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings . . . ."[91] If this Clause gives Congress the ability to make the federal district into a voting member, then presumably Congress could exercise "like Authority" and give the Department of Defense ten votes in Congress.

The context of the District Clause strongly suggests that it is a provision crafted for administrative purposes, as opposed to the structural provisions of Section 2. Indeed, the argument of unlimited powers under the District Clause parallels a similar argument under the Election Clause.[92] Some argue that the Framers gave states[93] or Con-

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89 U.S. CONST. amend. XXIII, § 1 (amended 1961) (emphasis added).

90 Even collateral provisions such as the prohibition on federal offices and emoluments in Article I, Section 6, make little sense if the drafters believed that the District could ever be treated like a state. For much of its history, the District was treated either like a territory or a federal agency. Lyndon Johnson appointed Mayor Walter Washington to his post by executive power over federal agencies. Officials held their offices and received their salaries by either legislative or executive action. Because the District was a creation and extension of the federal government, its officials held federal or quasi-federal offices. In the 1970s, Home Rule, *see infra* note 232, created more recognizable offices of a city government, though still ultimately under the control of Congress.

91 U.S. CONST. art. I, § 8.

92 U.S. CONST. art. I, § 4, cl. 1.

93 U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 832–33 (1995) ("The Framers intended the Elections Clause to grant States authority to create procedural regulations, not to provide States with license to exclude classes of candidates from federal office.").

gress the authority to manipulate the qualifications for members. In the latter case, the Clause provides that "Congress may at any time by Law make or alter such Regulations" that related to the "Times, Places and Manner of holding [federal] Elections."[94] Section 4 of Article I, however, was viewed by the Court as a purely procedural provision despite the absence of limiting language. As the Ninth Circuit noted in *Schaefer v. Townsend*,[95] the Supreme Court has rejected "a broad reading of the Elections Clause and held the balancing test inapplicable where the challenged provision supplemented the Qualifications Clause."[96] It is the Composition Clause and, as noted below, the Qualifications Clauses, that determine the prerequisites for congressional office.

The effort to focus on the District Clause rather than the Composition Clause is unlikely to succeed in court. The context of this language reinforces the plain meaning of the text itself. The District Clause concerns the authority of Congress over the internal affairs of the seat of government. To elevate that Clause to the same level as the Composition Clause would do great violence to the traditions of constitutional interpretation.

III. The Original Understanding of the Composition, Qualifications and District Clauses

The meaning of the Composition and District Clauses is not only consistent on both a textual and contextual basis, it is greatly reinforced by a review of the early understanding of these Clauses. History from the late eighteenth and early nineteenth centuries clearly refutes the repeated suggestion by supporters of the current legislation that the Framers did not and could not have intended to leave the District in an unrepresented status. No one has suggested that the District Clause was a focus of the debates leading to ratification or in the early Congresses. The record of these debates is incomplete, particularly in the state ratification conventions. Moreover, references to the District are sprinkled throughout the debates, tantalizing suggestions of discussion outside of the recorded sessions, but not the subject of extended debate. The assertion, however, that the meaning of the District Clause was either not clearly understood or considered at the time is clearly and irrefutably untrue. There are various references to

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94 U.S. CONST. art. I, § 4, cl. 1.

95 Schaefer v. Townsend, 215 F.3d 1031 (9th Cir. 2000).

96 *Id.* at 1038.

the Clause, and these references discussed below[97] demonstrate that the obvious meaning of the Clause was appreciated at the time. Indeed, the disenfranchisement of residents was not only obvious but equally controversial with some leaders at the time.[98]

It is also important to emphasize that the relevant historical discussions are not confined to the District Clause. While many advocates have insisted that the plain meaning of terms can change in a broader context, they notably avoid consideration of the text and history behind two clearly relevant Clauses: the Composition and Qualifications Clauses. These Clauses form a well-documented record of the intentions of the Framers as to the make-up of Congress and its inherent authority to change the composition of its own membership.

A. The Original Understanding of the Composition Clause

The intent behind the Composition Clause was clear throughout the debates. It was considered a vital structural provision. The Framers were obsessed with the power of the states and the structure of Congress. Few matters concerned the Framers more than who could vote in Congress and how they were elected. Indeed, some delegates wanted the House to be elected by the state legislatures, as was the Senate.[99] This proposal was not adopted, but the clear import of the debate was that representatives would be elected from the actual states. The very requirement of qualifications being set by "state legislature[s]" was meant to reaffirm that the composition of Congress would be controlled by states.

The Framers reinforced this view at the time. A fundamental guarantee offered to dissenters was that the composition of both houses would be controlled by the states. The Composition Clause was vital to securing the votes of reluctant members, particularly Anti-Federalists. Madison emphasized this point in *Federalist No. 45* when he pointed out that "each of the principal branches of the federal Government will owe its existence more or less to the favor of the State Governments, and must consequently feel a dependence . . . ."[100]

In his first comments after the Constitutional Convention, James Wilson emphasized the Composition Clause and the requirement that

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97 *See infra* Part III.A–C.

98 *See infra* Part III.C.

99 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 359 (Max Farrand ed., rev. ed. 1966).

100 THE FEDERALIST NO. 45, at 311 (James Madison) (Jacob E. Cooke ed., 1961).

members be elected by actual states.[101] In an October 6, 1787 speech, Wilson responded to Anti-Federalists who feared the power of the new Congress—a speech described at the time as "the first authoritative explanation of the principles of the NEW FEDERAL CONSTITUTION."[102] Wilson stressed that Congress would be tethered closely to the states and that only states could elect members:

> [U]pon what pretence can it be alleged that it was designed to annihilate the state governments? For, I will undertake to prove that upon their existence, depends the existence of the fœderal plan. For this purpose, permit me to call your attention to the manner in which the president, senate, and house of representatives, are proposed to be appointed. . . . The senate is to be composed of two senators from each state, chosen by the legislature; and therefore if there is no legislature, there can be no senate. The house of representatives, is to be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature,—*unless therefore, there is a state legislature, that qualification cannot be ascertained*, and the popular branch of the fœderal constitution must likewise be extinct. From this view, then it is evidently absurd to suppose, that the annihilation of the separate governments will result from their union; or, that having that intention, the authors of the new system would have bound their connection with such indissoluble ties.[103]

Wilson's comments, in what was billed at the time as the first public defense of the draft Constitution by a Framer, illustrate how important the Composition Clause of Article I, Section 2, was to the structure of government.[104] It was the very cornerstone for the new federal system. It is safe to say that the suggestion that the District could achieve a status equal to states in Congress would have been viewed as absurd, particularly because there could be no state legislature for the federal city. Wilson and others made clear that voting rights in Congress would be reserved for the representatives of the actual states.

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101 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 337, 342 (John P. Kaminski & Gaspare J. Saladino eds., 1981).

102 *Id.*

103 *Id.* (emphasis added).

104 *Id.*

This view was reaffirmed in the Third Congress in 1794, only a few years after ratification. The issue of the meaning of Article I, Section 2, was raised when a representative of the territory of Ohio sought admission as a nonvoting member to the House. Connecticut Representative Zephaniah Swift objected to the admission of anyone who is not a representative of a state: "The Constitution has made no provision for such a member as this person is intended to be. If we can admit a Delegate to Congress or a member of the House of Representatives, we may with equal propriety admit a stranger from any quarter of the world."[105]

Although nonvoting members would be allowed, the legislators on both sides agreed that the Constitution restricted voting members to representatives of actual states. This debate, occurring only a few years after the ratification, and with both drafters and ratifiers serving in Congress, reinforces the clear understanding of the meaning and purpose of the language.

While academic advocates of the District legislation struggle to claim an absence of a clear answer under the District Clause, they avoid the obvious thrust of the debates over the Composition Clause. The Constitutional Convention and various structural provisions of the Constitution establish not only how important the Composition Clause was to the drafters, but "makes clear just how deeply Congressional representation is tied to the structure of statehood."[106] It would be ridiculous to suggest that the delegates to the Constitutional Convention or ratification conventions would have worked out such specific and exacting rules for the composition of Congress, only to give the majority of Congress the right to create a new form of voting members from federal enclaves like the District. It would have constituted the realization of the worst fears for many delegates, particularly Anti-Federalists, to have an open-ended ability of the majority to manipulate the rolls of Congress and to use areas under the exclusive control of the federal government as the source for new voting members.

B. The Original Understanding of the Qualifications Clauses

Equally probative is the intent behind the Qualifications Clauses of Article I, Section 2. If Congress changes the meaning of the Composition Clause, it could also change the meaning of the Qualifications

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105 4 ANNALS OF CONG. 884 (1794). This debate is detailed in David P. Currie, *The Constitution in Congress: The Third Congress, 1793–1795*, 63 U. CHI. L. REV. 1, 42 (1996).

106 Adams v. Clinton, 90 F. Supp. 2d 35, 46–47 (D.D.C. 2000).

Clauses, which refers to the fixed criteria for eligibility for the House of Representatives, including the condition of being a resident of a state.

It is not simply the reference to a state that makes the Qualifications Clauses material to this debate. The Framers wrote this provision in the aftermath of the controversy over John Wilkes in the 1760s.[107] Wilkes had publicly attacked the peace treaty with France in 1763 and, in doing so, earned the ire of the Crown and Parliament. After he was convicted and jailed for sedition several years later, the Parliament moved to declare him ineligible for service in the legislature. He served anyway, and eventually the Parliament rescinded the legislative effort to disqualify him. Parliament accepted that such manipulation of qualifications for entry or service violated core democratic principles.

The Wilkes controversy was referenced in the Constitutional Convention, as members called for a rigid and fixed meaning as to the qualifications for Congress. Unless Congress was prevented from manipulating its membership, history would repeat itself. James Madison noted "[t]he abuse [the British Parliament] had made of it was a lesson worthy of our attention."[108] Madison warned that if Congress could engage in such manipulation it would "subvert the Constitution."[109]

This debate was largely triggered by proposals to allow congressional authority to add qualifications or to expressly require property prerequisites to membership. These efforts failed, however, due to a more general opposition to allowing Congress to change its membership. In a quote later cited by the Supreme Court, Alexander Hamilton noted that "[t]he qualifications of the persons who may choose or be chosen, as has been remarked upon another occasion, are *defined and fixed* in the constitution; and are *unalterable* by the legislature."[110]

The Supreme Court has emphasized this history in repeatedly holding that it was the intent of the Framers to prevent legislators from altering their own qualifications to manipulate the membership of Congress. Noting the Wilkes affair, the Court observed that the Clause was written in the aftermath of "English precedent [which] stood for the proposition that 'the law of the land had regulated the

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107 *See* Powell v. McCormack, 395 U.S. 486, 533–35 (1969).

108 *Id.* at 535 (quotation omitted).

109 *Id.* at 534.

110 THE FEDERALIST No. 60, at 409 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (emphasis added).

qualifications of members to serve in parliament' and those qualifications were 'not occasional but fixed.'"[111]

This debate has striking similarity to the current controversy. Today, sponsors are claiming that they can use their inherent authority to create new forms of members in federal enclaves. In the debate over term limits, the Court faced a claim of reserved and undefined authority under the Tenth Amendment.[112] States claimed that the Tenth Amendment leaves them with all reserved powers and thus, unless prohibited, states are entitled to exercise the authority.[113] This is analogous to the District Clause argument that, unless expressly prohibited, Congress has absolute authority under the Clause, even to create new members. The Court, however, rejected the argument and noted that this power was never part of the original powers of the states and that "the Framers intended the Constitution to be the exclusive source of qualifications for Members of Congress."[114] The same can be said of the District Clause. The power to unilaterally manipulate the rolls of membership in Congress was never an inherent power of Congress, and the composition of the voting members of Congress was exclusively defined under Section 2 of Article I.[115] Indeed, as the Court noted in *U.S. Term Limits v. Thorton*,[116] the Framers feared that if the membership of Congress could be manipulated, Congress could become "a self-perpetuating body to the detriment of the new Republic."[117]

The Qualification Clauses, and debate, magnify the significance of this section to the design of our constitutional system. Although this debate concerned the ability of states rather than Congress to manipulate the rolls of members, the principle remains the same. Indeed, the Framers were so concerned about efforts in Congress to use majority voting to manipulate membership that they required a supermajority to expel a member.[118] Just as there is no inherent right

111 *Powell*, 395 U.S. at 528 (quoting 16 PARL. HIST. ENG. 589, 590 (1769)).

112 U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 798 (1995).

113 *Id.*

114 *Id.* at 800–01.

115 *Id.* at 801.

116 U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995).

117 *Id.* at 793 n.10.

118 U.S. CONST. art. I, § 5, cl. 2. Madison viewed expulsion as a potential abuse tool of factional interests, the scourge of democratic systems. *See* RECORDS, *supra* 99, at 254 (referencing how "the right of expulsion . . . in emergencies of faction might be dangerously abused"); *see also* Powell v. McCormack, 395 U.S. 486, 536 (1969) (noting "the Convention's decision to increase the vote required to expel, because that power was too important to be exercised by a bare majority") (citations omitted).

to exclude members or tweak qualifications, there is no right to create new forms of members. The Framers clearly viewed such efforts at manipulation of the composition of Congress as destabilizing for the entire system. Indeed, the very stability of the legislative branch depends upon preventing Congress from unilaterally shrinking or expanding its membership by tweaking the Qualifications Clauses.

C. *The Original Understanding of the District Clause*

As opposed to either the Composition or Qualifications Clauses, the District Clause was not part of the debate or the provisions relating the structure of the government itself. It was contained with a list of enumerated powers of Congress in Article I, Section 8 that cover everything from creating post offices to inferior courts.[119] It was notably placed in the same Clause as the power of the Congress over "the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings."[120] Nevertheless, the creation of a seat of government was an issue of interest and concern before ratification.

As noted above, the status of the federal district was also clearly understood as a nonstate entity.[121] The Supreme Court has observed that "[t]he object of the grant of exclusive legislation over the district was . . . national in the highest sense, and the city organized under the grant became the city, not of a state, not of a district, but of a nation."[122] Although Madison conceded that some form of "municipal Legislature for local purposes" might be allowed, the district was to be the creation of Congress and maintained at its discretion.[123] Indeed, Madison dismissed the notion that this federal enclave could ever pose a threat to states given its unique status:

> The exclusive jurisdiction over the ten miles square is itself an anomaly in our representative system. And its object being manifest, and attested by the views taken of it at its date, there seems a *peculiar impropriety in making it the fulcrum for a lever stretching into the most distant parts of the Union*, and overruling the municipal policy of the States. The remark is still more striking when applied to the smaller places

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119 U.S. CONST. art. 1, § 8.

120 *Id.* § 8, cl. 17.

121 *See supra* notes 31–35 and accompanying text.

122 O'Donoghue v. United States, 289 U.S. 516, 539–40 (1933).

123 THE FEDERALIST NO. 43, *supra* note 31, at 289 (James Madison).

> over which an exclusive jurisdiction was suggested by a regard to the defence and the property of the nation.[124]

While not a matter of daily debate, the political status of the District residents was a controversy then as it is now. The Federal Farmer captured this concern in his January 1788 letter, where he criticized the fact that there was not "a single stipulation in the constitution, that the inhabitants of this city, and these places, shall be governed by laws founded on principles of freedom."[125] The various references to the District's status and function offer a consistent understanding of the plain meaning of the District Clause. The absence of a vote in Congress was clearly understood as a prominent characteristic of a federal district. Moreover, being a resident of the new capital city was viewed as compensation for this limitation. The fact that members would work, and generally reside, in the District gave the city sufficient attention in Congress.[126] Maryland Representative John Dennis noted that "though they might not be represented in the national body, their voice would be heard."[127] Indeed, it was the source of considerable competition and jealousy among the states.[128] In the Virginia Ratification Convention, Patrick Henry observed with unease how they have been "told that numerous advantages will result, from the concentration of the wealth and grandeur of the United States in one happy spot, to those who will reside in or near it. Prospects of profits and emoluments have a powerful influence on the human mind."[129]

Because residence would be voluntary within the federal district, most viewed the representative status as a quid pro quo for the obvious economic and symbolic benefit. Indeed, despite the fact that the citizens of the capital city would be disenfranchised, many cities from

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124 Letter from James Madison to Judge Spencer Roane (May 6, 1821), *in* 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 217, 220 (1867) (emphasis added).

125 Letter from the Federal Farmer to the Republican, XVIII (Jan. 25, 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 339, 346 (Herbert J. Storing ed., 1981); *see also* THE FOUNDERS' CONSTITUTION, *supra* note 33, at 220.

126 This point has been made by modern courts in rejecting the claim that residents lack influence over Congress in seeking benefits or protections. United States v. Cohen, 733 F.2d 128, 135 (D.C. Cir. 1984) ("It is, in any event, fanciful to consider as 'politically powerless' a city whose residents include a high proportion of the officers of all three branches of the federal government, and their staffs.").

127 10 ANNALS OF CONG. 998 (1801) (remarks of Rep. John Dennis).

128 Notably, during the Virginia Ratification Convention, when Grayson describes the District as "detrimental and injurious to the community, and . . . repugnant to the equal rights of mankind," he is not referring to the lack of voting rights but the anticipated power that District residents would wield over the rest of the nation due to "such exclusive emoluments." 3 ELLIOT DEBATES, *supra* note 29, at 291 (William Grayson).

129 *Id.* at 158.

Baltimore to Philadelphia to Elizabethtown vied for the opportunity to be selected for the honor.[130] It is simply not true that the District's status was overlooked because few people thought that the capital city "would evolve into the vibrant demographic and political entity it is today."[131] Various statements before ratification directly contradict this argument. First, the continued reference to the population of the Maryland/Virginia enclave is misleading.[132] At the time of the debate, many like Samuel Osgood believed the enclave was more likely to be found in Philadelphia or other populated areas.[133] The competition among the states for this designation was due in great part to the expectation that it would grow to be the greatest American city. Indeed, some cities vying for the status were already among the largest cities, like Baltimore, Annapolis, and Philadelphia. The new capital city was expected to be grand. Ultimately, Pierre Charles L'Enfant designed a city plan to accommodate 800,000 people, a huge city at that time.[134] The new enclave could easily have over 30,000 residents, the original constitutional standard for a representative in the House.[135] Second, far from disregarding the size of the future District, many delegates feared the creation of a huge city like an American London or Rome. Thus, many assumed that federal power and monies would draw both wealth and citizens to the new "Federal Town."[136]

It is true that there was little consideration of how residents would fare in terms of taxation, civil rights, conscription, and the like.[137] There is a very good reason for this omission: the drafters un-

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130 *See* BOWLING, *supra* note 39, at 78–79, 182–88.

131 RICHARD P. BRESS & LORI ALVINO MCGILL, CONGRESSIONAL AUTHORITY TO EXTEND VOTING REPRESENTATION TO CITIZENS OF THE DISTRICT OF COLUMBIA: THE CONSTITUTIONALITY OF H.R. 1905, at 3 (2007), *available at* http://www.acslaw.org/files/Bress%20and%20McGill%20on%20Constitutionality%20of%20HR%201905.pdf.

132 The population of the area now established as the District was 8000 in 1787. 1 U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, at 26 (3d ed. 1975).

133 Letter from Samuel Osgood to Samuel Adams (Jan. 5, 1788), *reprinted in* 5 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 621 (Merrill Jensen, John P. Kaminski & Gaspare J. Saladino eds., 1976) [hereinafter DOCUMENTARY HISTORY].

134 Adams v. Clinton, 90 F. Supp. 2d 35, 49 n.24 (D.D.C. 2000).

135 2 ELLIOT DEBATES, *supra* note 29, at 177.

136 *See infra* notes 161–66.

137 Various references were made to potential forms of local governance that might be allowed by Congress. Madison noted that:

> [A]s the [ceding] State will no doubt provide in the compact for the rights, and the consent of the citizens inhabiting [the federal district]; as the inhabitants will find sufficient inducements of interest to become willing parties to the cession; as they will have had their voice in the election of the Government which is to exercise authority over them; as a municipal Legislature for local purposes, derived from

derstood that these conditions would depend entirely on Congress. Because these matters would be left to the discretion of Congress, the details were not relevant to the constitutional debates. The *status* of the residents, however, was clearly debated and understood: residents would be represented by Congress as a whole and would not have individual representation in Congress. It is not true that "[t]he issue was not on their radar screen."[138] The District Clause received a proportionate level of attention and, more importantly, when it was discussed before ratification, delegates showed that they understood the issue well.

During ratification, various leaders objected to the disenfranchisement of the citizens in the district. In New York, Thomas Tredwell objected that the nonvoting status of District residents "departs from every principle of freedom . . . subjecting the inhabitants of that district to the exclusive legislation of Congress, in whose appointment they have no share or vote . . . ."[139]

The whole of Thomas Tredwell's comments merit reproduction:

> The plan of the *federal city*, sir, departs from every principle of freedom, as far as the distance of the two polar stars from each other; for, subjecting the inhabitants of that district to the exclusive legislation of Congress, *in whose appointment they have no share or vote*, is laying a foundation on which may be erected as complete a tyranny as can be found in the Eastern world. Nor do I see how this evil can possibly be prevented, without razing the foundation of this happy place, where men are to live, without labor, upon the fruit of the labors of others; this political hive, where all the drones in the society are to be collected to feed on the honey of the land. How dangerous this city may be, and what its operation on the general liberties of this country, time alone must discover; but I pray God, it may not prove to this western world

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> their own suffrages, will of course be allowed them; and as the authority of the Legislature of the State, and of the inhabitants of the ceded part of it, to concur in the cession, will be derived from the whole people of the State, in their adoption of the Constitution, every imaginable objection seems to be obviated.

THE FEDERALIST NO. 43, *supra* note 31, at 289 (James Madison). The drafters correctly believed that the "inducements" for ceding the land would be enough for residents to voluntarily agree to this unique status. Moreover, Madison correctly envisioned that forms of local government would be allowed, albeit in varying forms over the years.

138 Mary Beth Sheridan, *Picking the Brains of the Founding Fathers*, WASH. POST, May 28, 2007, at B6 (quoting The George Washington University historian Kenneth Bowling).

139 2 ELLIOT DEBATES, *supra* note 29, at 402 (Rep. Thomas Tredwell, N.Y.).

> what the city of Rome, enjoying a similar constitution, did to the eastern.[140]

In the effort to maintain that the voting status of District residents was simply not considered before ratification, advocates entirely avoid discussion of such passages that indicate that the issue was recognized and discussed at the time.

Some delegates even suggested amendments that would have addressed the problem. One such amendment was offered by Alexander Hamilton, who wanted the District residents to be able to secure representation in Congress once they grew to a reasonable size.[141] On July 22, 1788, Hamilton asked that the District Clause be amended to mandate that "the Inhabitants of the said District shall be entitled to the like essential Rights as the other Inhabitants of the United States in general."[142] Hamilton wanted the District to be given the same proportional representation in Congress and knew that this would have to be done in the body of the Constitution, in light of the District Clause. His proposal would have mandated:

> That When the Number of Persons in the District of Territory to be laid out for the Seat of the Government of the United States, shall according to the Rule for the Apportionment of Representatives and direct Taxes Amount to [blank] such District shall cease to be parcel of the State granting the Same, and Provision shall be made by Congress for their having a District Representation in that Body.[143]

Advocates like Richard Bress have insisted that this amendment neither shows a contemporary understanding of the implications of the District Clause as to the voting status of its residents, nor indicates an effort to guarantee such a vote. "That proposal," he claims, "presumed the District's residents could continue voting with the state from which the District was carved, and would have given them the *automatic* right to cast votes as *District residents* once the District's population reached the size necessary for voting representative under the apportionment rules."[144] This argument requires a considerable effort to ignore the obvious: Hamilton believed that under the current

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140 *Id.* (second emphasis added).

141 5 THE PAPERS OF ALEXANDER HAMILTON 189 (Harold C. Syrett & Jacob E. Cooke eds., 1962).

142 *Id.* at 190.

143 *Id.* at 189.

144 *Ending Taxation Hearing*, *supra* note 12 (statement of Richard P. Bress, Partner, Latham & Watkins, LLP), *available at* http://www.dcappleseed.org/projects/publications/Bress-05-23.pdf (citing PAPERS OF ALEXANDER HAMILTON, *supra* note 141, at 189).

language D.C. citizens would not be guaranteed "the like essential Rights as the other inhabitants of the United States" and most importantly believed that an amendment was necessary to grant "District Representation in that Body." Moreover, Hamilton's amendment starts with a description of how the District "shall according to the Rule for the Apportionment of Representatives and direct Taxes . . . cease to be parcel of the [original] State . . . ."[145] This does not suggest a belief that the District would continue to vote with the original state. To the contrary, it reflects the obvious meaning of the District Clause that it will cease to be part of any state and then proposes an amendment to guarantee a representative in Congress.

Hamilton was not the only one raising the issue of the rights of the residents of the future district at the New York Convention. On July 7, 1788, Melancton Smith also sought to make the rights and obligations of the residents commensurate with other citizens.[146] Smith's long amendment specifically raised concerns about the ability of Congress to afford district residents special status in terms of taxation, duties, and other obligations.[147] The amendment would expressly impose the same obligations while also addressing the ability of Congress to deny residents' constitutional rights. Thus, Smith wanted an express statement that "it is understood that the stipulations in this Constitution, respecting all essential rights, shall extend as well to this district as to the United States in general."[148] This amendment apparently was followed by a similar, but not identically-worded amendment referenced by Hamilton in his own proposal.[149]

Presumably, there would be little debate that voting was one of those essential rights, but Smith did not go as far as Hamilton in expressly referencing representation in Congress. Indeed, Hamilton appears to have viewed the two amendments as addressing similar points. On July 22, 1788, he moved to substitute a second version of the Smith amendment with language that expressly stated congressional representation as a right to be extended to District residents.[150]

Notably, in at least one state convention, the very proposal to give the District a vote in the House, but not the Senate, was proposed. In Massachusetts, Samuel Osgood sought to amend the provi-

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145 PAPERS OF ALEXANDER HAMILTON, *supra* note 141, at 189.

146 2 ELLIOT DEBATES, *supra* note 29, at 410 (Melancton Smith, N.Y. Del. to Continental Congress).

147 *Id.*

148 *Id.*

149 *See* PAPERS OF ALEXANDER HAMILTON, *supra* note 141, at 189–90 n.2.

150 *Id.*

sion to allow the residents to be "represented in the lower House."[151] No such amendment was enacted. Instead, some state delegates, like William Grayson in Virginia, distinguished the District from a state entity. Repeatedly, he stressed that the District would not have basic authorities and thus "is not to be a fourteenth state."[152] Osgood's letter to Samuel Adams, another member of the ratification convention, reveals that Adams had solicited his advice on these matters. The January 5, 1788, letter came at a critical time, shortly before the final votes on ratification the following month. Osgood himself referred to the timing as "a critical Moment" in the ratification convention.[153] It is a rare glimpse into the substantive exchanges of two delegates during the ratification debates.

Osgood refers to "many a Sleepless Night" in dealing with the proposed Constitution and returns repeatedly to the District as a source of this concern:

> I have finally fixed upon the exclusive Legislation in the Ten Miles Square.—This space is capable of holding two Millions of People—Here will the Wealth and Riches of every State center—And shall there be in the Bowels of the united States such a Number of People, brot up under the Hand of Despotism, without one Priviledge of Humanity . . . . Shall the supreme Legislature of the most enlightened People on the Face of the Earth; . . . be secluded from the World of Freemen; & seated down among Slaves & Tenants at Will?[154]

Osgood describes the efforts of Philadelphia to supply the ten miles enclave as a foolish move because it would find that the enclave would draw away both its citizens and their rights.[155] Notably, Osgood wanted to guarantee representation "when numerous enough [to] be represented in the lower House."[156] Like Hamilton, he understood that there was no current provision for such representation. Osgood also believed that Philadelphians and others were ignoring these flaws and that the delegates would have to protect them from themselves because "Mankind are too much disposed to barter away their Freedom for the Sake of Interest."[157] In addition to showing a clear, contemporary understanding of the implications of the District Clause

151 Letter from Samuel Osgood to Samuel Adams, *supra* note 133.

152 THE FOUNDERS' CONSTITUTION, *supra* note 33, at 223.

153 5 DOCUMENTARY HISTORY, *supra* note 133, at 618.

154 *Id.* at 621.

155 *Id.*

156 *Id.*

157 *Id.*

and absence of representational status, Osgood's letter further belies arguments by advocates like Bress that so few people lived in the District that these questions were simply not considered by the Framers.

The ratification debates have other references to the District Clause and proposed amendments. In North Carolina, objections were made to the inherent power that Congress would yield within the ten-mile enclave.[158] James Iredell defended the District Clause with reference to the failure of the state government to come to the aid of the delegates during the Philadelphia riot.[159] In response, delegates proposed limiting the authority of Congress in the enclave:

> That the exclusive power of legislation given to Congress over the federal town and its adjacent district, and other places purchased or to be purchased by Congress of any of the states, shall extend only to such regulations as respect the police and good government thereof.[160]

Although this amendment did not expressly address the preexisting rights of the residents, it showed that the District Clause was a concern as to its implications both for other states and the District's own residents. Virtually the same language was put forward in Virginia[161] and in the Pennsylvania General Assembly.[162] As these efforts limiting Congress's authority in the federal enclave indicate, the greatest concern was that the District could create an undue concentration of federal authority and usurp states' rights. Even with the express guarantees of state powers under the Composition Clause, there were many who were still deeply suspicious of the ability of the federal government to "annihilate" state authority.[163] Anti-Federalists, like George Mason, viewed the existence of a district under the exclusive control of Congress to be threatening.[164] He was not alone. Many

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158 4 ELLIOT DEBATES, *supra* note 29, at 245.

159 *Id.* at 220.

160 *Id.*

161 3 ELLIOT DEBATES, *supra* note 29, at 660.

162 This was an effort to qualify the earlier ratification of the Constitution. 2 DOCUMENTARY HISTORY, *supra* note 133.

163 *Id.*

164 In the Virginia Ratification Convention, notes record how George Mason stressed his view that:

> [F]ew clauses in the Constitution [are] so dangerous as that which gave Congress exclusive power of legislation within ten miles square. Implication, he observed, was capable of any extension, and would probably be extended to augment the congressional powers. But here there was no need of implication. This clause gave them an unlimited authority, in every possible case, within that district. This ten miles square, says Mr. Mason, may set at defiance the laws of the surrounding

viewed the future city to be a likely threat, not just to other cities, but the nation due to its power and size. Samuel Osgood noted that he had "finally fixed upon the exclusive legislation in the Ten Miles Square. . . . What an inexhaustible fountain of corruption are we opening?"[165] A member of the New York Ratification Convention compared the new capital city to Rome and complained that it could prove so large and powerful to control the nation as did that ancient city.[166] There would have been a riot if, in addition to creating a federal district, Congress could give it voting status equal to a state. The possibility of a federal district or territory being made a voting member of Congress would have certainly endangered, if not doomed, the precarious majority supporting the Constitution.

In order to quell fears of the power of the District, supporters of the Constitution emphasized that the exclusive authority of Congress over the District would have no impact on states, but was only a power related to the *internal* operations of the seat of government. This point was emphasized by Edmund Pendleton on June 16, 1788, as the President of the Virginia Ratification Convention. He assured his colleagues that Congress could not use the District Clause to affect states because the powers given to Congress only affected District residents and not states or state residents:

> Why oppose this power? Suppose it was contrary to the sense of their constituents to grant exclusive privileges to citizens residing within that place; the effect would be directly in opposition to what he says. It could have *no operation without the limits* of that district. Were Congress to make a law granting them an exclusive privilege of trading to the East Indies, it could have no effect the moment it would go without that place; for their exclusive power is confined to that district. . . . This exclusive power is limited to that place solely for their own preservation, which all gentlemen allow to be necessary . . . .[167]

Pendleton's view of the purpose and limitation of the District Clause is reflected in a long line of Supreme Court cases. As the Court noted in *Cohens v. Virginia*,[168] this Clause gives Congress clear

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states, and may, like the custom of the superstitious days of our ancestors, become the sanctuary of the blackest crimes.

THE FOUNDERS' CONSTITUTION, *supra* note 32, at 222.

165 BOWLING, *supra* note 39, at 81.

166 *Id.*

167 THE FOUNDERS' CONSTITUTION, *supra* note 33, at 180.

168 Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821).

authority over internal matters related to the District and not significant matters affecting states outside of the District.[169] The Court has also stated: "We could not of course countenance any exercise of this plenary power either within or without the District if it were such as to draw into congressional control subjects over which there has been no delegation of power to the Federal Government."[170]

Pendleton's comments capture the essence of the problem then and now. Congress has considerable plenary authority over the District, but that authority is lost when it is used to change the District's status vis-à-vis the states. Such external use of District authority is precisely what delegates were assured could not happen under this Clause.

This history offers ample support for the plain meaning of the text of the Constitution. It demonstrates that the implications of the language were understood at the time of ratification. Indeed, the language prompted efforts to amend the Constitution. These efforts to give District residents conventional representation failed, despite the advocacy of no less a person than Alexander Hamilton.[171] Although the issue of the status of the residents was not a major topic of debate, it requires an exercise of willful blindness to argue that the District's voting status was simply some oversight or casual omission. The contemporary record supporting the constitutional language is further strengthened when one examines the history immediately following ratification.

IV. The Post-Ratification Treatment of the District as a Federal Enclave by Congress and the Courts

The status of the District, as represented by Congress as a whole, has been a matter of continual controversy from ratification to the present day. Thus, this is no new debate, but one that has been addressed by both the Congress and the courts on a regular basis. The early congressional debates in this area are particularly revealing.

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169 *Id.* at 265.

170 Nat'l Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 602 (1949).

171 This is not to say that the precise conditions of the cessation were clear. Indeed, some states passed amendments that qualified their votes; amendments that appear to have been simply ignored. Thus, Virginia ratified the Constitution, but specifically indicated that some state authority would continue to apply to citizens of the original state from which the "Federal Town and its adjacent District" was ceded. Moreover, Congress enacted a law that provided that the laws of Maryland and Virginia "shall be and continue in force" in the District, suggesting that, unless repealed or amended, Maryland continues to have jurisdictional claims in the District. *See* Act of Feb. 27, 1801, ch. 15, § 1, 2 Stat. 103.

Members clearly understood, as did the drafters and ratifiers, that only representatives of the actual states could be voting members and that Congress's authority over the District was a purely internal power.

In the late eighteenth and early nineteenth centuries, the political status of the District was viewed as fixed and immutable absent a constitutional amendment or retrocession. Indeed, a constitutional amendment was repeatedly referenced during debates over the lack of a vote in Congress. Maryland Representative John Dennis noted that such a change could occur as the city grew in size: "[I]f it should be necessary [that residents have a representative], the Constitution might be so altered as to give them a delegate to the General Legislature when their numbers should become sufficient."[172] Indeed, one of the most prominent advocates for the District at its creation sought such an amendment. A well-known jurist and lawyer, Augustus Woodward was a close associate of L'Enfant and played a significant role in the early evolution of the District. He published a series of essays under the pen name of Epaminondas entitled *Considerations on the Government of the Territory of Columbia*.[173] He was opposed to the lack of a vote for residents in Congress, but stressed that "[i]t will require an amendment to the Constitution of the United States" to secure individual representation for District residents.[174]

Various efforts were made to legislatively create delegates for the District, but these were largely nonvoting members and failed. For example, as early as 1819, a proposal was made to give the District the same status as a territory with a nonvoting member.[175] It was defeated. Notably, this was roughly thirty years after the ratification and roughly the same period before retrocession of the Virginia portion of the District. Contrary to those who argue that this issue was overlooked, it continued to be raised, and even nonvoting representation continued to be denied. A similar proposal in the Senate recognizing the "equal necessity of allowing to the District of Columbia a delegate, upon a footing with the Territorial governments" was not adopted in the House in 1820.[176] A similar motion in 1824 was tabled[177] in the House and again in 1830.[178] Proposals recorded in

172 10 ANNALS OF CONG. 998–99 (1801) (remarks of Rep. John Dennis).

173 AUGUSTUS WOODWARD, CONSIDERATIONS ON THE GOVERNMENT OF COLUMBIA 5–6 (1801).

174 *Id.*

175 *See* U.S. HOUSE JOURNAL, 16th Cong., 1st Sess. 90 (1819).

176 36 ANNALS OF CONG. 552 (1820).

177 41 ANNALS OF CONG. 1504, 1506 (1824).

1836,[179] 1838,[180] and 1845[181] also failed. These were all proposals for nonvoting status where the constitutional issue was avoided.[182] Yet, they all failed for lack of support. The only two methods for attaining a vote in Congress was statehood for a territory and (for the District) retrocession.[183]

A. The Retrocession Debates

The knowledge of the nonvoting status of the capital city was reaffirmed not long after the cessation when a retrocession movement began. Within a few years of ratification, leaders continued to discuss the disenfranchisement of citizens from votes in Congress. Republican Representative John Smilie from Pennsylvania objected that "the people of the District would be reduced to the state of subjects, and deprived of their political rights . . . ."[184] The passionate opposition to the nonvoting status of the District was as strong as it is today:

> We have most happily combined the democratic representative with the federal principle in the Union of the States. But the inhabitants of this territory, under the exclusive legislation of Congress, partake of neither the one nor the other. They have not, and they cannot possess a State sovereignty; nor are they in their present situation entitled to elective franchise. They are as much the vassals of Congress as the

178 U.S. HOUSE JOURNAL, 21st Cong., 2d Sess. 568 (1830).

179 U.S. SENATE JOURNAL, 24th Cong., 1st Sess. 208 (1836).

180 CONG. GLOBE, 25th Cong., 2d Sess. 271 (1838).

181 U.S. HOUSE JOURNAL, 28th Cong., 2d Sess. 297 (1845).

182 Bress cites these examples with a notation that the constitutional issue was never raised in most of the debates, suggesting that somehow members did not view the Clause as creating a constitutional barrier. *Ending Taxation Hearing*, *supra* note 12 (supplemental statement of Richard P. Bress, Partner, Latham & Watkins, LLP), *available at* http://www.dcappleseed.org/projects/publications/Bress-05-23.pdf, at *6. Because these proposed amendments dealt with nonvoting members, however, there is no reason why the constitutional issue would be raised. There is little debate that Congress can create nonvoting members. Yet, even on this symbolic level, there was little interest in creating a member for the District, which was represented by Congress as a whole and had a Committee assigned to its governing affairs.

183 Indeed, territories were expected to eventually evolve into states as was the case with the Northwest Territory, which existed at the time of the time of the ratification and, under the Ordinance of July 13, 1787 ("Northwest Ordinance"), could become states after meeting certain criteria . Eventually, the Northwest Territory became the states of Ohio, Indiana, Illinois, Michigan, and Wisconsin. Only then did the citizens in those areas receive voting representatives in Congress. *See generally* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801–1829, at 90 (2001). The District has already attempted statehood and was partially retroceded. The current legislation is attempting to create an easier third option never envisioned by the Framers or the early Congresses.

184 6 ANNALS OF CONG. 992 (1801); *see also* THOMAS, CONG. RESEARCH SERV., *supra* note 17, at 6.

> troops that garrison your forts, and guard your arsenals. They are subjects, not merely because they are not represented in Congress, but also because they have no rights as freemen secured to them by the Constitution.[185]

Members questioned the need to "keep the people in this degraded situation" and objected to subjecting American citizens to "laws not made with their own consent."[186] The federal district was characterized as being subject to despotic rule "by men . . . not acquainted with the minute and local interests of the place, coming, as they did, from distances of 500 to 1000 miles."[187] Much of this debate followed the same lines of argument that we hear today. While acknowledging that "citizens may not possess full political rights," leaders like John Bacon of Massachusetts noted that they had special status and influence as residents of the capital city.[188] Yet, retrocession bills were introduced within a few years of the actual cessation, again prominently citing the lack of any congressional representation as a motivating factor.[189]

Indeed, the retrocession of Virginia highlights the original understanding of the status of the District. Virginians contrasted their situation with residents of Washington. For them, cessation was "an evil hour, [when] they were separated" from their state and stripped of their political voice.[190] Washingtonians, however, were viewed as compensated for their loss of political representation. As a committee noted in 1835,

> [o]ur situation is essentially different, and far worse, than that of our neighbors on the northern side of the Potomac. They are citizens of the Metropolis, of a great, and noble Republic, and wherever they go, there clusters about them all those glorious associations, connected with the progress and fame of their country. They are in *some* measure compensated in the loss of their political rights.[191]

Thus, during the drive for retrocession that began shortly after ratification, District residents appear to have opposed retrocession

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185 Mark D. Richards, Presentation Before the Arlington Historical Society: Fragmented Before a Great Storm (May 9, 2002), *available at* http://www.dcwatch.com/richards/020509.htm (citing CONG. REC. 910 (1805)) (quoting Rep. Ebenezer Elmer, R-N.J.).

186 *Id.* (quoting Rep. John Smilie, R-Pa.).

187 *Id.* (quoting Rep. John Smilie, R-Pa.).

188 *Id.* (quoting Rep. John Bacon, R-Mass.).

189 *Id.*

190 *Id.*

191 *Id.*

and accepted the condition as nonvoting citizens in Congress as their special status. Indeed, the only serious retrocession effort focused on Georgetown and not the capital city itself. Some in Maryland vehemently objected to the nonvoting status, complaining to Congress that "the people are almost afraid to present their grievances, least a body in which they are not represented, and which feels little sympathy in their local relations, should in their attempt to make laws for them, do more harm than good."[192] Yet, even in a vote taken within Georgetown, the Board of Common Council voted overwhelmingly (410 to 139) to accept these limitations in favor of staying with the federal district.[193]

During the Virginia retrocession debate, various sources reported the strong opposition of residents in the city to returning to Maryland, even though such retrocession would return their right to full representation. The reason was financial. District residents received considerable economic advantages from living within the federal city. These benefits were not as great in the Virginia areas, a point made in a congressional report:

> The people of the county and town of Alexandria have been subjected not only to their full share of those evils which affect the District generally, but they have enjoyed none of those benefits which serve to mitigate their disadvantages in the county of Washington. The advantages which flow from the location of the seat of Government are almost entirely confined to the latter county, *whose people, as far as your committee are advised, are entirely content to remain under the exclusive legislation of Congress*. But the people of the county and town of Alexandria, who enjoy few of those advantages, are (as your committee believe) justly impatient of a state of things which subjects them not only to all the evils of inefficient legislation, but also to political disfranchisement.[194]

The result of this debate was the retrocession of Northern Virginia, changing the shape of the District from the original diamond shape created by George Washington.[195] The Virginia land was retro-

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192 Mark D. Richards, *The Debates Over the Retrocession of the District of Columbia, 1801–2004*, WASH. HIST. 55, 62 (Spring/Summer 2004), *available at* http://www.dcvote.org/pdfs/mdrretro062004.pdf (quoting memorial submitted by Sen. William D. Merrick of Maryland).

193 *Id.*

194 *Retrocession of Alexandria to Virginia*, DAILY NAT'L INTELLIGENCER, Mar. 20, 1846, at 1 (emphasis added) (reprinting committee report).

195 Under the Residence Act of July 16, 1790, Washington was given the task of drawing

ceded to Virginia in 1846. The District residents chose to remain as part of the federal seat of government, independent from participation or representation in any state. Just as with the first cession, it was clear that residents had knowingly "relinquished the right of representation, and . . . adopted the whole body of Congress for its legitimate government . . . ."[196]

Finally, much is made of the ten-year period during which District residents voted with their original states, before the federal government formally took control of the District. As established in *Adams*, this argument has been raised and rejected by courts as without legal significance.[197] This was simply a transition period before the District became the federal enclave. Under the Residence Act of 1790, which was entitled "An Act for Establishing the Temporary and Permanent Seat of the Government of the United States,"[198] Congress selected Philadelphia as the temporary capital while authorizing the establishment of the federal district.[199] This law allowed the District to continue under the prior state systems pending the implementation of federal jurisdiction. The law expressly states that, while the District was being surveyed and established, "the operation of the laws of the state within such district shall not be affected by this acceptance, until the time fixed for the removal of the government thereto, and until Congress shall otherwise by law provide."[200]

Clearly, Congress could use its authority regarding the internal affairs of the District to continue such state functions pending its final takeover and to avoid a dangerous gap in basic governmental functions. It was clearly neither the intention of the drafters nor indicative of the post-federalization status of residents. Rather, as indicated by the Supreme Court,[201] the exclusion of residents from voting:

District lines, *see* ch. 28, 1 Stat. 130 (1790), not surprising given his adoration around the country and his experience as a surveyor. Washington adopted a diamond-shaped area that included his hometown of Alexandria, Virginia. This area included parts that now belong to Alexandria and Arlington. At the time, the area contained two developed municipalities (Georgetown and Alexandria) and two undeveloped municipalities (Hamburg, later known as Funkstown, and Carrollsburg).

196 Loughborough v. Blake, 18 U.S. (5 Wheat.) 317, 324 (1820).

197 *See* Adams v. Clinton, 90 F. Supp. 2d 35, 56 (D.D.C. 2000); *see also* Albaugh v. Tawes, 233 F. Supp. 576, 578 (D. Md. 1964) (per curiam).

198 Act for Establishing the Temporary and Permanent Seat of the Government of the United States, ch. 28, 1 Stat. 130 (1790).

199 *Id.*

200 *Id.*

201 *See* Reily v. Lamar, 6 U.S. (2 Cranch) 344, 356–57 (1805).

> was the consequence of the completion of the cessation transaction—which transformed the territory from being part of a state, whose residents were entitled to vote under Article I, to being part of the seat of government, whose residents were not. Although Congress' exercise of jurisdiction over the District through passage of the Organic Act was the last step in that process, it was a step expressly contemplated by the Constitution.[202]

B. *The Post-Retrocession Controversies over the District Status and Congressional Members*

As noted above, as early as 1794, Congress was dealing with claims by territories that their representatives should be allowed to be members of the House.[203] Congress, which had some of the original Framers and ratifiers among its members, insisted that the most that a nonstate could receive in representation would be a nonvoting member.[204]

Early controversies also focused on the use of Congress's plenary authority under the District Clause to create national policies or affect states. The consistent view was that the plenary authority over the District was confined to its internal operations and, as noted by Pendleton, would not extend beyond its borders to affect the states.[205] For example, in 1814, the use of this authority was successfully challenged when used to create a second national bank. Senator John Calhoun and Representative Robert Wright joined together to use the District Clause as a way of avoiding constitutional questions.[206] It was defeated in part by arguments that the District Clause could not be used to circumvent national legislation or impose policies on the rest of the nation.[207] In 1813, the proposed National Vaccine Institution was defeated after sponsors sought to use the District Clause to establish it under Congress's plenary authority.[208] Again, it was viewed as an effort to use the District Clause to impose policies outside of its borders. Likewise, in 1823, an effort to create a fraternal association for the relief of families of dead naval officers was rejected.[209] Opponents

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202 *Adams*, 90 F. Supp. 2d at 62.

203 *See supra* Part III.A.

204 *See supra* note 105 and accompanying text.

205 *Id.*

206 28 ANNALS OF CONG. 496 (1814).

207 *Id.*

208 CURRIE, *supra* note 183, at 300.

209 40 ANNALS OF CONG. 437, 541–42 (1823).

objected to the use of the District Clause to create an institution with national purposes.[210]

When one looks at the historical structure and status of the District as a governing unit, it is obvious that neither the drafters nor later legislators would have viewed the District as interchangeable with a state under Article I. When the District was first created, it was barely a city, let alone a substitute for a state: "The capital city that came into being in 1800 was, in reality, a few federal buildings surrounded by thinly populated swampland, on which a few marginal farms were maintained."[211]

For much of its history, the District was not even properly classified as an independent city. In 1802, the first mayor was a presidential appointee.[212] Congress continued to possess authority over its budget and operations. Although elections were allowed until 1871, the city was placed under a territorial government and effectively run by a Board and Commissioner of Public Works, again appointed by the President.[213] After 1874, the city was run through Congress and the Board of Commissioners.[214]

In 1967, the House Judiciary Committee directly addressed how to give the District an actual voting member in Congress and concluded:

> If the citizens of the District are to have voting representation in the Congress, a constitutional amendment is essential; statutory action alone will not suffice. This is the case because provisions for elections of Senators and Representatives in the Constitution are stated in terms of the States, and the District of Columbia is not a State.[215]

Despite the failure of this constitutional amendment effort, members did not abandon their principled view that only such a change could bring representational status to the District. Indeed, in 1976, members again recognized that "[i]f the citizens of the District are to

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210 *Id.* at 494–97, 501–19.

211 Philip G. Schrag, *By the People: The Political Dynamics of a Constitutional Convention*, 72 GEO. L.J. 819, 826 (1984). Schrag also noted that "[t]he towns of Georgetown and Alexandria were included in the District, but even Georgetown was, to Abigail Adams, 'the very dirtyest Hole I ever saw for a place of any trade or respectability of inhabitants.'" *Id.* (quotations omitted).

212 *Id.* at 826–28.

213 *Id.* at 827.

214 *Id.*

215 EMANUEL CELLER, COMM. ON THE JUDICIARY, PROVIDING REPRESENTATION OF THE DISTRICT OF COLUMBIA IN CONGRESS, H.R. REP. NO. 90-819, at 4 (1967).

have voting representation in the Congress, a constitutional amendment is essential; statutory action alone will not suffice."[216]

President Lyndon Johnson expressly treated the District as the equivalent of a federal agency when he appointed Walter Washington to be mayor in 1967.[217] Under Johnson's legal interpretation, giving the District a vote in Congress would have been akin to making the Department of Defense a congressional member to represent all of the personnel and families on military bases. In granting this form of home rule, Congress retained final approval of all legislative and budget items. In 1973, when it passed the Self-Government Act,[218] Congress noted that it was simply a measure to "relieve Congress of the burden of legislating upon essentially local District matters."[219] Congress again retained final approval.

Thus, for most of its history, the District was maintained as either a territory, a federal agency, or a delegated governing unit of Congress. All of these constructions are totally at odds with the qualification and descriptions of voting members of Congress. The drafters went to great lengths to guarantee independence of members from federal offices or benefits in Article I, Section 6. Likewise, members are not subject to the potential manipulation of their home powers by either the federal government or the other states (through Congress).[220]

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216 DON EDWARDS, COMM. ON THE JUDICIARY, PROVIDING REPRESENTATION OF THE DISTRICT OF COLUMBIA IN CONGRESS, H.R. REP. NO. 94-714, at 4 (1975).

217 Schrag, *supra* note 211, at 829–30.

218 Pub. L. No. 93-198, 87 Stat. 774 (1973) (codified at D.C. CODE §§ 1-201 to 1-206 (2001)).

219 *Id.* § 1-201(a).

220 Over the history of the District, it has had a variety of different governmental systems imposed at the whim of Congress. These include:

- A presidentially appointed three-member commission (1790–1802);
- A popularly elected two chamber council with a presidentially appointed mayor (1802–1820);
- A popularly elected board of common council, board of alderman, and mayor; the elected mayor was replaced by a mayor appointed by the council and alderman and subsequently the mayor being again popularly elected (1820–1871);
- A presidentially appointed governor and council along with a popularly elected house of delegates, and for the first time a popularly elected non-voting delegate to the House of Representatives (1871–1874);
- Another presidentially appointed three member commission (1874–1878);
- Another presidentially appointed commission; this commission consisted of two civilians and one senior Army engineer officer (1878–1967);
- A presidentially appointed mayor/commissioner and nine-member council (1967–1973);
- A non-voting delegate to the House of Representatives, independent of the form of government (1970–Present);

The post-retrocession period contains a long line of cases that repeatedly deny the District the status of a state and reaffirm the intention to create a nonstate entity. This status did not impair the ability of Congress to impose other obligations of citizenship. Thus, in *Loughborough v. Blake*,[221] the Court ruled that the lack of representation did not bar the imposition of taxation.[222] The District was created as a unique area controlled by Congress that was expressly distinguished from state entities. This point was amplified by then-Judge Scalia of the D.C. Circuit in *United States v. Cohen*:[223]

> [The District Clause] enables Congress to do many things in the District of Columbia which it has no authority to do in the 50 states. There has never been any rule of law that Congress must treat people in the District of Columbia exactly the same as people are treated in the various states.[224]

Additionally, a long line of cases establish that the drafters intended legislative authority to be "constitutionally limited to 'Members chosen . . . by the People of the several States.'"[225] This interpretation has long been supported by the Justice Department.[226]

V. A Response to Messrs. Dinh, Starrs et al.

Given the unwavering consistency between the plain meaning of the text of Article I and the historical record, it is baffling to read assertions by Professor Dinh that "[t]here are no indications, textual or otherwise" to suggest that the Framers viewed the nonvoting status

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• Home Rule, a congressional invention, providing for a popularly elected mayor and city council (1974–Present);

• and finally, a congressionally established transitory Control Board, consisting of five members appointed by the President exercising sovereign authority over the popularly elected mayor and council (1995–2001).

Aaron E. Price, Sr., Comment, *A Representative Democracy: An Unfulfilled Ideal for Citizens of the District of Columbia*, 7 D.C. L. REV. 77, 83–84 (2003) (citations omitted).

221 Loughborough v. Blake, 18 U.S. (5 Wheat.) 317 (1820).

222 *Id.* at 324–25; *see also* Heald v. District of Columbia, 259 U.S. 114, 124 (1922); Neild v. District of Columbia, 110 F.2d 246 (D.C. Cir. 1940).

223 United States v. Cohen, 733 F.2d 128 (D.C. Cir. 1984).

224 *Id.* at 140–41.

225 Michel v. Anderson, 817 F. Supp. 126, 140 (D.D.C. 1993) (citing U.S. CONST. art. I, § 2, cl. 1).

226 *See, e.g.*, *District of Columbia Representation in Congress: Hearing on S.J. Res. 65 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 95th Cong. 16–29 (1978) (testimony of John M. Harmon, Assistant Att'y Gen., Office of Legal Counsel) (explaining the options for a voting member in Congress, but excluding legislative creation of a new member); Letter from Martin F. Richman, Acting Assistant Att'y Gen., Office of Legal Counsel (Aug. 11, 1967) (concluding that "a constitutional amendment is essential" for representation of the District in Congress).

of the District to be permanent or beyond the inherent powers of Congress to change.[227] Indeed, in his testimony before Congress, Professor Dinh repeated his position that this issue was not considered during the drafting and ratification. He and Mr. Charnes have written that the nonvoting status "was neither necessary nor intended by the Framers" and have further asserted that the only "purpose for establishing a federal district was to ensure that the national capital would not be subject to the influences of any state."[228] They insist that "representation for the District's residents seemed unimportant" at the time.[229] The record, however, directly contradicts these statements. As noted earlier, there were various stated purposes behind designating the federal district, and the issue of the nonvoting status of its residents was repeatedly raised before final ratification. Most importantly, the nonvoting status of residents was tied directly to the concept of a seat of government under the control and exclusive jurisdiction of Congress. This status of the District was viewed as obnoxious by some and essential by others before ratification and during the early retrocession movement.

It is true that the District is viewed as "an exceptional community" that is "[u]nlike either the States or Territories."[230] This does not mean, however, that this unique or "*sui generis*" status empowers Congress to bestow upon the District the rights and privileges that are expressly given to the states. To the contrary, Congress has plenary authority in the sense that it holds legislative authority on matters *within* the District.[231] The extent to which the District has and will continue to enjoy its own governmental systems depends entirely upon the will of Congress.[232] This authority over the District does not mean that it can increase the power of the District to compete with the states or dilute their powers under the Constitution. Indeed, as noted below, the District itself took a similar position in recent litigation when it emphasized that it should not be treated as a state under the Second Amendment, and that constitutional limitations are not

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227 Dinh & Charnes, *supra* note 13, at 6.

228 *Id.* at 6.

229 *Id.*

230 District of Columbia v. Carter, 409 U.S. 418, 432 (1973) (citations omitted), *superseded by statute*, Pub. L. No. 96-170, 93 Stat. 1284 (1979) (amending 42 U.S.C. § 1983).

231 *Id.* at 429 ("[T]he power of Congress over the District of Columbia includes all the legislative powers which a state may exercise over its affairs.") (quotation omitted).

232 *See* District of Columbia Home Rule Act of 1973, D.C. CODE § 1-201.1 (2001).

implicated by laws affecting only the federal enclave with "no possible impact on the states."[233]

The repeated reference to the District Clause in terms of taxation, conscription, and other state-like matters is entirely irrelevant. Congress can impose any of these requirements within the District.[234] As the Court stated in *Heald v. District of Columbia*,[235] the "[r]esidents of the District lack the suffrage and have politically no voice in the expenditure of the money raised by taxation."[236] Congress cannot, however, use its authority over the internal operations of the District to change the District's political status vis-à-vis the states. Ironically, just as the nonvoting status of the District was discussed before ratification, so was the distinction between exercising powers within the District and using the same powers against states. For example, during the Virginia debates, Pendleton defended the District Clause by noting that "this clause does not give Congress power to impede the operation of any part of the Constitution, or to make any regulation that may affect the interests of the citizens of the Union at large."[237] The dangers posed by a "Federal Town" were muted both by the fact that Congress would control its operations and that Congress's exclusive legislation concerned its internal operations.

It is equally hard to see the "ample constitutional authority," alluded to by Dinh and Charnes,[238] for Congress using its authority over the internal operations of the District to change the composition of voting members in a house of Congress. To the contrary, the arguments made in their paper strongly contradict suggestions of inherent authority to create de facto state members of Congress. For example, it is certainly true that the Constitution gives Congress "extraordinary and plenary power to legislate with respect to the District."[239] This legislation, however, is not simply a District matter. It affects the voting rights of the states by augmenting the voting members of Congress. It is also legislation that alters the structural make-up of Congress. More importantly, Dinh and Charnes go to great lengths to

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233 Brief for the District of Columbia at 38, Parker v. District Columbia, 478 F.3d 370 (D.C. Cir. 2007) (No. 04-7041).

234 Heald v. District of Columbia, 259 U.S. 114, 124 (1922) ("There is no constitutional provision which so limits the power of Congress that taxes can be imposed only upon those who have political representation.").

235 Heald v. District of Columbia, 259 U.S. 114 (1922).

236 *Id.* at 124.

237 3 THE FOUNDERS' CONSTITUTION, *supra* note 33.

238 Dinh & Charnes, *supra* note 13, at 4.

239 *Id.*

point out how different the District is from the states, noting that the District Clause:

> [W]orks an exception to the constitutional structure of "our Federalism," which delineates and delimits the legislative power of Congress and state legislatures. In joining the Union, the states gave up certain of their powers. Most explicitly, Article II, section 10 specifies activities which are prohibited to the States. None of these prohibitions apply to Congress when it exercises its authority under the District Clause. Conversely, Congress is limited to legislative powers enumerated in the Constitution; such limited enumeration, coupled with the reservation under the Tenth Amendment, serves to check the power of Congress vis-à-vis the states.[240]

This is precisely the point. The significant differences between the District and the states further support the view that they cannot be treated as the same entities for the purposes of voting in Congress. The District is not independent of the federal government, but subject to the will of the federal government. Nor is the District independent of the states, which can exercise enormous power over its operations. The drafters wanted members to be independent from any influence exerted through federal offices or the threat of arrest. For that reason, they expressly prohibited members from holding offices with the federal government,[241] other than their legislative offices, and protected them under the Speech or Debate Clause.[242]

The District has different provisions because it was not meant to act as a state. For much of its history, the District was treated like a territory or a federal agency without any of the core independent institutions that define most cities, let alone states. Thus, the District is allowed exceptions because it is not serving the functions of a state in our system.

Dinh and Starr have both argued that references to "states" are not controlling because other provisions with similar references have been interpreted as nevertheless encompassing District residents.[243] This argument is illusory. The relatively few cases extending the meaning of "states" to the District generally involved irreconcilable conflicts between a literal meaning of the term state and the inherent

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240 *Id.* at 6.

241 U.S. CONST. art. I, § 6, cl. 2.

242 *Id.* art. I, § 6, cl. 1.

243 *See* Dinh & Charnes, *supra* note 13, at 14, 16; *see also* Starr, *supra* note 15, at 75, 83.

rights of all American citizens under the Equal Protection Clause[244] and other provisions.[245] District citizens remain U.S. citizens, even though they are not state citizens. The creation of the federal district removed one right of citizenship, voting in Congress, in exchange for the status of being part of the Capital City. Congress never intended to turn residents into noncitizens with no constitutional rights. As the Court stated in 1901:

> [T]he District was made up of portions of two of the original states of the Union, and was not taken out of the Union by cessation. Prior thereto its inhabitants were entitled to all the rights, guaranties, and immunities of the Constitution . . . .
>
> The Constitution had attached to [the District] irrevocably. There are steps which can never be taken backward. . . . The mere cession of the District of Columbia to the Federal government relinquished the authority of the States, but it did not take it out of the United States or from under the aegis of the Constitution. Neither party had ever consented to that construction of the cession.[246]

The upshot of these opinions is that a literal interpretation of the word "states" would produce facially illogical and unintended consequences. Because residents remain U.S. citizens, they must continue to enjoy those protections accorded to citizens.[247] Otherwise, they could all be enslaved or impaled at the whim of Congress.

Likewise, the Commerce Clause[248] is intended to give Congress the authority to regulate commerce that crosses state borders. Although the Clause refers to commerce "among the several States,"[249] the Court rejected the notion that it excludes the District as a nonstate.[250] The reference to several states was to distinguish the regulated activity from intrastate commerce. As a federal enclave, the District was clearly subsumed within the Commerce Clause.[251] Such commerce questions are clearly not intrastate matters but multiple jurisdictional matters.

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244 U.S. CONST. amend. XIV, § 1, cl. 2.

245 *See* Dinh & Charnes, *supra* note 13, at 16.

246 O'Donoghue v. United States, 289 U.S. 516, 540–41 (1933) (quotation omitted).

247 *See, e.g.*, Callan v. Wilson, 127 U.S. 540, 550 (1888) (holding that District residents continue to enjoy the right to trial as American citizens).

248 U.S. CONST. art. 1, § 8, cl. 3.

249 *Id.*

250 *See* Stoutenburgh v. Hennick, 129 U.S. 141, 147–48 (1889).

251 *See id.*

None of these cases means that the term "states" can now be treated as having an entirely fluid and malleable meaning. The courts merely adopted a traditional interpretation as a way to minimize the conflict between provisions and to reflect the clear intent of the various provisions.[252] The District Clause was specifically directed at the meaning of a state. It creates a nonstate status related to the seat of government and particularly Congress. The nonvoting status of the District is a special entity. In provisions dealing with such rights as equal protection, the rights extend to all citizens of the United States. A literal interpretation of states in such contexts would defeat the purpose of the provisions and produce a counterintuitive result. Thus, Congress could govern the District without direct representation, but it must do so in such a way as not to violate those rights protected in the Constitution:

> Congress may exercise within the District all legislative powers that the legislature of a State might exercise within the State; and may vest and distribute the judicial authority in and among courts and magistrates, and regulate judicial proceedings before them, as it may think fit, *so long as it does not contravene any provision of the Constitution of the United States*.[253]

Notably, Congress had to enact statutes and a constitutional amendment to treat the District as a quasi-state for some purposes. Thus, Congress could enact a law that allowed citizens of the District to maintain diversity suits despite the fact that the Diversity Clause refers to diversity between "states."[254] Diversity jurisdiction is meant to protect citizens from the prejudice of being tried in the state courts of another party. The triggering concern was the fairness afforded to two parties from different jurisdictions. District residents are from a different jurisdiction than citizens of any state, and the diversity conflict is equally real.

The decision in *National Mutual Insurance Co. v. Tidewater Transfer Co.*[255] is heavily relied upon in the Dinh and Starr analyses. The actual rulings comprising the decision, however, would appear to contradict their conclusions. Only two justices indicated that they

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252 *See also* District of Columbia v. Carter, 409 U.S. 418, 420 (1973) ("Whether the District of Columbia constitutes a 'State or Territory' within the meaning of any particular statutory or constitutional provision depends upon the character and aim of the specific provision involved.").

253 Palmore v. United States, 411 U.S. 389, 397 (1973) (emphasis added) (citation omitted).

254 *See* 28 U.S.C. § 1332 (2000).

255 Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1948).

would treat the District as a state in their interpretations of the Constitution.[256] The Court began its analysis by stating categorically that the District was not a state and could not be treated as a state under Article III.[257] This point was clearly established in 1805 in *Hepburn v. Ellzey*,[258] only a few years after the establishment of the District. The Court rejected the notion that "Columbia is a distinct political society; and is therefore 'a state' . . . . the members of the American confederacy only are the states contemplated in the constitution."[259] This view was reaffirmed by the Court in 1948:

> In referring to the "States" in the fateful instrument which amalgamated them into the "United States," the Founders obviously were not speaking of states in the abstract. They referred to those concrete organized societies which were thereby contributing to the federation by delegating some part of their sovereign powers and to those that should later be organized and admitted to the partnership in the method prescribed. They obviously did not contemplate unorganized and dependent spaces as states. The District of Columbia being nonexistent in any form, much less a state, at the time of the compact, certainly was not taken into the Union of states by it, nor has it since been admitted as a new state is required to be admitted.[260]

The Court also ruled, however, that Congress could extend diversity jurisdiction to the District because this was a modest use of Article I authority given the fact that the "jurisdiction conferred is limited to controversies of a justiciable nature, the sole feature distinguishing them from countless other controversies handled by the same courts being the fact that one party is a District citizen."[261] Thus, while residents did not have this inherent right as members of a nonstate, Congress could include a federal enclave within the jurisdictional category.

When one looks at the individual opinions of this highly fractured, plurality decision, it is hard to see what about *Tidewater* gives advocates so much hope.[262] Dinh and his co-author Charnes state that

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256 *See id.* at 625–26 (Rutledge, J., concurring, joined by Murphy, J.).

257 *Id.* at 588 (majority opinion).

258 Hepburn v. Ellzey, 6 U.S. (2 Cranch) 445 (1805).

259 *Id.* at 452.

260 *Tidewater*, 337 U.S. at 588.

261 *Id.* at 591.

262 The Congressional Research Service included an exhaustive analysis of the case in its excellent study of this bill and its constitutionality. *See* THOMAS, CONG. RESEARCH SERV., *supra* note 17, at 9–17.

"[t]he significance of *Tidewater* is that the five justices concurring in the result believed either that the District was a state under the terms of the Constitution or that the District Clause authorized Congress to enact legislation treating the District as a state."[263] Yet, to uphold this legislation, a majority of the Court would have to recognize that the District Clause gives Congress this extraordinary authority to convert the District into an effective state for voting purposes. In *Tidewater*, six of nine justices appear to reject the argument that the Clause could be used to extend diversity jurisdiction to the District,[264] a far more modest proposal than creating a voting nonstate entity. Five justices agreed only *in the result* that produced the ruling, a point emphasized by Justice Frankfurter when he noted with considerable irony in his dissent that:

> A substantial majority of the Court agrees that each of the two grounds urged in support of the attempt by Congress to extend diversity jurisdiction to cases involving citizens of the District of Columbia must be rejected—but not the same majority. And so, conflicting minorities in combination bring to pass a result—paradoxical as it may appear—which differing majorities of the Court find insupportable.[265]

When one reviews the insular opinions, it is easy to see what Justice Frankfurter meant and why this case is radically overblown in its significance to the immediate controversy. Justices Rutledge and Murphy, in concurring, based their votes on the irrelevance of the distinction between a state citizen and a District citizen for the purposes of diversity.[266] This view, however, was expressly rejected by the Jackson plurality of Justices Jackson, Black, and Burton. The Jackson plurality did not agree with Justice Rutledge that the term "state" had a more fluid meaning, an argument close to the one advanced by Dinh and Starr. Conversely, Justices Rutledge and Murphy strongly dissented from the arguments of the Jackson plurality.[267] Likewise, represented in two dissenting opinions, Chief Justice Vinson and Justices Frankfurter, Douglas, and Reed rejected arguments that Congress had such authority under either the District Clause or the Diversity

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263 Dinh & Charnes, *supra* note 13, at 13.

264 *See Tidewater*, 337 U.S. at 587–88, 626, 646.

265 *Id.* at 655.

266 *See id.* at 625 (Rutledge, J., concurring).

267 *Id.* at 604 ("But I strongly dissent from the reasons assigned to support [the Court's judgment] in the opinion of Mr. Justice Jackson.").

Clause.[268] The Jackson plurality prevailed because Justices Rutledge and Murphy were able to join in the result, not the rationale. Justices Rutledge and Murphy suggested that they had no argument with the narrow reading of the structuring provisions concerning voting members of Congress. Rather, they drew a distinction with other provisions affecting the rights of individuals as potentially more expansive:

> [The] narrow and literal reading was grounded exclusively on three constitutional provisions: the requirements that members of the House of Representatives be chosen by the people of the several states; that the Senate shall be composed of two Senators from each state; and that each state "shall appoint, for the election of the executive," the specified number of electors; all, be it noted, provisions relating to the organization and structure of the political departments of the government, not to the civil rights of citizens as such.[269]

Thus, Justice Rutledge saw that, even allowing for some variation in the interpretation of "states," there was a distinction to be drawn when such expansive reading would affect the organization or structure of Congress. This would leave at most three justices who seem to support the interpretation of the District Clause advanced in this case.

Professor Dinh's reliance on *De Geofroy v. Riggs*[270] is equally misplaced. It is true that the Court found that a treaty referring to "states of the Union" included the District of Columbia.[271] This interpretation, however, was not based on the U.S. Constitution and its meaning. Rather, the Court relied on the meaning commonly given this term under international law:

> It leaves in doubt what is meant by "States of the Union." Ordinarily these terms would be held to apply to those political communities exercising various attributes of sovereignty which compose the United States, as distinguished from the organized municipalities known as Territories and the District of Columbia. And yet separate communities, with an independent local government, are often described as states, though the extent of their political sovereignty be limited by relations to a more general government or to other countries. The term is used in general jurisprudence and by writ-

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268 *See id.* at 626–27 (Vinson, C.J., dissenting); *see also id.* at 646, 653–54 (Frankfurter, J., dissenting).

269 *Id.* at 619 (Rutledge, J., concurring).

270 De Geofroy v. Riggs, 133 U.S. 258 (1890).

271 Dinh & Charnes, *supra* note 13, at 16.

> ers on public law as denoting organized political societies with an established government.[272]

This was an interpretation of a treaty based on the most logical meaning that the signatories would have used for its terminology. It was not, as suggested, an interpretation of the meaning of that term as it is used in the U.S. Constitution. Indeed, as shown above, the Court begins by recognizing the more narrow meaning under the Constitution before adopting the more generally understood meaning for the purpose of interpreting a treaty in the context of international and public law.[273]

Finally, Professor Dinh and Mr. Charnes place great importance on the fact that citizens overseas are allowed to vote under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA).[274] Dinh and Charnes cite this fact as powerful evidence that "[i]f there is no constitutional bar prohibiting Congress from permitting overseas voters who are not citizens of a state to vote in federal elections, there is no constitutional bar to similar legislation extending the federal franchise to District residents."[275] Again, the comparison between overseas and District citizens is misplaced. Although the Supreme Court has never reviewed the UOCAVA and some legitimate questions remain about its constitutionality, several courts have found the statute to be constitutional.[276] In the overseas legislation, Congress made a logical choice in treating citizens abroad as continuing to be citizens of the last state in which they resided. The same argument, advanced by Dinh et al., was used and rejected in *Attorney General of Guam v. United States*.[277] In that case, citizens of Guam argued, as do Dinh and Charnes, that the meaning of "state" has been interpreted liberally and that the Overseas Act relieves any necessity of being a resident of a state for voting in the presidential election.[278] The court categorically rejected the argument and noted that the act was "premised constitutionally on prior residence in a state."[279] The court quoted from the House Report in support of this holding:

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272 *De Geofroy*, 133 U.S. at 268 (citation omitted).

273 *Id.*

274 Uniformed and Overseas Citizens Absentee Voting Act, Pub. L. No. 99-410, 100 Stat. 924 (1986) (codified as amended at 42 U.S.C. § 1973ff (Supp. IV 2000)).

275 Dinh & Charnes, *supra* note 13, at 18.

276 *See* Romeu v. Cohen, 265 F.3d 118, 125–26 (2d Cir. 2001); De La Rosa v. United States, 842 F. Supp. 607, 611–12 (D.P.R. 1994).

277 Att'y Gen. of Guam v. United States, 738 F.2d 1017, 1019–20 (9th Cir. 1984).

278 *See id.* at 1019.

279 *Id.* at 1020.

> The Committee believes that a U.S. citizen residing outside the United States can remain a citizen of his last State of residence and domicile for purposes of voting in Federal elections under this bill, as long as he has not become a citizen of another State and has not otherwise relinquished his citizenship in such prior State.[280]

Given this logical and limited rationale, the court held that the UOCAVA "does not evidence Congress's ability or intent to permit all voters in Guam elections to vote in presidential elections."[281]

Granting a vote in Congress is not merely a tinkering of "the mechanics of administering justice in our federation."[282] It would touch upon the constitutionally sacred rules of who can create laws that bind the nation.[283] This is not the first time that Congress has sought to give the District a voting role in the political process that is given textually to the states. When Congress sought to allow the District to participate in the Electoral College, it passed a constitutional amendment to accomplish that goal, the Twenty-Third Amendment. Likewise, when Congress changed the rules for electing members of the United States Senate, it did not extend the language to include the District. Rather, it reaffirmed that the voting membership was composed of representatives of the states. These cases and enactments reflect that voting was a defining characteristic of the District and not a matter that can be awarded, or removed, by a simple vote of Congress.

The courts have taken great care for over two hundred years to clearly maintain the original understanding of the District as represented by Congress as a whole. This point was made by Chief Justice John Roberts in one of his last decisions as a lower court judge. In *Banner v. United States*,[284] the D.C. Circuit (including now-Chief Justice Roberts) stressed that:

> [T]he Constitution denies District residents voting representation in Congress. . . . Congress *is* the District's government, and the fact that District residents do not have

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280 *Id.* (citing H.R. REP. NO. 649, at 7, *reprinted in* 1975 U.S.C.C.A.N. 2358, 2364).

281 *Id.*

282 Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 585 (1949).

283 In the past, the District and various territories were afforded the right to vote in Committee. Such committees, however, are merely preparatory to the actual vote on the floor. It is that final vote that is contemplated in the constitutional language. *See* Michel v. Anderson, 14 F.3d 623, 629–30 (D.C. Cir. 1994) (recognizing the constitutional limitation that would bar Congress from granting votes in the full House).

284 Banner v. United States, 428 F.3d 303 (D.C. Cir. 2005) (per curiam).

> congressional representation does not alter that constitutional reality.
>
> . . . .
>
> It is beyond question that the Constitution grants Congress exclusive authority to govern the District, but does not provide for District representation in Congress.[285]

The overwhelming case law precedent refutes the arguments of Messrs. Dinh and Starr. Indeed, just recently in *Parker v. District of Columbia*,[286] the United States Court of Appeals for the District of Columbia Circuit reaffirmed, in both majority and dissenting opinions, that the word "states" refers to actual state entities.[287] *Parker* struck down the District's gun control laws as violative of the Second Amendment.[288] That Amendment uses the term "a free state," and the parties argued over the proper interpretation of the term. Notably, in its briefs and oral argument, the District appeared to take a different position on the interpretation of the word "state," arguing that the court could dismiss the action because the District is not a state under the Second Amendment—a position later adopted by the dissenting judge. The District argued:

> The federalism concerns embodied in the Amendment have no relevance in a purely federal entity such as the District because there is no danger of federal interference with an effective *state* militia. This places District residents on a par with state residents. . . . The Amendment, concerned with ensuring that the national government not interfere with the "security of a free State," is not implicated by local legislation in a federal district having no possible impact on the states or their militias.[289]

In the opinion striking down the District's laws, the majority noted that the term "free state" was unique in the Second Amend-

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285 *Id.* at 309, 312 (citing U.S. CONST. art. I, § 8, cl. 17).

286 Parker v. District of Columbia, 478 F.3d 370 (D.C. Cir. 2007).

287 *Id.* at 396, 405. The D.C. Circuit is the most likely forum for a future challenge to this law.

288 *See id.* at 395, 399–401. The Second Amendment states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.

289 Brief for the District of Columbia at 38, Parker v. District Columbia, 478 F.3d 370 (D.C. Cir. 2007) (No. 04-7041). Adding to the irony, the District's insistence that it was a nonstate under the Constitution was criticized by the plaintiffs as "specious" because the Second Amendment uses the unique term of "free states" rather than "the states" or "the several states." This term, they argued, was intended to mean a "free society," not a state entity. Appellant's Reply Brief at 15 n.4, Parker v. District Columbia, 478 F.3d 370 (D.C. Cir. 2007) (No. 04-7041).

ment and that "[e]lsewhere the Constitution refers to 'the states' or 'each state' when unambiguously denoting the domestic political entities such as Virginia."[290] Although the dissent would have treated "free state" to mean the same as other state references, the uniform meaning given the term "states" was equally clear:

> The Supreme Court has long held that "State" as used in the Constitution refers to one of the States of the Union. . . . In fact, the Constitution uses "State" or "States" 119 times apart from the Second Amendment and in 116 of the 119, the term unambiguously refers to the States of the Union.[291]

The dissent specifically relies on the fact that the District is not a state for the purposes of voting in Congress.[292] Thus, in the latest decision from the D.C. Circuit, the judges continue the same view of the non-state status of the District, as described in earlier decisions of both the Supreme Court and lower courts.

VI. The Policy and Practical Implications of Using the District Clause To Create New Forms of Voting Members

The current approach to securing partial representation for the District is fraught with dangers. What is striking is how none of these dangers have been addressed by advocates with any level of detail. Instead, members are voting on a radical new interpretation with little thought or recognition of its implications for our constitutional system. The Framers created clear guidelines to avoid creating a system on a hope and a prayer. It would be a shame if our current leaders added ambiguity where clarity once resided in the Constitution on such a question. The burden should be on those advocating this legislation to fully answer each of these questions before asking for a vote from Congress.

A. Partisan Manipulation of the Voting Body of Congress

By adopting a liberal interpretation of the meaning of "states" in Article I, Congress would be undermining the very bedrock of our constitutional structure. The membership and division of Congress was carefully defined by the Framers. The legislative branch is the engine of the Madisonian democracy. It is in these two houses that

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290 *Parker*, 478 F.3d at 396.

291 *Id.* at 405 (Henderson, J., dissenting). The dissent noted that three instances of the use of the term "state" involve the use of "foreign state" under Article I, Section 9, Clause 8; Article III, Section 2, Clause 1; and the Eleventh Amendment. *Id.* at 405 n.9.

292 *Id.* at 406 (citing Adams v. Clinton, 531 U.S. 941 (2000)).

disparate factional disputes are converted into majoritarian compromises, the defining principle of the Madisonian system. Allowing majorities to manipulate the membership rolls would add dangerous instability and uncertainty to the system. The obvious and traditional meaning of "states" deters legislative measures to create new forms of voting representatives or shifting voters among states.[293] Under this approach, the House could award a vote to District residents and a later majority could take it away. The District residents would continue to vote, not as do other citizens, but at the whim and will of the Congress like some party favor that can be withdrawn with the passing fortunes of politics. Moreover, the evasion of the 435-member limitation created in 1911 would encourage additional manipulations of the House rolls in the future. Finally, if the Congress can give the District one vote, they could by the same authority give the District ten votes or, as noted below,[294] award additional seats to other federal enclaves.

B. Creation of New Districts Among Other Federal Enclaves and Territories

If successful, this legislation would allow any majority in Congress to create other novel seats in the House. This is not the only federal enclave, and there is great potential for abuse and mischief in the exercise of such authority. Under Article IV, Section 3, "[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[295] Roughly thirty percent of land in the United States (over 659 million acres) is part of a federal enclave regulated under the same power as the District.[296] The Supreme Court has re-

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293 This latter approach was raised by Judge Leval in *Romeu v. Cohen*, 265 F.3d 118, 129–30 (2d Cir. 2001), when he suggested that Congress could require each state to accept a certain proportion of voters in territories to give them a voice in Congress. This view has been rejected, including by the concurring opinion in that decision which found "no authority in the Constitution for the Congress (even with the states' consent) to enact such a provision." *Id.* at 131 (Walker, C.J., concurring); *see also* Igartua-De La Rosa v. United States, 417 F.3d 145, 154 n.9 (1st Cir. 2005). According to Chief Judge Walker, there are "only two remedies afforded by the Constitution: (1) statehood . . . , or (2) a constitutional amendment." Romeu, 265 F.3d at 136 (Walker, C.J., concurring).

294 *See infra* Part VII.B.

295 U.S. CONST. art. IV, § 3, cl. 2.

296 Deborah Zabarenko, *Climate Change Hit U.S. Federal Land, Water*, REUTERS, Sept. 6, 2007, *available at* http://www.alertnet.org/thenews/newsdesk/N06343350.htm; *see also* national atlas.gov, Federal Lands and Indian Reservations, http://nationalatlas.gov/printable/fedlands.html (last visited Jan. 2, 2008). In addition to the District of Columbia and domestic federal areas, this includes such territories in American Samoa, Baker Island, Federated States of Micronesia, Guam, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Marshall Islands,

peatedly stated that the congressional authority over other federal enclaves derives from the same basic source:[297]

> This brings us to the question whether Congress has power to exercise "exclusive legislation" over these enclaves within the meaning of Art. I, § 8, cl. 17, of the Constitution, which reads in relevant part: "The Congress shall have Power . . . [t]o exercise exclusive Legislation in all Cases whatsoever" over the District of Columbia and "to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings."
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> The power of Congress over federal enclaves that come within the scope of Art. I, § 8, cl. 17, is obviously the same as the power of Congress over the District of Columbia. The cases make clear that the grant of "exclusive" legislative power to Congress over enclaves that meet the requirements of Art. I, § 8, cl. 17, by its own weight, bars state regulation without specific congressional action.[298]

Congress could use the same claimed authority to award seats to other federal enclaves. Indeed, because these enclaves were not established with the purpose of being a special nonstate entity, as was the District, they could claim to be free of some of these countervailing arguments against the District. Indeed, the District is often treated the same as states for the purposes of federal jurisdiction, taxes, and military service. There are literally millions of people living in these areas, including Puerto Rico, with a population of four million people—roughly eight times the size of the District.[299] These territories are under the plenary authority of Congress.[300] Similar to the cases involving the District, this authority is often stated in absolute

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Midway Islands, Navassa Island, Northern Mariana Islands, Palmyra Atoll, Republic of Palau, Puerto Rico, the U.S. Virgin Islands, U.S. Minor Outlying Islands, and Wake Island. FEDERAL REAL PROPERTY COUNCIL, FY 2005 FEDERAL REAL PROPERTY REPORT: AN OVERVIEW OF THE FEDERAL GOVERNMENT'S REAL PROPERTY ASSETS 3 (June 2006), http://www.gsa.gov/gsa/cm_attachments/GSA_DOCUMENT/TRPR_5-30_updated_R2872-m_0Z5RDZ-i34K-pR.pdf.

297 In addition to Article I, Section 8, the Territorial Clause in Article IV, Section 3 states that "[t]he Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." U.S. CONST. art. IV, § 3, cl. 2.

298 Paul v. United States, 371 U.S. 245, 263 (1963).

299 U.S. Census Bureau, http://www.census.gov/schools/facts/puerto_rico.html.

300 *See, e.g.*, Davila-Perez v. Lockheed Martin Corp., 202 F.3d 464, 468 (1st Cir. 2000) ("Puerto Rico . . . is still subject to the plenary powers of Congress under the territorial clause . . . .").

terms. In *Downes v. Bidwell*,[301] the Court held that "[t]he territorial clause . . . is absolute in its terms, and suggestive of no limitations upon the power of Congress in dealing with [nonstate territories]."[302] Puerto Rico would warrant as many as six districts.[303] It is not enough to assert that the District has a more compelling political or historical case. Advocates within these federal enclaves and territories can, and have,[304] cited the same interpretation for their own representation in Congress.

It is no answer to this concern to note that territory residents do not bear full taxation burdens, military conscription, or the right to vote in presidential elections.[305] Congress determines whether these territories will bear taxation or service burdens, just as it did for the District. The District previously did not share the taxation burden, but now does as a result of congressional fiat. As for the presidential election, it took the Twenty-Third Amendment to secure that right for the District residents. If anything, voting in the presidential elections is proof that the District is not distinct from territories.

Finally, it is argued that residents in the territories only have nationality not citizenship.[306] In fact, there are millions of citizens residing in federal enclaves and territories. More to the point, the interpretation being advanced in this legislation turns on the authority of Congress, not the status of residents, to justify the creation of a new district.

C. *Expanded Senate Representation*

Although the issue of Senate representation is left largely untouched in the Dinh and Starr analyses,[307] there is no obvious princi-

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301 Downes v. Bidwell, 182 U.S. 244 (1901).

302 *Id.* at 285.

303 Indeed, citing this bill, some have already called for Puerto Rico to be given multiple seats in Congress. *See* José R. Coleman Tió, Comment, *Six Puerto Rican Congressmen Go to Washington*, 116 YALE L.J. 1389, 1390 n.6 (2007).

304 *Id.* at 1391–92.

305 *Cf.* Bress & McGill, *supra* note 131, at 8 (citing such factors to support the claim of unique status for the District).

306 *Id.*

307 In their footnote on this issue, Dinh and Charnes note that there may be significance that the Seventeenth Amendment refers to the election of two Senators "from each state." Dinh & Charnes, *supra* note 13, at 13 n.57. They suggest that this somehow creates a clearer barrier to District representatives in the Senate—a matter of obvious concern in that body. *See id.* The interpretation tries too hard to achieve a limiting outcome, particularly after endorsing a wildly liberal interpretation of the language of Article I. Article I, Section 2 refers to members elected "by the People of the several States" whereas the Seventeenth Amendment refers to two Senators "from each State" and "elected by the people thereof." U.S. CONST. art. I, § 2; *id.* amend.

ple that would prevent a majority from expanding its ranks with two new Senate seats for the District. Two Senators and a member of the House would be a considerable level of representation for a nonstate with a small population. Yet, this analysis would suggest that such a change could take place without a constitutional amendment. When asked about the extension of the same theory to claiming two Senate seats in the last hearing before the House Judiciary Committee, Professor Dinh once again said that he had not given it much thought.[308] Yet, since his first report in 2004, this issue has been repeatedly raised to Dinh without a response. Likewise, Richard Bress has given legal advice to the House Committee on the constitutionality of the legislation for years and was asked the same question in the last hearing, but insisted that he had not resolved the question.[309] After those hearings, Mr. Bress published a defense of the current bill, and, despite the earlier questions from members on this point, he again declined to answer and dismissed the issue as "entirely speculative."[310]

In his last testimony on this question, Dinh ventured to offer a possible limitation that would confine his interpretation to only the House. He cited Article I, Section 3, and (as he had in his 2004 report) noted that "quite unlike the treatment of the House of Representatives, the constitutional provisions relating to composition of the Senate additionally specifies that there shall be two senators 'from each State.'"[311] As I pointed out in the prior hearing, however, Section 2 has similar language related to the House, specifying that "each State shall have at Least one Representative."[312] It remains unclear why this language does not suggest that same "interests of states qua states" for the House as it does for the Senate.

Conversely, if this language can be ignored in Section 2, it is not clear why it cannot also be ignored in Section 3. One would expect at a minimum that, after three years, these advocates could answer this

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XVII. Because the object of the Seventeenth Amendment is to specify the number from each state, it is obviously more direct to write "two Senators from each State," rather than "two Senators elected by the people from each of the several States."

308 *See Judiciary Comm. Hearing*, *supra* note 12, at 112 (testimony of Viet Dinh, Professor of Law and Co-Director Asian Law & Policy Studies Georgetown University Law Center).

309 *See id.* (testimony of Richard P. Bress, Partner, Latham & Watkins, LLP).

310 Bress & McGill, *supra* note 131, at 12.

311 *See Judiciary Comm. Hearing*, *supra* note 12, at 20 n.56, 118 (testimony of Viet Dinh, Professor of Law and Co-Director Asian Law & Policy Studies Georgetown University Law Center); Dinh & Charnes, *supra* note 13, at 13 n.57.

312 *Hearing on H.R. 5388*, supra note 7 (testimony of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School) (referring to U.S. CONST. art. I, § 2).

question with the certainty that they offer on the House question. There is an element of willful blindness to the implications of the new interpretation. To his credit, at the last hearing, Bruce Spiva of DC Vote answered the question directly.[313] He stated that he wanted to see such Senate representation and believed that the same arguments could secure such an expansion.[314] Legislators should not vote on a radical new interpretation without confirming whether the same argument would allow the addition of new members in the Senate.

D. One Person, One Vote

This legislation would create a bizarre district that would not be affected by a substantial growth or reduction in population. The bill states that "the District of Columbia may not receive more than one Member under any reapportionment of Members."[315] Thus, whether the District of Columbia grew to three million or shrank to 30,000 citizens, it would remain a single congressional district, unlike other districts that must increase or decrease to guarantee such principles as one person/one vote. This could ultimately produce another one person/one vote issue. If the District shrinks to a sub-standard size in population, other citizens could object that because it is not a state under Article I, Section 3 (creating the minimum of vote representative per state), this new District would violate principles of equal representation. Likewise, if the District grew in population, citizens would be underrepresented and Congress would be expected to add another representative under the same principles, potentially giving the District more representatives than some states. The creation of a district outside of the apportionment requirements is a direct contradiction of the Framers' intent.[316]

E. Nonseverability

The inevitable challenge to this legislation could produce serious legislative complications. With a relatively close House division, the casting of a questionable vote for the District could leave the validity of the legislation itself in question. Moreover, if challenged, the status of the two new members would be in question. This latter problem is not resolved by Section 6's nonseverability provision, which states: "If

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313 *See Judiciary Comm. Hearing*, *supra* note 12, at 35 (testimony of Bruce V. Spiva, Partner, Spiva & Hartnett, LLP).

314 *Id.*

315 S. 1257, 110th Cong. § 2(b)(1) (2007).

316 *See* Wesberry v. Sanders, 376 U.S. 1, 8–11, 13–14 (1964).

any provision of this Act or any amendment made by this Act is declared or held invalid or unenforceable, the remaining provisions of this Act or any amendment made by this Act shall be treated and deemed invalid and shall have no force or effect of law."[317] However, if the D.C. vote is subject to a temporary or permanent injunction (or conversely, if the Utah seat is enjoined), it could be argued that a provision of the Act was not technically "declared or held invalid or unenforceable." Rather, it could be enjoined for years on appeal, without any declaration or holding of unenforceability. This confusion could even extend to the next presidential election. By adding a district to Utah, that new seat would add another electoral vote for Utah in the presidential election. Given the last two elections, it is possible that there could be another cliffhanger with a tie or one-vote margin between the main candidates. The Utah vote could be determinative. Yet, such a close election is likely to occur in the midst of litigation over the current legislation.[318] Thus, we could face a constitutional crisis over whether the Congress will accept the results based upon this vote when both the Utah and District seats might be nullified in a final ruling.[319]

F. Qualification Issues

Because delegates are not addressed or defined in Article I, these new members from the District or territories would not technically be covered by the qualification provisions for members of Congress. Thus, although conventional members of Congress would be constitutionally defined,[320] these new members would be legislatively defined—allowing Congress to lower or raise such requirements in contradiction to the uniform standard of Article I. Conversely, if Congress treats any district or territory as "a state" and any delegate as a "member of Congress," it would effectively gut the qualification standards in the Constitution by treating the title rather than the defi-

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317 S. 1257, 110th Cong. § 6 (2007).

318 The case challenging the Elizabeth Morgan Act (on which I was lead counsel) took years before it was struck down as an unconstitutional bill of attainder. *See* Foretich v. United States, 351 F.3d 1198, 1204, 1226 (D.C. Cir. 2003).

319 Indeed, some in Utah are already questioning the wisdom of seeking this novel deal with the District because it is likely that the state will receive a new district in the ordinary course of reapportionment in 2012, while litigation would delay any seat founded on this legislation. *See* Thomas Burr, *Should Utah Stay on Quest for House Seat?*, SALT LAKE TRIB., Sept. 23, 2007.

320 *See* U.S. CONST. art. I, § 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.").

nition of "members of Congress" as controlling. As noted above,[321] this directly contradicts the express effort of the Framers to make the qualifications of Congress a fixed structural element of the Constitution.

Another example of this contradiction can be found in the definition of the districts of members versus delegates. Members of Congress represent districts that are adjusted periodically to achieve a degree of uniformity in the number of constituents represented, including the need to add or eliminate districts for states with rising or falling constituencies. A District member would be locked into a single district that would not change with the population. The result is undermining the uniformity of qualifications and constituency provisions that the Framers painstakingly placed into Article I.

G. Faustian Bargain

This legislation is a true Faustian bargain for District residents who are about to effectively forego true representation for a limited and non-guaranteed district vote in one house. The legislation would only serve to delay true representational status for district residents. On a practical level, this bill would likely extinguish efforts at full representation in both houses. During the pendency of the litigation, it is highly unlikely that additional measures would be considered, thereby delaying reforms for many years. Ultimately, if the legislation were struck down, it would leave the campaign for full representation frozen in political amber for many years.[322]

VII. The Modified Retrocession Plan: A Three-Phase Alternative for the Full Representation of Current District Residents in Both the House and the Senate

The history of the District of Columbia shows that, even before its formal creation, there were cries of objection to the status of its

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321 *See supra* notes 107–10 and accompanying text.

322 Notably, the sponsors would not support a good-faith offer from Senator John Warner (R-Va.) to draft a constitutional amendment that would create the special seat in the House for the District. *See* Mary Beth Sheridan, *Senators Block D.C. Vote Bill, Delivering Possibly Fatal Blow*, WASH. POST, Sept. 19, 2007, at A1. The dismissal of this proposal was highly enlightening. Some sponsors do not believe that they could win a direct vote by the citizens. Thus, they are seeking a novel way of circumventing voters and hoping that plaintiffs would not have standing to challenge the law. The assumption that the public would not support the reform, however, is misplaced. The last amendment sought the creation of a 51st state, a much more difficult concept to sell to the public. The creation of a special seat for the district is materially different from the earlier proposal.

residents.[323] Since that time, there have been dozens of different proposals to change the status of the District, including one successful retrocession of part of the original district and one unsuccessful effort to ratify a constitutional amendment making the district a state.[324] A constitutional amendment remains the most straightforward approach to resolving this long controversy. Certainly, as noted above, it was the option that many thought appropriate when the District was created. Moreover, while the proposal of state status was not popular nationally, a more modest constitutional amendment securing representation in the House would likely appeal to many reluctant voters. Thus, the current legislative approach could be put into a proposed amendment and possibly win over those citizens uncomfortable with the idea of either statehood or senate representation for the District.[325]

Putting aside a constitutional amendment, however, there remains retrocession, which can come in many different forms. Like a constitutional amendment, retrocession offers a complete and lasting resumption of political rights for residents. Ironically, the complete bar to representation in Congress was viewed as necessary because any halfway measure would only lead to eventual demands for statehood. For example, James Holland of North Carolina noted that only retrocession would work because anything short of that would be a flawed territorial form of government:

> If you give them a Territorial government they will be discontented with it, and you cannot take from them the privilege you have given. You must progress. You cannot disenfranchise them. The next step will be a request to be admitted as a member of the Union, and, if you pursue the practice relative to territories, you must, so soon as their numbers will authorize it, admit them into the Union. Is it proper or politic to add to the influence of the people of the seat of Government by giving a representative in this House and a representation in the Senate equal to the greatest State in the Union? In my conception it would be unjust and impolitic . . . .[326]

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323 *See supra* note 125 and accompanying text.

324 *See supra* notes 195–96 and accompanying text.

325 This alternative has been refused by sponsors who insist on a legislative fix rather than presenting the question to the voters. *See* Mary Beth Sheridan, *D.C. Vote Nears Its Do-or-Die Moment*, WASH. POST, Sept. 16, 2007, at C1.

326 Richards, *supra* note 192 (quoting Rep. James Holland, R-N.C.).

We are, hopefully, in the final chapter of this debate. One hundred and sixty years ago, Congress retroceded land back to Virginia under its Article I authority.[327] Retrocession has always been the most direct way of securing a resumption of voting rights for District residents.[328] Most of the District can be simply returned from whence it came: the state of Maryland. The greatest barrier to retrocession has always been more symbolic than legal. Replacing Washington, DC with Washington, MD is a conceptual leap that many are simply not willing to make. However, it is the most logical resolution of this problem.[329]

For a number of years, I have advocated the reduction of the District of Columbia to the small area that runs from the Capitol to the Lincoln Memorial.[330] The only residents in this space would be the First Family. The remainder of the current District would then be retroceded to Maryland.

Such retrocession can occur without a constitutional amendment. Ironically, in 1910 when some members sought to undo the Virginia retrocession, another George Washington University Law Professor, Hannis Taylor, supplied the legal analysis that the prior retrocession was unconstitutional without an amendment.[331] I respectfully disagree with my esteemed predecessor. In my view, Congress can not only order retrocession, but can do it without the prior approval of Maryland—though I believe that this would be a bad policy decision. Although Congress did allow Virginia to vote to accept its land back, it is not clearly required to do so under the Constitution. The original land grant was ceded to Congress, which always had the right to retrocede it. Obviously, no one is suggesting such a step. As a constitu-

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[327] *See supra* note 195 and accompanying text.

[328] An alternative, but analogous, retrocession plan has been proposed by Representative Dana Rohrabacher. For a recent discussion of this proposal, see Dana Rohrabacher, *Full Representation for Washington—The Constitutional Way*, ROLL CALL, Jan. 25, 2007, at 8.

[329] At first blush, there would seem to be a promising approach found in legislation granting Native Americans the right to vote in the state in which their respective reservation is located. *See* 8 U.S.C. § 1401(a)(2) (2000). After all, these areas fall under congressional authority in the provision of Section 8. U.S. CONST. art. 1, § 8, cl. 3. The District, however, presents the dilemma of being intentionally created as a unique nonstate entity, severed from Maryland. For this approach to work, the District would still have to be returned to Maryland while retaining the status of a federal enclave. *See* Evans v. Cornman, 398 U.S. 419, 424–25 (1970) (holding that residents on the campus of the National Institutes of Health (NIH) in Maryland could vote as part of that state's elections).

[330] *See, e.g.*, *Hearing on H.R. 5388*, *supra* note 7 (testimony of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School).

[331] S. DOC. NO. 61-286, at 4 (1910) (Opinion of Hannis Taylor as to the Constitutionality of the Act of Retrocession of 1846).

tional matter, however, I do not see the barrier to retroceding the Maryland portion of the original federal enclave. As John Calhoun correctly noted in 1846: "The act of Congress, it was true, established this as the permanent seat of Government; but they all knew that an act of Congress possessed no perpetuity of obligation. It was a simple resolution of the body, and could be at any time repealed."[332]

I have also proposed a three-phase process for retrocession. In the first phase, a political transfer would occur immediately with the District securing a House seat as a Maryland district and residents voting in Maryland statewide elections. In the second phase, any incorporation of public services from education to prisons to law enforcement would occur. In the third phase, any incorporation of tax and revenue systems would occur.

These phases would occur over many years with only the first phase occurring immediately upon retrocession. Indeed, I have recommended the creation of a three-commissioner body, like the one that worked with George Washington in the establishment of the original federal district. These commissioners would recommend and oversee the incorporation process. Moreover, Maryland can agree to continue to treat the District as a special tax or governing zone until incorporation is completed. Indeed, Maryland may choose to allow the District to continue in a special status due to its historical position.

Any incorporation is made easier, not more difficult, by the District's historic independence. Like most cities, it would continue to have its own law enforcement and local governing authority. The District could also benefit, however, from incorporation into Maryland's respected educational system and other statewide programs related to prisons and other public needs. Maryland could benefit from the addition of one of the world's great centers of learning and politics and a city experiencing a comprehensive political and economic renewal after years of corruption and cronyism.[333] The city is now prospering, and its residents currently pay roughly $6 billion a year in federal taxes, the second highest per capita in the nation.[334]

In my view, this approach would be unassailable on a legal level and highly efficient on a practical level. I realize that there remains a fixation with the special status of the city, but much of this status

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332 CONG. GLOBE, 29th Cong., 1st Sess. 1046 (1846).

333 *See, e.g.*, David Nakamura, *Senate Approves D.C. School Takeover Plan*, WASH. POST, May 23, 2007, at B1.

334 *See Homeland Security Hearing*, *supra* note 5, at 1 (testimony of Del. Eleanor Holmes Norton, D-D.C.).

would remain. Although the city would not technically be the seat of government, it would obviously remain for all practical purposes our Capital City.

This is not to suggest that a retrocession would be without complexity. Indeed, the Twenty-Third Amendment represents an obvious anomaly.[335] Section 1 of that Amendment states:

> The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:
>
> > A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.[336]

Because the only likely residents would be the first family, this presents something of a problem. There are a few obvious solutions. One solution would be to repeal the Amendment, which is the most straight-forward and preferred.[337] Another approach would be to leave the Amendment as constructively repealed. Most presidents vote in their home states. A federal law can bar residences in the new District of Columbia. A third and related approach would be to allow the Clause to remain dormant because it states that electors are to be appointed "as the Congress may direct."[338] Congress can enact a law directing that no such electors may be chosen. The only concern is that a future majority could do mischief by directing an appointment when electoral votes are close.

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335 *See* U.S. CONST. amend. XXIII.

336 *Id.* amend. XXIII, § 1.

337 I have previously stated that my preference would be to repeal the entire Electoral College as an archaic and unnecessary institution and move to direct election of our President. But that is a debate for another day.

338 *See* Peter Raven-Hansen, *The Constitutionality of D.C. Statehood*, 60 GEO. WASH. L. REV. 160, 187–88 (1991); Philip G. Schrag, *The Future of District of Columbia Home Rule*, 39 CATH. U. L. REV. 311, 317 (1990).

Conclusion

There is an old story about a man who comes upon another man in the dark on his knees looking for something under a street lamp. "What did you lose?" he asked the stranger. "My wedding ring," he answered. Sympathetic, the man joined the stranger on his knees and looked for almost an hour until he asked if the man was sure that he dropped it here. "Oh, no," the stranger admitted, "I lost it across the street but the light is better here." Like this story, there is a tendency in Congress to look for answers where the political light is better, even when it knows that the solution must be found elsewhere. That is the case with the current District legislation, which mirrors an earlier failed effort to pass a constitutional amendment. The 1978 amendment was a more difficult course, but the answer to the current problems can only be found constitutionally in some form of either an amendment or retrocession.

Currently, the advocates of a new District seat are looking where the light is better with a simple political trade-off of two seats. It is deceptively easy to make such political deals by majority vote. Not only is this approach facially unconstitutional, but the outcome of this legislation, even if sustained on appeal, would not be cause for celebration. Indeed, this legislation would replace one grotesque constitutional curiosity in the current status of the District with a new curiosity. The creation of a single vote in the House (with no representation in the Senate) would create a type of half-formed citizenry with partial representation derived from residence in a nonstate. It is an idea that is clearly put forward with the best of motivations, but one that is shaped by political convenience rather than constitutional principle.

From its very inception, the District was meant to be unique: a nonstate entity represented by the whole of Congress. It may be true that the drafters should have addressed concerns like those of Hamilton. However, there is an amendment process for the correction of outdated or ill-advised provisions. More importantly, this constitutional process would preserve the integrity and stability of the legislative branch. Allowing Congress to create new forms of members would undermine the very structure of the legislative branch under Article I.

It is certainly time to right this historical wrong, but, in our constitutional system, how we do something is often more important than what we do. The current legislative approach is simply the wrong means to a worthy end. It is not, however, the only means. Although

a constitutional amendment and retrocession are neither easy nor fast, they represent the greatest hope for a lasting resolution of the unrepresented status of the citizens of the District of Columbia.

Mr. NADLER. Thank you, Professor. We appreciate you will submit the rest of your testimony for the record.

And I recognize Professor Dinh for 5 minutes.

TESTIMONY OF VIET D. DINH, PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER

Mr. DINH. Thank you, Chairman Nadler, Ranking Member Sensenbrenner, Members of the Committee. It is an honor to be here with you again.

The question we have been asking——

Mr. NADLER. Sorry—are you using the mic?

Mr. DINH. I am, sir. I am, sir. I will speak louder.

The question that we have been asked to consider today, the constitutionality of H.R. 157, I will admit is a difficult one, but one ultimately that I conclude in the affirmative, that Congress has ample authority to pass H.R. 157.

And I, of course, am not alone. Judge Starr, Judge Wald, 25 other constitutional lawyers and law professors, not the least of which I would recognize as Delegate Holmes Norton herself, who, like me, is a constitutional law professor at the Georgetown University Law Center, as well as the American Bar Association.

But it is a difficult question. It is difficult, because we see two constitutional provisions that appears to be in tension.

The first is, of course, the District Clause, which gives Congress the power "to exercise exclusive legislation in all cases whatsoever" over the District.

The courts have characterized this power as plenary and majestic. Now, this interpretation makes structural sense, because the District Clause works an exception to the system of federalism in our Constitution.

Article I, Section 8 defines the power of Congress. Article I, Section 9 limits the power of Congress. And Section 10 limits the power of the states.

But when Congress acts pursuant to the District Clause, it acts as a legislature of national character, exercising in the words of the D.C. Court of Appeals, "complete legislative control as contrasted with the limited power of the state legislature on the one hand and as contrasted with the limited sovereignty which Congress exercises within the boundaries of the states on the other."

This is truly a unique plenary and exclusive power you alone in this entire Federal republic have complete power as a legislature of national character.

But opponents also raise an important point when they cite Article I, Section 2, the Composition Clause. "The House of Representatives shall be composed of members chosen in every second year by the people of the several states."

Because D.C. is not a state, so goes the argument, Congress cannot allow District residents to vote for a representative.

I note only in passing that the argument is a textual one. It proceeds from text, but it is not clearly a textualist one, because it proceeds from a negative implication of what is not said—that is, the negative implication is that because it does not say state and the territories and the District, then by definition or by implication, such people are excluded.

But it is only by negative implication, not clear. explicit textual command.

When we are faced with such a seeming contradiction or tension between the various provisions of the Constitution, I think it is our duty as Constitution interpreters to try to resolve them. And that is how the courts have tried to do in other contexts.

Yes, the District is not a state. Yes, "states" mean states. But in other contexts, where we have similar type intention, the courts have resolved the issue by allowing Congress to treat District residents as if they were residents of states, or courts themselves have treated District residents as if they were residents of a state.

I cite here the tax apportionment clauses, Article I, Section 2, and the 16th amendment, the Congressional authority to regulate commerce among the several states, the sixth amendment right to jury trial, and state sovereignty unity under the 11th amendment, even though each one of these provisions in our Constitution refer only to "states."

More relevantly, I think the specific historical incident supports this conclusion in the context of House representation. As you know, the District originally was made up of land ceded by Maryland in 1788 and Virginia in 1789.

By the Residence Act of 1790, Congress accepted the cession. The text of the Residence Act of July 16th, 1790, is in point, so I want to quote it.

The land, "it is hereby accepted for the permanent seat of the government of the United States, provided nevertheless that the operation of the laws of within such District shall not be affected by this acceptance until such time fixed for the removal of the government thereto and until Congress shall otherwise by law provide."

What this provision of law means is that between 1790, when Congress assumed title and jurisdiction over the land, and 1800, when government was officially moved here from Philadelphia, Congress by act of Congress, by the Residence Act, provided that the laws of Maryland and Virginia would operate here in the District.

During that time the District residents enjoyed the right to vote not because they were citizens of Maryland or Virginia—they had lost that right; in 1790 the land was ceded and accepted—but rather by act of Congress granting them that right to vote as if they were residents of—or citizens of Maryland and Virginia.

What Congress could do then I submit Congress can now do in order to give the District residents the power to vote for its own representative.

There are a number of cases holding that District residents are no longer residents of Maryland and Virginia. These cases, as I have noted, confirm that they are no longer exercising the right of the citizenship under Maryland and Virginia, but rather that right was granted to them in the first Congress in 1790.

I encourage this Committee to evaluate this historical evidence and treat this issue as their predecessors did in the first Congress. Thank you very much.

[The prepared statement of Mr. Dinh follows:]

PREPARED STATEMENT OF

PROF. VIET D. DINH

GEORGETOWN UNIVERSITY LAW CENTER
AND BANCROFT ASSOCIATES, PLLC

Before the

COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

of the

U.S. HOUSE OF REPRESENTATIVES

On the

DISTRICT OF COLUMBIA HOUSE VOTING RIGHTS ACT OF 2009

January 27, 2009

Prepared Statement of Prof. Viet D. Dinh on the
District of Columbia House Voting Rights Act of 2009[1]

As delegates gathered in Philadelphia in the summer of 1787 for the Constitutional Convention, among the questions they faced was whether the young United States should have an autonomous, independent seat of government. Just four years prior, in 1783, a mutiny of disbanded soldiers had gathered and threatened Congressional delegates when they met in Philadelphia. Congress called upon the government of Pennsylvania for protection; when refused, it was forced to adjourn and reconvene in New Jersey.[2] The incident underscored the importance that "the federal government be independent of the states, and that no one state be given more than an equal share of influence over it. . . ."[3] According to James Madison, without a permanent national capital,

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[1] This submission closely tracks the testimony that Mr. Adam H. Charnes and I submitted to the House Committee on Government Reform in 2004.

[2] KENNETH R. BOWLING, THE CREATION OF WASHINGTON, D.C. 30-34 (1991), *cited in Adams v. Clinton*, 90 F. Supp. 2d 35, 50 n.25 (D.D.C.), *aff'd*, 531 U.S. 940 (2000).

[3] STEPHEN J. MARKMAN, STATEHOOD FOR THE DISTRICT OF COLUMBIA: IS IT CONSTITUTIONAL? IS IT WISE? IS IT NECESSARY? 48 (1988); *see also Adams*, 90 F. Supp. 2d at 50 n.25 (quoting THE FEDERALIST NO. 43) (James Madison) ("The gradual accumulation of public improvements at the stationary residence of the Government, would be . . . too great a public pledge to be left in the hands of a single State"); *id.* at 76 (Oberdorfer, J., dissenting in part) ("What would be the consequence if the seat of the government of the United States, with all the archives of America, was in the power of any one particular state? Would not this be most unsafe and humiliating?" (quoting James Iredell, Remarks at the Debate in North Carolina Ratifying Convention (July 30, 1788), *in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 219-20 (Jonathan Elliot ed., 2d ed. 1907), *reprinted in* 3 THE FOUNDERS' CONSTITUTION 225 (Philip B. Kurland & Ralph Lerner eds., 1987))); Lawrence M. Frankel, Comment, *National Representation for the District of Columbia: A Legislative Solution*, 139 U. PA. L. REV. 1659, 1684 (1991); Peter Raven-Hansen, *Congressional Representation for the District of Columbia: A Constitutional Analysis*, 12 HARV. J. ON LEGIS. 167, 171 (1975) ("How could the general government be guarded from the undue influence of particular states, or from insults, without such exclusive power? If it were at the pleasure of a particular state to control the sessions and deliberations of Congress, would they be secure from insults, or the influence of such state?" (quoting James Madison in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 433 (Jonathan Elliot ed., 2d ed. 1907)); Raven-Hansen, 12 HARV. J. ON LEGIS. at 170 (having the national and a state capital in the same place would give "'a provincial tincture to your national deliberations.'" (quoting George Mason in JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 332 (Gaillard Hund & James B. Scott eds., 1920)).

> not only the public authority might be insulted and its proceedings be interrupted, with impunity; but a dependence of the members of the general Government, on the State comprehending the seat of the Government for protection in the exercise of their duty might bring on the national councils an imputation of awe or influence, equally dishonorable to the Government and dissatisfactory to the other members of the confederacy.[4]

The Constitution thus authorized the creation of an autonomous, permanent District to serve as the seat of the federal government. This clause was effectuated in 1790, when Congress accepted land that Maryland and Virginia ceded to the United States to create the national capital.[5] Ten years later, on the first Monday of December 1800, jurisdiction over the District of Columbia (the "District") was vested in the federal government.[6] Since then, District residents have not had a right to vote for Members of Congress.

The *District of Columbia House Voting Rights Act of 2009*, H.R. 157, (the "Act"), would grant District residents Congressional representation by providing that the District be considered a Congressional district in the House of Representatives, beginning with the 112th Congress.[7] To accommodate the new representative from the District, membership in the House would be permanently increased by two members. One newly created seat would go to the representative from the District, and the other would be assigned to the State next eligible for a Congressional district.[8]

Congress has ample constitutional authority to enact the *District of Columbia House Voting Rights Act of 2009*. The District Clause, U.S. Const. Art. I, § 8, cl. 17, empowers Congress to "exercise exclusive Legislation in all Cases whatsoever, over such

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[4] THE FEDERALIST NO. 43, at 289 (James Madison) (Jacob E. Cooke ed., 1961).

[5] Act of July 16, 1790, ch. 28, 1 Stat. 130; see also Act of Mar. 3, 1791, ch. 27, 1 Stat. 214. The land given by Virginia was subsequently retroceded by act of Congress (and upon the consent of the Commonwealth of Virginia and the citizens residing in such area) in 1846. See Act of July 9, 1846, ch. 35, 9 Stat. 35.

[6] *See* Act of July 16, 1790, ch. 28, § 6, 1 Stat. 130; *see also Hobson v. Tobriner*, 255 F. Supp. 295, 297 (D.D.C. 1966).

[7] H.R. 157, 111th Cong. § 2(a) (2009).

[8] *Id.*, § 3(a).

District" and thus grants Congress plenary and exclusive authority to legislate all matters concerning the District. This broad legislative authority extends to the granting of Congressional voting rights for District residents—as illustrated by the text, history and structure of the Constitution as well as judicial decisions and pronouncements in analogous or related contexts. Article I, section 2, prescribing that the House be composed of members chosen "by the People of the several States," does not speak to Congressional authority under the District Clause to afford the District certain rights and status appurtenant to states. Indeed, the courts have consistently validated legislation treating the District as a state, even for constitutional purposes. Most notably, the Supreme Court affirmed Congressional power to grant District residents access to federal courts through diversity jurisdiction, notwithstanding that the Constitution grants such jurisdiction only "to all Cases . . . between Citizens of different States."[9] Likewise, cases like *Adams v. Clinton*, 90 F. Supp. 2d 35, 50 n.25 (D.D.C.), *aff'd*, 531 U.S. 940 (2000), holding that District residents do not have a judicially enforceable constitutional right to Congressional representation, do not deny (but rather, in some instances, affirm) Congressional authority under the District Clause to grant such voting rights.

I. Congress Has the Authority under the District Clause to Provide the District of Columbia with Representation in the House of Representatives.

The District Clause provides Congress with ample authority to give citizens of the District representation in the House of Representatives. That Clause provides Congress with extraordinary and plenary power to legislate with respect to the District. This authority was recognized at the time of the Founding, when (before formal creation of the national capital in 1800) Congress exercised its authority to permit citizens of the District to vote in Maryland and Virginia elections.

A. The Constitution Grants Congress the Broadest Possible Legislative Authority Over the District of Columbia.

[9] U.S. CONST. art. III, § 2.

The District of Columbia as the national seat of the federal government is explicitly created by Article I, § 8, clause 17 (the "District Clause"). This provision authorizes Congress

> [t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States...

This clause, which has been described as "majestic in its scope,"[10] gives Congress plenary and exclusive power to legislate for the District.[11] Courts have held that the District Clause is "sweeping and inclusive in character"[12] and gives Congress "extraordinary and plenary power" over the District.[13] It allows Congress to legislate within the District for "every proper purpose of government."[14] Congress therefore possesses "full and unlimited jurisdiction to provide for the general welfare of citizens within the District of Columbia by any and every act of legislation which it may deem conducive to that end," subject, of course, to the negative prohibitions of the Constitution.[15]

To appreciate the full breadth of Congress' plenary power under the District Clause, one need only recognize that the Clause works an exception to the constitutional structure of "our Federalism,"[16] which delineates and delimits the legislative power of Congress and state legislatures. In joining the Union, the states gave up certain of their

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[10] Common Sense Justice for the Nation's Capital: An Examination of Proposals to Give D.C. Residents Direct Representation Before the House Comm. On Government Reform, 108th Cong. 2d Sess. (June 23, 2004) (statement of the Hon. Kenneth W. Starr).

[11] *Sims v. Rives*, 84 F.2d 871, 877 (D.C. App. 1936).

[12] *Neild v. District of Columbia*, 110 F.2d 246, 249 (D.C. App. 1940).

[13] *United States v. Cohen*, 733 F.2d 128, 140 (D.C. Cir. 1984).

[14] *Neild*, 110 F.2d at 249.

[15] *Id.* at 250; *see also Capital Traction Co. v. Hof*, 174 U.S. 1, 5 (1899); *Turner v. D.C. Bd. of Elections & Ethics*, 77 F. Supp. 2d 25, 29 (D.D.C. 1999). As discussed *infra*, the terms of Article I, § 2 do not conflict with the authority of Congress in this area.

[16] *Younger v. Harris*, 401 U.S. 37, 44 (1971).

powers. Most explicitly, Article II, section 10 specifies activities which are prohibited to the States. None of these prohibitions apply to Congress when it exercises its authority under the District Clause. Conversely, Congress is limited to legislative powers enumerated in the Constitution; such limited enumeration, coupled with the reservation under the Tenth Amendment, serves to check the power of Congress vis-à-vis the states.[17] The District Clause contains no such counterbalancing restraints because its authorization of "exclusive Legislation in all Cases whatsoever" explicitly recognizes that there is no competing state sovereign authority. Thus, when Congress acts pursuant to the District Clause, it acts as a legislature of national character, exercising "complete legislative control as contrasted with the limited power of a state legislature, on the one hand, and as contrasted with the limited sovereignty which Congress exercises within the boundaries of the states, on the other."[18] In few, if any, other areas does the Constitution grant any broader authority to Congress to legislate.

B. Evidence at the Founding Confirms that Congress' Extraordinary and Plenary Authority under the District Clause Extends to Granting Congressional Representation to the District.

There are no indications, textual or otherwise, to suggest that the Framers intended that Congressional authority under the District Clause, extraordinary and plenary in all other respects, would not extend also to grant District residents representation in Congress. The delegates to the Constitutional Convention discussed and adopted the Constitution without any recorded debates on voting, representation, or other rights of the inhabitants of the yet-to-be-selected seat of government.[19] The purpose for establishing a federal district was to ensure that the national capital would not be subject to the influences of any state.[20] Denying the residents of the District the right

[17] *See United States v. Lopez*, 514 U.S. 549, 552 (1995); New York v. United States, 505 U.S. 144, 155-56 (1992).

[18] *Neild*, 110 F.2d at 250.

[19] *Adams*, 90 F. Supp. 2d at 77 (Oberdorfer, J., dissenting in part).

[20] Frankel, *supra* note 2, at 1668; Raven-Hansen, *supra* note 2, at 178.

to vote in elections for the House of Representatives was neither necessary nor intended by the Framers to achieve this purpose.[21]

Indeed, so long as the exact location of the seat of government was undecided, representation for the District's residents seemed unimportant.[22] It was assumed that the states donating the land for the District would make appropriate provisions in their acts of cession for the rights of the residents of the ceded land.[23] As a delegate to the North Carolina ratification debate noted,

> Wherever they may have this district, they must possess it from the authority of the state within which it lies; and that state may stipulate the conditions of the cession. Will not such state take care of the liberties of its own people?[24]

James Madison also felt that "there must be a cession, by particular states, of the district to Congress, and that the states may settle the terms of the cession. The states may make what stipulation they please in it, and, if they apprehend any danger, they may refuse it altogether."[25] The terms of the cession and acceptance illustrate that, in effect, Congress exercised its authority under the District Clause to grant District residents voting rights coterminous with those of the ceding states when it accepted the land in 1790. Maryland ceded land to the United States in 1788.[26] Virginia did so in 1789.[27]

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[21] Frankel, *supra* note 2, at 1685; Raven-Hansen, *supra* note 2, at 178. Nor is there any evidence that the Framers explicitly intended Congress to have no power to remedy the situation. Frankel, *supra* note 2, at 1685.

[22] Raven-Hansen, *supra* note 2, at 172.

[23] *Id.*

[24] 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 219-20 (Jonathan Elliot ed., 1888).

[25] 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 433 (Jonathan Elliot ed., 2d ed. 1907) (*cited in District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 109-10 (1953)).

[26] An Act to Cede to Congress a District of Ten Miles Square in This State for the Seat of the Government of the United States, 1788 Md. Acts ch. 46, *reprinted in* 1 D.C. Code Ann. 34 (2001) (hereinafter "Maryland Cession").

The cessions of land by Maryland and Virginia were accepted by Act of Congress in 1790.[28] This Act also established the first Monday in December 1800 as the official date of federal assumption of control over the District.[29] Because of the lag between the time of cession by Maryland and Virginia and the actual creation of the District by the federal government, assertion of exclusive federal jurisdiction over the area was postponed for a decade.[30] During that time, District residents voted in Congressional elections in their respective ceding state.[31]

In 1800, when the United States formally assumed full control of the District, Congress by omission withdrew the grant of voting rights to District residents. The legislatures of both Maryland and Virginia provided that their respective laws would continue in force in the territories they had ceded until Congress both accepted the cessions and provided for the government of the District.[32] Congress, in turn, explicitly acknowledged by act that the "operation of the laws" of Maryland and Virginia would continue until the acceptance of the District by the federal government and the time when Congress would "otherwise by law provide."[33] The laws of Maryland and Virginia thus remained in force for the next decade and District residents continued to be represented by and vote for Maryland and Virginia congressmen during this period.[34]

The critical point here is that during the relevant period of 1790-1800, District residents were able to vote in Congressional elections in Maryland and Virginia not because they were citizens of those states—the cession had ended their political link with

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[27] An Act for the Cession of Ten Miles Square, or any Lesser Quantity of Territory Within This State, to the United States, in Congress Assembled, for the Permanent Seat of the General Government, 13 Va. Stat. at Large, ch. 32, *reprinted in* 1 D.C. Code Ann. 33 (2001) (hereinafter "Virginia Cession").

[28] Act of July 16, 1790, Ch. 28, 1 Stat. 130.

[29] *See id.* § 6.

[30] Raven-Hansen, *supra* note 2, at 173.

[31] *Adams*, 90 F. Supp. 2d at 58, 73, 79 & n.20.

[32] Maryland Cession, *supra* note 30; Virginia Cession, *supra* note 31.

[33] Act of July 16, 1790, ch. 28, § 1, 1 Stat. 130.

[34] *Adams*, 90 F. Supp. 2d at 58, 73, 79 & n.20; Raven-Hansen, *supra* note 2, at 174.

those states.[35] Rather, their voting rights derived from *Congressional action under the District Clause* recognizing and ratifying the ceding states' law as the applicable law for the now-federal territory until further legislation.[36] It was therefore not the cessions themselves, but the federal assumption of authority in 1800, that deprived District residents of representation in Congress. The actions of this first Congress, authorizing District residents to vote in Congressional elections of the ceding states, thus demonstrate the Framers' belief that Congress may authorize by statute representation for the District.

II. Article I, Section 2, Clause 1 Does Not Speak to Congressional Authority to Grant Representation to the District.

The District is not a state for purposes of Congress' Article I, section 2, clause 1, which provides that members of the House are chosen "by the people of the several States." This fact, however, says nothing about Congress' authority under the District Clause to give residents of the District the same rights as citizens of a state. As early as 1805 the Supreme Court recognized that Congress had authority to treat the District like a state, and Congress has repeatedly exercised this authority. This long-standing precedent demonstrates the breadth of Congress' power under the District Clause.

A. Congress May Exercise Its Authority Under the District Clause to Grant District Residents Certain Rights and Status Appurtenant to Citizenship of a State, Including Congressional Representation.

Article I, § 2, clause 1 of the Constitution provides for the election of members of the House of Representatives. It states:

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

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[35] *See Downes v. Bidwell*, 182 U.S. 244, 260-61 (1901); *Reily v. Lamar*, 6 U.S. (2 Cranch) 344, 356 (1805); *Hobson v. Tobriner*, 255 F. Supp. 295, 297 (D.D.C. 1966).

[36] Indeed, even after the formal assumption of federal responsibility in December 1800, Congress enacted further legislation providing that Maryland and Virginia law "shall be and continue in force" in the areas of the District ceded by that state. Act of Feb. 27, 1801, ch. 15, § 1, 2 Stat. 103.

Although the District is not a state in the same manner as the fifty constituent geographical bodies that comprise the United States, the failure of this clause to mention citizens of the District does not preclude Congress from legislating to provide representation in the House.

Case law dating from the early days of the Republic demonstrates that Congressional legislation is the appropriate mechanism for granting national representation to District residents. In *Hepburn v. Ellzey*,[37] residents of the District attempted to file suit in the Circuit Court of Virginia based on diversity jurisdiction.[38] However, under Article III, section 2, of the Constitution, diversity jurisdiction only exists "between citizens of different States."[39] Plaintiffs argued that the District was a state for purposes of Article III's Diversity Clause.[40] Chief Justice Marshall, writing for the Court, held that "members of the American confederacy" are the only "states" contemplated in the Constitution.[41] Provisions such as Article I, section 2, use the word "state" as designating a member of the Union, the Court observed, and the same meaning must therefore apply to provisions relating to the judiciary.[42] Thus, the Court held that the District was not a state for purposes of diversity jurisdiction under Article III.

However, even though the Court held that the term "state" as used in Article III did not include the District, Chief Justice Marshall acknowledged that "it is extraordinary that the courts of the United States, which are open to aliens, and to the citizens of every state in the union, should be closed upon [District citizens]."[43] But, he explained, "this is a subject for legislative, not for judicial consideration."[44] Chief Justice Marshall thereby

[37] 6 U.S. (2 Cranch) 445 (1805).

[38] *Id.* at 452.

[39] U.S. CONST. art. III, § 2, cl. 1.

[40] *Hepburn*, 6 U.S. (2 Cranch) at 452.

[41] *Id.*

[42] *Id.* at 452-53.

[43] *Id.* at 453.

[44] *Id.*

laid out the blueprint by which *Congress*, rather than the courts, could treat the District as a state under the Constitution.

Over the many years since *Hepburn*, Congress heeded Chief Justice Marshall's advice and enacted legislation granting District residents access to federal courts on diversity grounds. In 1940, Congress enacted a statute bestowing jurisdiction on federal courts in actions "between citizens of different States, or citizens of the District of Columbia . . . and any State or Territory."[45] This statute was challenged in *National Mutual Insurance Co. of the District of Columbia v. Tidewater Transfer Co.*[46] Relying on *Hepburn* as well as Congress' power under the District Clause, the Court upheld the statute. Justice Jackson, writing for a plurality of the Court, declined to overrule the conclusion in *Hepburn* that the District is not a "state" under the Constitution.[47] Relying on Marshall's statement that "the matter is a subject for 'legislative not for judicial consideration,'"[48] however, the plurality held that the conclusion that the District was not a "state" as the term is used in Article III did not deny Congress the power under other provisions of the Constitution to treat the District as a state for purposes of diversity jurisdiction.[49]

Specifically, the plurality noted that the District Clause authorizes Congress "to exercise exclusive Legislation in all Cases whatsoever, over such District,"[50] and concluded that Chief Justice Marshall was referring to this provision when he stated in *Hepburn* that the matter was more appropriate for legislative attention.[51] The responsibility of Congress for the welfare of District residents includes the power and duty to provide those residents with courts adequate to adjudicate their claims against, as

[45] Act of April 20, 1940, ch. 117, 54 Stat. 143.

[46] 337 U.S. 582 (1949).

[47] *Id.* at 587-88 (plurality opinion). Justices Black and Burton joined the plurality opinion.

[48] *Id.* at 589 (quoting Hepburn, 6 U.S. (2 Cranch) at 453).

[49] *Id.* at 588.

[50] *Id.* at 589.

[51] *Id.*

well as suits brought by, citizens of the several states.[52] Therefore, according to the plurality, Congress can utilize its power under the District Clause to impose "the judicial function of adjudicating justiciable controversies on the regular federal courts . . . ."[53] The statute, it held, was constitutional. Justice Rutledge, concurring in the judgment, would have overruled *Hepburn* outright and held that the District constituted a "state" under the Diversity Clause.[54]

The significance of *Tidewater* is that the five justices concurring in the result believed either that the District was a state under the terms of the Constitution or that the District Clause authorized Congress to enact legislation treating the District as a state. The decision did not overrule *Hepburn*, but it effectively rejected the view that "state" has a "single, unvarying constitutional meaning which excludes the District."[55] Although both Article I, section 2, and Article III, section 2, refer to "States" and by their terms do not include the District, *Tidewater* makes clear that this limitation does not vitiate Congressional authority to treat the District like a state for purposes of federal legislation, including legislation governing election of members to the House.[56]

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[52] *Id.* at 590. The plurality also made a distinction between constitutional issues such as the one before it, which "affect[] only the mechanics of administering justice in our federation [and do] not involve an extension or a denial of any fundamental right or immunity which goes to make up our freedoms" and "considerations which bid us strictly to apply the Constitution to congressional enactments which invade fundamental freedoms or which reach for powers that would substantially disturb the balance between the Union and its component states ..." Id. at 585.

[53] *Id.* at 600; *see also id.* at 607 (Rutledge, J., concurring) ("[F]aced with an explicit congressional command to extend jurisdiction in nonfederal cases to the citizens of the District of Columbia, [the plurality] finds that Congress has the power to add to the Article III jurisdiction of federal district courts such further jurisdiction as Congress may think 'necessary and proper' to implement its power of 'exclusive Legislation' over the District of Columbia") (citations omitted). The plurality also quoted Chief Justice Marshall's opinion in McCulloch v. Maryland, where he held that "[l]et the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id.* at 604 n.25.

[54] *Id.* at 617-18 (Rutledge, J., concurring). Justice Murphy joined Justice Rutledge's opinion.

[55] Raven-Hansen, *supra* note 2, at 183.

[56] We have not considered whether Congress could similarly enact legislation to provide the District of Columbia with voting representation in the United States Senate. That question turns additionally on interpretation of the text, history, and structure of Article I, section 3, and the 17th Amendment to the U.S. Constitution, which is outside the scope of this opinion. We note only that, like Article I, section 2, these provisions specify the qualification of the electors. Compare U.S. Const. art. I, § 2 ("chosen every second year by the People of the several States") with *id.* art. I, § 3 ("chosen by the Legislature thereof") and *id.*

Adams v. Clinton[57] is not to the contrary. Rather, the decision reinforces Chief Justice Marshall's pronouncement that Congress, and not the courts, has authority to grant District residents certain rights and status appurtenant to state citizenship under the Constitution. In *Adams*, District residents argued that they have a constitutional right to elect representatives to Congress.[58] A three-judge district court, construing the constitutional text and history, determined that the District is not a state under Article I, section 2, and therefore the plaintiffs do not have a judicially cognizable right to Congressional representation.[59] In so doing, the court noted specifically that it "lack[ed] authority to grant plaintiffs the relief they seek," and thus District residents "must plead their cause in *other venues*."[60] Just as Chief Justice Marshall in *Hepburn* and Justice Jackson in *Tidewater* recognized that the District Clause protected the plenary and exclusive authority of Congress to traverse where the judiciary cannot tread, so too the court in *Adams v. Clinton* suggested that it is up to Congress to grant through legislation the fairness in representation that the court was unable to order by fiat.

Tidewater is simply the most influential of many cases in which courts have upheld the right of Congress to treat the District as a state under the Constitution pursuant to its broad authority under the District Clause. From the birth of the Republic, courts have repeatedly affirmed treatment of the District a "state" for a wide variety of statutory, treaty, and even constitutional purposes.

In deciding whether the District constitutes a "state" under a particular statute, courts examine "the character and aim of the specific provision involved."[61] In *Milton S.*

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amend. XVII ("elected by the people thereof"). However, quite unlike the treatment of the House of Representatives, the constitutional provisions relating to composition of the Senate additionally specifies that there shall be two senators "from each State," see U.S. Const. art. I, § 3; *id.* amend. XVII, thereby arguably giving rise to interests of states *qua* states not present in Article I, section 2.

[57] 90 F. Supp. 2d 35 (D.D.C.), *aff'd*, 531 U.S. 940 (2000).

[58] *Id.* at 37.

[59] *Id.* at 55-56.

[60] *Id.* at 72 (emphasis added).

[61] *District of Columbia v. Carter*, 409 U.S. 418, 420 (1973).

Kronheim & Co. Inc. v. District of Columbia,[62] Congress treated the District as a state for purposes of alcohol regulation under the Alcoholic Beverage Control Act.[63] The District of Columbia Circuit held that such a designation was valid and it had "no warrant to interfere with Congress' plenary power under the District Clause '[t]o exercise exclusive Legislation in all Cases whatsoever, over [the] District.'"[64] In *Palmore v. United States*,[65] the Court recognized and accepted that 28 U.S.C. § 1257, which provides for Supreme Court review of the final judgments of the highest court of a state, had been amended by Congress in 1970 to include the District of Columbia Court of Appeals within the term "highest court of a State."[66] The federal district court in the District found that Congress could treat the District as a state, and thus provide it with 11th Amendment immunity, when creating an interstate agency, as it did when it treated the District as a state under the Washington Metropolitan Area Transit Authority.[67] Even *District of Columbia v. Carter*,[68] which found that the District was not a state for purposes of 42 U.S.C. § 1983,[69] helps illustrate this fundamental point. In the aftermath of the *Carter* decision, Congress passed an amendment treating the District as a state under section 1983,[70] and this enactment has never successfully been challenged. Numerous other examples abound of statutes that treat the District like a state.[71]

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[62] 91 F.3d 193 (D.C. Cir. 1996).

[63] *Id.* at 201.

[64] *Id.*

[65] 411 U.S. 389 (1973).

[66] *Id.* at 394.

[67] *Clarke v. Wash. Metro. Area Transit Auth.*, 654 F. Supp. 712, 714 n.1 (D.D.C. 1985), aff'd, 808 F.2d 137 (D.C. Cir. 1987).

[68] 409 U.S. 418 (1973).

[69] *Id.* at 419.

[70] Act of Dec. 29, 1979, Pub. L. No. 96-170, 93 Stat. 1284 (codified at 42 U.S.C. § 1983 (2003)).

[71] *See, e.g.*, 18 U.S.C. § 1953(d) (interstate transportation of wagering paraphernalia); 26 U.S.C. § 6365(a) (collection of state incomes taxes); 29 U.S.C. § 50 (apprentice labor); 42 U.S.C. § 10603(d)(1) (crime victim assistance program); 42 U.S.C. § 2000e(i) (civil rights/equal employment opportunities).

The District may also be considered a state pursuant to an international treaty. In *de Geofroy v. Riggs*,[72] a treaty between the United States and France provided that:

> In all states of the Union whose existing laws permit it, so long and to the same extent as the said laws shall remain in force, Frenchmen shall enjoy the right of possessing personal and real property by the same title, and in the same manner, as the citizens of the United States.[73]

The Supreme Court concluded that "states of the Union" meant "all the political communities exercising legislative powers in the country, embracing, not only those political communities which constitute the United States, but also those communities which constitute the political bodies known as 'territories' and the 'District of Columbia.'"[74]

Courts have even found the District to constitute a state under other provisions of the Constitution. The Supreme Court has held that the Commerce Clause[75] authorizes Congress to regulate commerce across the District's borders, even though that Clause only refers to commerce "among the several States."[76] Similarly, the Court has interpreted Article I, section 2, clause 3, which provides that "Representatives and direct Taxes shall be apportioned among the several States ... according to their respective Numbers," as applying to the District.[77] The Court also found that the Sixth Amendment right to trial by jury extends to the people of the District,[78] even though the text of the Amendment states "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime

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[72] 133 U.S. 258 (1890).

[73] *Id.* at 267-68.

[74] *Id.* at 271.

[75] U.S. CONST. art. I, § 8, cl. 3.

[76] *Stoutenburgh v. Hennick*, 129 U.S. 141 (1889).

[77] *Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317, 319-20 (1820). The clause at issue has since been amended by the 14th and 16th Amendments.

[78] *Callan v. Wilson*, 127 U.S. 540, 548 (1888); *see also Capital Traction Co. v. Hof*, 174 U.S. 1, 5 (1899) ("It is beyond doubt, at the present day, that the provisions of the Constitution of the United States securing the right of trial by jury, whether in civil or in criminal cases, are applicable to the District of Columbia.").

shall have been committed..."[79] And the District of Columbia Circuit held that the District is a state under the Twenty-First Amendment,[80] which prohibits "[t]he transportation or importation into any state, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof . . . ."[81] If the District can be treated as a "state" under the Constitution for these and other purposes,[82] it follows that Congress can legislate to treat the District as a state for purposes of Article I representation.[83]

B. Other Legislation Has Allowed Citizens Who Are Not Residents of States to Vote in National Elections.

A frequent argument advanced by opponents of District representation is that Article I explicitly ties voting for members of the House of Representatives to citizenship in a state. This argument is wrong.

The Uniformed and Overseas Citizens Absentee Voting Act[84] allows otherwise disenfranchised American citizens residing in foreign countries while retaining their American citizenship to vote by absentee ballot in "the last place in which the person was domiciled before leaving the United States."[85] The overseas voter need not be a citizen of the state where voting occurs. Indeed, the voter need not have an abode in that state,

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[79] U.S. CONST. amend. VI (emphasis added).

[80] *Milton S. Kronheim & Co. v. District of Columbia*, 91 F.3d 193, 198-99 (D.C. Cir. 1996).

[81] U.S. CONST. amend. XXI (emphasis added).

[82] *See Hobson v. Tobriner*, 255 F. Supp. 295, 297 (D.D.C. 1966) (noting that District residents are afforded trial by jury, presentment by grand jury, and the protections of due process of law, although not regarded as a state).

[83] It is of little moment that allowing Congress to treat the District as a state under Article I would give the term a broader meaning in certain provisions of the Constitution than in others. The Supreme Court has held that terms in the Constitution have different meanings in different provisions. For example, "citizens" has a broader meaning in Article III, § 2, where it includes corporations, than it has in Article IV, § 2, or the Fourteenth Amendment, where it is not interpreted to include such artificial entities. *See Tidewater*, 337 U.S. at 620-21 (Rutledge, J., concurring).

[84] Pub. L. 99-410, 100 Stat. 924 (1986), codified at 42 U.S.C. §§ 1973ff *et seq.* (2003).

[85] 42 U.S.C. § 1973ff-6(5)(B) (2003); *Att'y Gen. v. United States*, 738 F.2d 1017, 1020 (9th Cir. 1984).

pay taxes in that state, or even intend to return to that state.[86] Thus, the Act permits voting in federal elections by persons who are not citizens of any state. Moreover, these overseas voters are not qualified to vote in national elections under the literal terms of Article I; because they are no longer citizens of a state, they do not have "the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."[87] If there is no constitutional bar prohibiting Congress from permitting overseas voters who are not citizens of a state to vote in federal elections,[88] there is no constitutional bar to similar legislation extending the federal franchise to District residents.

Justice Kennedy's concurring opinion in *U.S. Term Limits, Inc. v. Thornton*[89] provides further evidence that the right to vote in federal elections is not necessarily tied to state citizenship. In his opinion, Justice Kennedy wrote that the right to vote in federal elections "do[es] not derive from the state power in the first instance but...belong[s] to the voter in his or her capacity as a citizen of the United States…"[90] Indeed, when citizens vote in national elections, they exercise "a federal right of citizenship, a relationship between the people of the Nation and their National Government, with which the States may not interfere."[91]

Needless to say, the right to vote is one of the most important of the fundamental principles of democracy:

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote

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[86] *Att'y Gen. v. United States*, 738 F.2d at 1020; Peter Raven-Hansen, *The Constitutionality of D.C. Statehood*, 60 GEO. WASH. L. REV. 160, 185 (1991).

[87] U.S. CONST. art. I, § 2, cl. 1.

[88] Since the Uniformed and Overseas Citizens Absentee Voting Act was enacted in 1986, the constitutional authority of Congress to extend the vote to United States citizens living abroad has never been challenged. *Cf. Romeu v. Cohen*, 265 F.3d 118 (2d Cir. 2001).

[89] 514 U.S. 779 (1995).

[90] *Id.* at 844 (Kennedy, J., concurring).

[91] *Id.* at 842, 845.

> is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.[92]

The right to vote is regarded as "a fundamental political right, because preservative of all rights."[93] Such a right "is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."[94] Given these considerations, depriving Congress of the right to grant the District Congressional representation pursuant to the District Clause thwarts the very purposes on which the Constitution is based.[95] Allowing Congress to exercise such a power under the authority granted to it by the District Clause would remove a political disability with no constitutional rationale, give the District, which is akin to a state in virtually all important respects, its proportionate influence in national affairs, and correct the historical accident by which District residents have been denied the right to vote in national elections.[96]

It has been suggested that the District should be "allowed exceptions because it is not serving the functions of a state in our system."[97] That the District serves a special role as the federal capital is unquestionably true. But, as Congress and the courts have long recognized, that function does not diminish the rights accorded American citizens, including those who reside in the District. The fundamental flaw in this line of thinking is the fanciful notion that "creation of the federal district removed one right of citizenship, voting in Congress, in exchange for the status of being part of the Capital City."[98] One does not cease being a United States citizen by becoming a D.C. resident, a fact that Professor Turley himself concedes: "Because residents remain U.S. citizens,

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[92] *Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964).

[93] *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

[94] *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

[95] Frankel, *supra* note 2, at 1687; Raven-Hansen, *supra* note 2, at 187.

[96] Raven-Hansen, *supra* note 2, at 185.

[97] Jonathan Turley, *Too Clever By Half: The Unconstitutionality of Partial Representation of the District of Columbia in Congress*, 76 GEO. WASH. L. REV. 305, 352 (2008).

[98] *Id.* at 353.

they must continue to enjoy those protections accorded to citizens. Otherwise, they could all be enslaved or impaled at the whim of Congress."[99]

Few rights are as fundamental as having voting representation in the national legislature. Throughout our nation's history, Congress and the courts have worked to ensure that District residents enjoy many of the same rights as American citizens living anywhere. The current lack of voting representation for the District in the House of Representatives remains an anomaly that this Congress can and should rectify.

C. The Twenty-Third Amendment Does Not Affect Congressional Authority to Grant Representation to the District.

Although District residents currently may not vote for representatives or senators, the 23rd Amendment to the Constitution provides them the right to cast a vote in presidential elections. The 23rd Amendment, ratified in 1961, provides:

> The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:
>
> A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State;... but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State . . . .[100]

Opponents of District representation argue that the enactment of the Amendment demonstrates that any provision for District representation must be made by constitutional amendment and not by simple legislation.

The existence of the 23rd Amendment, dealing with presidential elections under Article II, has little relevance to Congress' power to provide the District with Congressional representation under the District Clause of Article I. Not only does the Constitution grant Congress broad and plenary powers to legislate for the District by such clause, it provides Congress with sweeping authority "[t]o make all Laws which shall be

[99] *Id.* at 353.

[100] U.S. CONST. amend. XXIII, § 1.

necessary and proper for carrying into Execution" its Article I powers.[101] The 23rd Amendment, however, concerns the District's ability to appoint presidential electors to the Electoral College, an entity established by Article II of the Constitution.[102] Congressional authority under Article II is very circumscribed[103]—indeed, limited to its authority under Article II, § 1, clause 4, to determine the day on which the Electoral College votes. Because legislating with respect to the Electoral College is outside Congress' Article I authority, Congress could not by statute grant District residents a vote for President; granting District residents the right to vote in presidential elections of necessity had to be achieved via constitutional amendment.[104] By contrast, providing the District with representation in Congress implicates Article I concerns and Congress is authorized to enact such legislation by the District Clause. Therefore, no constitutional amendment is needed, and the existence of the 23rd Amendment does not imply otherwise.[105]

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[101] U.S. CONST. art. I, § 8, cl. 18.

[102] *See id.* art. II, § 1, cls. 2-3 & amend. XII.

[103] *See Oregon v. Mitchell*, 400 U.S. 112, 211-12 (1970) (Harlan, J., concurring in part and dissenting in part).

[104] In *Oregon v. Mitchell*, 400 U.S. 112 (1970), a five-to-four decision, the Court upheld a federal statute that, *inter alia*, lowered the voting age in presidential elections to 18. *Id.* at 117-18 (opinion of Black, J.). Of the five Justices who addressed whether Article I gives Congress authority to lower the voting age in presidential elections, four found such authority lacking because the election of the President is governed by Article II. *See id.* at 210-12 (Harlan, J., concurring in part and dissenting in part); *id.* at 290-91, 294 (Stewart, J., concurring in part and dissenting in part). Four other justices based their decision on Congress' authority under § 5 of the 14th Amendment. *See id.* at 135-44 (Douglas, J., concurring in part and dissenting in part); *id.* at 231 (Brennan, J., concurring in part and dissenting in part). This rationale is unavailable to citizens of the District. See *Adams*, 90 F. Supp. 2d at 65-68. Thus, any Congressional authority to allow District residents to vote in presidential elections by statute must lie in Article I. Lacking authority by statute to grant District residents the right to vote in presidential elections, Congress needed to amend the Constitution through the 23rd Amendment. These obstacles to legislation in the context of presidential elections are not present here, however, because Article I (not Article II) governs Congressional elections and it provides Congress with plenary authority over the District in the District Clause.

[105] The cases rejecting constitutional challenges to the denial of the vote in presidential elections to citizens of Puerto Rico and Guam are not to the contrary. *See Igartua de la Rosa v. United States*, 32 F.3d 8, 10 (1st Cir. 1994); *Att'y Gen. v. United States*, 738 F.2d 1017, 1019 (9th Cir. 1984). While those cases contain some dicta related to the 23rd Amendment, neither addressed the affirmative power of Congress to legislate under the District Clause. Indeed, the language of the District Clause seems broader than that of the Territories Clause (which governs the extent of Congress' authority over Puerto Rico and Guam). *See* U.S.

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Although this opinion is limited to analyzing the legal basis of Congressional authority to enact the *District of Columbia House Voting Rights Act of 2009* and does not venture a view on its policy merits, it is at least ironic that residents of the Nation's capital continue to be denied the right to select a representative to the "People's House." My conclusion that Congress has the authority to grant Congressional representation to the District is motivated in part by the principle, firmly imbedded in our constitutional tradition, that "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live."[106]

CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to...make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States").

[106] *Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964).

Mr. NADLER. I thank the gentleman. I thank the gentleman.

And I will begin the questions by recognizing myself for 5 minutes.

My first question is to Mr. Henderson. Earlier we heard from former Congressman Tom Davis, who worked with Congresswoman Norton to develop a bipartisan, politically neutral approach to secure House representation for the District on the assumption—on the frankly political assumption—that the district would elect a Democratic member, so we will give in this bill Utah another seat until the next reapportionment on the assumption that Utah would elect a Republican member, so this would be politically neutral.

Do you support continuing to pair the District with the Utah seat, even though there are presumably the votes in both houses now to do it without that, so we don't have to be politically neutral if we don't want to?

Mr. HENDERSON. Thank you, Mr. Chairman, for your question.

The leadership conference unequivocally, wholeheartedly supports keeping the bill as it was passed last year in the House of Representatives, which means that both Utah and the District would be provided with representation.

We think it is important that we send a signal to the rest of the country that this is really not about a partisan issue. It is really about elevating voting rights to its constitutional frame. So, yes, we support it.

Mr. NADLER. Thank you. And I have one further question for you before I turn to some of the other witnesses.

One way to ensure that the bill's political neutrality is by mandating that Utah's additional seat be an at-large seat, thereby leaving intact Utah's current district representation, because if we didn't do that, the Utah Legislature, presumably, and the governor would have to reapportion. Reapportionment is a very political act, as you know, and so this would negate that.

Can you please discuss briefly the benefits of ensuring that Utah's additional seat is an at-large seat, rather than a single member seat, as well as why the at-large seat should remain intact through 2012, especially in light of the general view that the Ranking Member referred to earlier That under the Voting Rights Act, at-large seats are disfavored?

Mr. HENDERSON. Thank you, Mr. Chairman.

Again, I think your question frames the answer that we would provide, which is to say we recognize that redistricting is indeed a very political issue and can be an extremely partisan issue.

We want to avoid that kind of partisanship. We want to avoid that kind of fight. We think it is unnecessary, and we think it is potentially harmful.

I think the notion that the seat would come in as an at-large seat is one that we are perfectly comfortable with, notwithstanding the Voting Rights Act and its normal application, because I think in this context there has been great care given to trying to frame this issue in a way that would have the least amount of partisanship and political impact, aside from providing a representative vote for both the state of Utah and the District of Columbia.

Mr. NADLER. Thank you.

Professor Turley, you testified that you believe that this bill is unconstitutional, because despite the District Clause of the Constitution, we—that is, Congress—lacks the power by statute to afford the District congressional representation, because congressional representation is based on the states.

And yet, as former Congressman Davis testified, we impose direct Federal taxes on District residents, despite the fact that the Constitution says direct taxes should be apportioned among the several states.

District residents have the right to jury trial from the states. D.C. residents benefit or are not—or do not benefit—are subject to, in any event, diversity jurisdiction. The right to sue is a benefit. The right to be sued I am not so sure of. But they have diversity jurisdiction, which is a right for the several states.

The full faith and credit clause has been held to apply to D.C. And the District has no power to regulate commerce, as the states do not, because only Congress can regulate interstate commerce. I do not believe anybody thinks that the District of Columbia is an Indian tribe or a foreign nation, so it comes under the interstate commerce clause.

Why do you think that Congress has been—that it has been held in a series of Supreme Court decisions that the District Clause gives Congress the power to consider the District a state for these purposes, and yet it wouldn't have the power to consider the state a—I am sorry—to consider the District a state or analogous to a state for purposes of congressional representation?

Mr. TURLEY. It is an excellent question, Mr. Chairman.

Mr. NADLER. Could you use your mic, please, or get closer to it?

Mr. TURLEY. Oh, yes.

I was surprised by my friend Tom Davis' statement that the plenary authority of the District had never been struck down in terms of legislation. He is excluding the Elizabeth Morgan Act. And the reason I think that he would recall that is because he was the sponsor of the Elizabeth Morgan Act, and I was the lawyer that challenged it.

And in fact it was struck down. It was true it was struck down by bill of attainder, but much of the arguments in terms of the Elizabeth Morgan Act were made terms of plenary power. Ranking Member Sensenbrenner was involved in that debate on the floor.

Many of the things that you cite, which are I think poignant points to be sure, fall into categories of individual rights of citizens that belong to them as a citizen of the United States, or they do fall under the plenary authority.

As Justice Scalia said in the Cohen decision in 1984, there are many things you can do in the District you can't do in the 50 states. And it is indeed true that this is truly plenary jurisdiction——

Mr. NADLER. Excuse me, let me just—I know my time has expired. We are going to be a little liberal here.

Diversity jurisdiction falls under individual rights?

Mr. TURLEY. No, no. I am saying that there are different categories they fall under.

That is, the Supreme Court has recognized that Congress can in fact extend certain things to the District. Congress can do a lot of

things in the District. It has also said that there are rights that apply to members of the District.

But what is clear is from the very beginning, it has been understood that that plenary authority deals with things within the District. Edmund Pendleton made that clear as a framer. He said that this power, in assuring his colleagues, only applies within the District. What you are doing now is applying that power outside the District to affect other states.

Mr. NADLER. Thank you. I would observe that. I won't pursue this, because my time has expired, but I observed that diversity of jurisdiction doesn't seem to apply only within the District.

I hope that one of the other Members of the Committee may ask Professor Dinh why he disagrees with Professor Turley.

Mr. TURLEY. No, I wasn't only in the District, but I am saying it could be extended to the District.

Mr. NADLER. Thank you. My time has expired.

I now recognized for 5 minutes the distinguished Ranking Member of the Subcommittee, Mr. Sensenbrenner.

Mr. SENSENBRENNER. Well, I have a question of Professor Dinh, but it is not that one.

Professor Dinh, why do you think this bill did not include granting the District the right to vote for two senators?

Mr. DINH. You know, we have a footnote in our opinion—footnote 56—which specifically says that because we were asked to review this bill, which does not provide for Senate, so I did not spend the time necessary to think about a comprehensive answer to that.

I do not have a conclusive or comprehensive answer to you. I think that it may open the door to that, and it also under our brief, very brief analysis suggests that it may be different, that senators are different, because in the relevant text there, Article I, Section 7, I believe, and also the 17th amendment, it has a Composition Clause, as it does in Article I, Section 2, but it also says that the Senate shall be composed of two Senators from each state and suggests that states qua states may have interest in that limitation in number.

I, frankly, have not done the exhaustive look or comprehensive analysis to give you a final answer, but that may be a limiting point.

Mr. SENSENBRENNER. Doesn't it concern you that there may be an unintended consequence of this legislation, that if it is upheld as constitutional, the next lawsuit will be to judicially decree two senators from the District of Columbia, if the court should determine that D.C. really is a state for purposes of representation?

Mr. DINH. Mr. Ranking Member, that is a concern. I think if it is, it certainly would be unintended from all my understanding of the purpose of the legislation. More importantly, I think it would be wrong.

Such a judicial holding would simply be wrong. The D.C. Circuit was right in the Alexander case to say that there is no inherent right for D.C. residents to vote either for senators or for the House of Representatives.

The question that is raised here is whether Congress has the power under the District Clause to give that statutory right. And I do not think that that can bleed over into an inherent constitu-

tional right to overrule the Alexander decision, which I think that the D.C. Circuit got exactly right.

Mr. SENSENBRENNER. If there is a statutory right for the Congress to give voting representation in the House for the District, is there also a statutory right utilizing the same argument to give them voting representation in the Senate?

Mr. DINH. That is exactly your first question. I think it is a very good question. I do not have a full and comprehensive answer to you. I have suggested that where there is the limiting principle in the fact that the 17th amendment calls for two senators from each state, but other than that I don't have a good answer for you, or at least a conclusive answer in that regard.

But that is a possibility. I acknowledge it.

Mr. SENSENBRENNER. Professor Turley, what is your opinion on these questions?

Mr. TURLEY. Well, actually, Viet and I have raised this question now for a number of years, and I disagree that it can be easily distinguished between the House and Senate clauses.

Article I, Section 2 reads, "Each state shall have at least one representative," very close to the language related to the Senate. It doesn't seem to me that is that easy to distinguish.

And I think you have to ask that that once you put yourself on the slippery slope of redefining what our Members in the House of Representatives, you inevitably will have to adopt a consistent view.

And in fact in one of our previous hearings, one of the witnesses in favor of the legislation admitted that he does believe that eventually the District could ask for two senators.

I don't believe that that was within the intention of the framers, and I think that a better solution would be the most constitutional one, which is to go for a constitutional amendment, as you have previously stated, or, of course, to do what Virginia did. And that is to go for retrocession.

In fact, I supplied in my previous testimony what I call a modified retrocession plan, which is very close to the legislation that has been offered.

Mr. SENSENBRENNER. Let me ask you one further question, Professor Turley. And that is is that when Congress proposed a constitutional amendment in 1978, which failed at ratification in the states, it was clear in the Committee report that the Judiciary Committee at that time felt that a constitutional amendment was the only way to go about it.

What impact do you think that Committee report and the failure of the amendment to be ratified by the states will have on the litigation, should this bill become law?

Mr. TURLEY. Well, I think that this legislation is being pulled down by considerable weights, and one of them is indeed the failed effort to amend the Constitution. It seemed a rather transparent effort to circumvent article V in terms of the amendment of the Constitution.

And there has been rather frank discussion of that, that this idea born out of the expediency of the moment, with the trade of two districts. And unfortunately, as you know, convenience is often the enemy of principle. And we see that here.

Mr. SENSENBRENNER. I thank the Chair.

Mr. NADLER. I thank the gentleman.

I now recognize for 5 minutes the distinguished Chairman of the full Committee, the gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Chairman Nadler. I am happened to see all of our witnesses here again.

Professor Turley, let me say that I have been going over your work for quite a while now, not only on this subject, but others as well. But there is only one thing that I would like to talk with you about today.

You said here, "Permit me to be blunt. I consider this to be the most premeditated, unconstitutional act by Congress in decades."

Now, I have been reviewing the Congress and the court in its entire history, and that seems to imply some bad faith or lack of integrity on the part of this present Congress in that regard. Am I being oversensitive this morning, or am I supposed to take this precisely at what you have said twice?

The same language you used 2 years ago: "I consider this act to be the most premeditated, unconstitutional act by Congress in decades."

Mr. TURLEY. Well, I can't blame it on the spellcheck system, which I wish I could at this moment. But I don't mean truly to cast real type of aspersions. I have tremendous respect for you, as you know, and for the Members of this Committee. And in fact, I have worked with most of the Members of this Committee on legislation.

But I also believe that we can be blunt and be clear. I believe that this legislation is motivated more by passion than by principle. And I can't deny that.

Constitutional scholars like yourself and the Members of this Committee I believe have to recognize that the record is not found in that the President goes against this legislation.

Having said that, I would never suggest those types of dishonest motives—certainly not from you and certainly not from Delegate Norton. I believe that Delegate Norton has been trying—I think heroically—to find a way to get her constituents of vote in the House, and I think that is a noble purpose.

I just believe that the means here is clearly unconstitutional.

Mr. CONYERS. Well, we have got the weight of most constitutional authorities. We have got the weight of the majority of people not just in the District, but in the country. Do they come under your rather critical scrutiny that if they understand the Constitution, this is the most premeditated, unconstitutional act by the Congress in decades?

I mean you said let us be blunt, and so I am returning the attitude in which I presume you wrote this. Do you really mean that? In other words if we go through the Congress do just that decade that I have been here, that I couldn't find another act that is more premeditatedly unconstitutional that the act of trying to get the vote to the citizens of this District?

Mr. TURLEY. In recent decades I would say it would be hard. The mistakes that this institution has made has often been done because the institution move too quickly. That was certainly the case with Elizabeth Morgan in the Elizabeth Morgan Act.

Many Members, Democrats and Republicans, objected to that act and the ability to remove it from the legislation was blocked, but I have to say, Mr. Chairman, even though the polls do show that the American people support this, it is not polls, but precedent that will determine the outcome of this legislation.

And I do not believe that there is a scintilla of precedent to support what is happening here, particularly after what the court said just recently in Haller.

Mr. CONYERS. Well, let us say this final comment of yours that I would like to read. Look, you write this beautifully, and you do this for your questions in law school. You do it in the courts all the way up to the Supreme Court. You do it in the Congress, both House and Senate.

But let me ask you about this. It takes an act of willful blindness to ignore the obvious meaning of these words. Just defend that for the few seconds we have left.

Mr. TURLEY. I am pretty sure that was the spellcheck. No. Once again, I have to say that on that I must stand firm, Mr. Chairman. I believe that in order to get from here to the enactment of this law, you must step over considerable evidence in the record and say things like the framers didn't say anything about the Federal enclave after the mutiny.

Those are simply—those are actual——

Mr. CONYERS. You are raising—you are impugning the integrity not just of the Congress, but every constitutional scholar and every one that doesn't agree with you. I mean this is a rather wide attack that is being made here.

I think there are a lot of people that agree with the proponents of this measure, which has already passed the Congress a couple of years ago, that they weren't engaging in willful act of blindness to get the vote to the District of Columbia.

Mr. TURLEY. Well, what I would say, Mr. Chairman, is that it is true that academics some time speak more bluntly than they should. We feel very strongly about our views of the Constitution. I know Viet does, and I do as well.

Mr. NADLER. The gentleman's time has expired. You may finish answering his question.

Mr. TURLEY. Thank you.

And perhaps it is a different forum, but I do feel quite strongly that this is not a close question. And I am not imputing motivation. What I am imputing is the analysis and the failure to recognize what I believe is unmistakable, unquestionable evidence of the intent of the framers.

Mr. NADLER. I thank the gentleman.

I will now recognize for 5 minutes the gentleman from Iowa, Mr. King.

Mr. KING. Thank you, Mr. Chairman.

I observe, as I listen to this discussion, that 25 scholars that would take the position that this legislation is constitutional doesn't sway me particularly, unless I would know how many of them actually teach constitutional law.

And then I would follow that question up—this is a rhetorical one, I would point out, though, so the witnesses can relax a little bit—that I would want to know how they taught their con law.

Was it from the Constitution? Did they start there and build their way up, or do they start at case law and never actually arrive at the text of the Constitution during the instruction of con law.

Then, no matter how many experts are they are, I would point out to the body that there are 31,000 scientists that say that global warming is a bogus idea.

So I would just leave that rhetorically the way it is, and I would raise this issue, that it seems to me that as I have watched the political arena—and we talked about a political decision on redistricting.

In Iowa it isn't political. We actually have a law that says it is going to be drawn according to the defined concepts of the law with a nonpartisan three-person bureau that sits in a room, and everybody has to accept what they give, vote it up or down, or handed to the judges, which we live in great fear of.

But I have watched in my political career and throughout my adult life a constant, in the political arena, migration toward power. And there seems to be a pulling and a tugging effect on that.

So I am sitting here listening to this testimony, thinking if I were a D.C. resident, if I represented D.C. residents, what I dig a little deeper, trying to find a way that I could argue that this bill is constitutional?

The answer to that is, yes, probably, because he has some incentive to dig a little deeper. If it works the other way, then you are more likely to read the text of the Constitution and accept the presentation of the argument that it is an unconstitutional bill.

We went through this a couple of years ago, and I dug into it a little more deeply, and I watched some of the Members positioned themselves and go through their constitutional analysis. And I think that power becomes part of that analysis—in most cases passion over principle, as Professor Turley said.

And so I just pose this question to you, Professor Turley. Have you watched this in your observation of politics on how the migration toward power seems to affect the judgment of principle?

Mr. TURLEY. Well, I certainly believe that politics is about expediency. It is not without principle. And I believe that the Members on the other side of this aisle have fought hard and long for many principle—and I am deeply thankful to them—as has the minority.

So this is not a place devoid of principle, but there is no question that politics tends to be about expediency. It tends to find the shortest and easiest route to an objective.

This would certainly be that. It is a legislative amendment of the Constitution, in my view, and I think we have seen that before.

What I think is the true tragedy here is that we now have this unique window of opportunity. Republicans and Democrats are pledged to solving the problem. And I think that what we can do is precisely that.

But what will happen is this will put us on the road to litigation that I believe will ultimately go against this bill. I don't see the basis on which this could be sustained.

And when it comes back, that window of opportunity may be loss. And I think that is what makes this a true tragedy in the making.

Mr. KING. Professor Turley, in following up on that, if there truly was a passion and conviction that the residents here, who many have already voted with their feet by moving here, would only have to move five miles to have their vote registered in the fashion that they ask.

If they really believed in principle, if they really had the passion, wouldn't they then support retrocession?

Mr. TURLEY. Well, I believe the modified—that retrocession is the correct way to go. And in the plan that I put forward, which is in my previous testimony and also in the article that I attach to my testimony, I go through how retrocession can retain the unique status of the District.

The District residents will wake up, and nothing will be just as accept that they will have two senators and a Member—at least one Member of Congress, and they will be fully represented.

That is why I reject this as a civil rights measure, because to me it is akin like saying that Rosa Parks could move halfway up the bus. I think that the key is to resolve the fact that not giving half-formed citizens, but full citizens and full representation, and that could be done.

Mr. KING. Thank you, Professor Turley.

Thank you, Mr. Chairman. I yield back.

Mr. NADLER. I thank the gentleman.

I know recognize for 5 minutes the gentleman from North Carolina, Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman. And thank you for convening this very important hearing.

I am in an interesting position this morning, because I have seated in the audience an intern who is working in my office, and I know she just graduated from Spellman, and she is getting ready to go to law school.

And this for me is one of those classic constitutional issues, where you have got persuasive arguments on both sides, and we as Members of Congress have to decide where we come down.

I hadn't focused on Professor Turley's insult to the integrity with which we proceed, but having been the sole and only member of this body who voted against Megan's Law, because I thought it was unconstitutional and thought that the Supreme Court would in fact declared unconstitutional, and having had my Republican opponents spend almost $900,000 telling people how terrible I was for casting that one vote, and having almost lost my seat as a result of that one vote, I can tell you that I personally take this very, very seriously.

Professor Dinh conceded that at least that this is a close question. Professor Turley, I take it you seem to be suggesting it is not even close. And I guess my concern is that if we pass this, it is obviously going to the Supreme Court. There is no question about that.

Professor Dinh, is the Supreme Court going to uphold this statute in your opinion?

Mr. DINH. Yes.

Mr. WATT. And Professor Turley, is the Supreme Court going to strike it down in your opinion? I mean that is where I am, because it really will be embarrassing, if it goes through the process and

it ends up in the Supreme Court, and the Supreme Court does in fact strike it down.

I think it would be a counterproductive move, as Professor Turley has indicated. I am just trying to figure out where this Supreme Court stands on this issue. And it seems to me to be a very close issue. I thought it was close from day one, and I have said that publicly, much to the chagrin of some of my District of Columbia friends.

I think this is a tough constitutional question, and it is obviously going to be resolved. I mean that is what the Supreme Court is for. But how are they going to decide?

Mr. DINH. If I may, Congressman, I do think that the law as proposed is constitutional. I do think that the Supreme Court would uphold it, based upon my reading of the precedents as articulated in my testimony.

The reason why I think that it is a close question is like all constitutional questions of high caliber, it is a question of characterization. Do you think that the Composition Clause trumps, or do you think the District Clause trumps?

Well, I suggest that they can be reconciled in a way that the Supreme Court has reconciled, in so many other aspects, diversity jurisdiction, state sovereign immunity, Commerce Clause and the like.

And so I think that that is the predictive path as to how the court would reconcile these two provisions in order to uphold this body's authority under the District Clause to do exactly that proposed by H.R. 157.

Mr. WATT. Professor Turley is smiling at you as if to say that is absurd, as I take it you think it is.

Mr. TURLEY. First of all, with Chairman Conyers staring directly at me, I would never use verbiage of that kind. But what I will say is that I would be astonished if the Supreme Court even was close on the question that——

Mr. WATT. Pretty astonished about their ruling in the Megan's Law ratification, but they did it.

Mr. TURLEY. Well, the problem is that—you know the problem for the District is that they have been saying different things in different locales. That is not going to help them.

In the *Parker* case, they were just blocks away. While arguing here in the Congress that we are like a state for the purposes of this question, they were in court in *Parker*, saying we are not a state for the purposes of the second amendment.

And they lost there. They lost at the Supreme Court, but they did win the dissenting judge. And the dissenting judge based her dissent on the fact that you aren't even close to a state, that the second amendment doesn't apply to you for the very reasons that they suggested.

But Heller just decided. The Supreme Court just decided in quoting the very terms of the Composition Clause that it is restricted to states. I don't see how you could possibly get around that without changing Heller.

Mr. NADLER. The time of the gentleman has expired.

The gentleman from Texas, Mr. Gohmert?

Mr. GOHMERT. Thank you.

And I do appreciate all the witnesses' testimony—enlightening.

And, Captain Lee, in your case inspiring. I know the Army doesn't just hand out Bronze Stars, so you are obviously an American hero and a great icon and somebody that I hope more people will emulate with your dedication to the country. And I appreciate that.

It seems to me the issue is are we going to show America that we abide by the law, because the ultimate law is the Constitution. And it was very clear the more you go back to the debates, the discussion, in 1978 every proponent of the constitutional amendment in 1978 agreed, including this Committee, that there is only one way to give a representative to the District of Columbia, and that is by constitutional amendment.

So it would appear that what we are doing here is, having seen that that did pass two-thirds in the House, two-thirds in the Senate, and then all it needed was three-fourths of the states to ratify, which never came.

And it is like proponents said, "You know what? It is just too hard to get three-fourths of the state to ratify, so we will do an end run on the Constitution."

You know this isn't a tactic. It is not a ploy to propose retrocession, as was done in 1847 with the land on the west side of Virginia. And for whoever came up with the idea of making taxation without representation such a slogan that it is on the license plates in D.C., it has worked, because it made an impression on me.

As a big fan of history and studying history, you know you go back and you know that is right, and digging up the examples you know from Franklin's comment about, "It is supposed to be an undoubted right of Englishmen not to be taxed but by their own consent given through their representatives."

And then they got more upset in 1765 with the passage of the Stamp Act. Taxation without representation—that slogan has made an impact on me. So that is why I have been looking. How do you do this constitutionally?

If it is going to be too hard to create a representative and get it passed constitutionally as an amendment, then what else can be done? And we have the example in 1847.

And then the other thing that hit me just in the last few days was we have done this with every part of the United States that has a delicate and not a representative, and that is they don't pay Federal income tax on income derived within their territory.

Well, if we are not going to go to the trouble to have a constitutional amendment and do this the right way that will be upheld by the Supreme Court, then why not fix all these years of impropriety and just say until we fix this the right way, the residents of the District of Columbia that hold together the city where we come and we meet and we make laws, you don't have to pay Federal income tax.

That is fair. And that came as a result of the big push about taxation without representation. Those that have been pushing that slogan, you are right. It has made an impact on me. And that is why I have got these two alternative bills.

If the majority is not going to do this as a constitutional amendment, then let us do it constitutionally. Let us retrocede the terri-

tory back to Maryland see get two senators and a representative. And until we do that, or until we do a constitutional amendment, I don't think you ought to have to pay Federal income tax.

And that bill will be filed this week, and I would encourage residents of the District of Columbia to encourage Members of Congress. Cut out our income tax until you fix up our representation issue.

And Professor Turley, you had mentioned the Heller case, but going back to you know 1805, the Hepburn case that discuss the term "states"—I know you are familiar with that, because I know, having dealt with you so much in the past, that you are smarter than me—but also came up in the 1949 Tidewater case.

Don't those you believe add merit to your position on this issue?

Mr. TURLEY. Indeed——

Mr. NADLER. The gentleman's time has expired. The witness may answer the question.

Mr. TURLEY. Indeed, it did come up. And in fact, Tidewater is relied on very heavily by the other side. But if you look at the opinion, it is deeply fractured. And the court began its analysis by categorically saying that the district is not a state. And then it fractured other reasons for the result.

There are, as I mentioned before, some references to states that have been given different meanings, but if you take a look at the 120 or so references, all but a handful have been defined in this way.

But most importantly, and the only question in front of us, is that the references in the Composition Clause have been defined that way. And that should end the question.

Mr. GOHMERT. Thank you.

Mr. NADLER. I thank the gentleman.

I now recognized for 5 minutes the gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you.

Mr. Turley, would there be any constitutional problems if we just made Washington, DC, a state?

Mr. TURLEY. I am sorry.

Mr. SCOTT. Would there be any constitutional problem if we made D.C. a state?

Mr. TURLEY. In terms of whether you could do it legislatively in establishing it to be a state, you could declare the District to be a state. It would be a question about the Federal enclave within it. I would have to look into to what extent it would be a state within an interior Federal enclave.

In fact, that issue was going to come up, if New York had won the fight over being the capital. My guess is that New York would have been New York with a Federal enclave inside it.

Mr. SCOTT. The constitutional problem, Mr. Turley, is in Section 2, which says people of the several states, and we are looking at the word "state" to exclude D.C. And you have indicated that sometimes it is a state, sometimes it isn't.

Section 10 says that no state shall enter into a treaty. Does that include D.C.?

Mr. TURLEY. Whether true, whether the District of Columbia can enter into a treaty with a foreign government, I would say not.

Mr. SCOTT. And the prohibition would be Section 10, which says no state shall enter into a treaty.

Mr. TURLEY. Oh, I think there is other reasons why it can't enter into a treaty besides that provision.

Mr. SCOTT. What?

Mr. TURLEY. Well, I mean first of all the right to enter into a treaty belongs to the executive branch in the Federal system, and I think that if you look at article II, as well as article I, there are limitations that would kick into the treaty-making state or district.

Mr. SCOTT. No state shall engage in war. Does that include D.C.?

Mr. TURLEY. In the meaning that I think it is offered, but what I would submit is that the question that the Supreme Court I assume will take as a relevant one is that this body is trying to change the definition of a Member.

They will go directly to the Composition Clause. There won't be any hesitation. They will look at the Composition Clause and see what the Constitution says about Members. And there they will find states and several states that they have just said is confined to political units, to the state unit.

And unless they are going to reverse all of their precedent, I don't see how they could possibly give the Congress what it wants.

Mr. SCOTT. Okay. And so when it says—I think we heard about the privileges and immunities clause. Citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states. That includes D.C.?

Mr. TURLEY. Well, the Supreme Court has said that District of Columbia residents have the privileges and immunities of citizens, and there are some things that you take with you.

And that includes, by the way, the Heller decision, where the District Clause really wasn't that relevant ultimately to the decision that this was an individual right to bear arms, and as citizens of the United States, District residents have that authority.

Mr. SCOTT. A person in charge of the state under the Extradition Clause shall be delivered up or removed—a person who is charged in any state. Does that include D.C.?

Mr. TURLEY. I go through these examples in my article that there are situations where the court has accepted states mean something different. And I say that repeatedly. In fact, the Supreme Court——

Mr. SCOTT. Mr. Turley, that is what—I mean if you look at the words in Section 2, it seems fairly open and shut. But as you go through the Constitution, "state" kind of wanders around.

Mr. TURLEY. Congressman, I think that my problem with the analysis of saying, "Well, that is the word 'state' too; it is the same noun" is it is not the same noun. The Supreme Court has been very clear on the Composition Clause.

The Composition Clause is so central to the constitutional structure it was a point of considerable debate among the framers. They were obsessed with state. They were obsessed with who could vote in Congress. They spend enormous amounts of time and energy and heat to trying to work out who could vote in Congress.

The Supreme Court of the United States, in my view, is not going to wander into other provisions. The precedent related to the

meaning of those words in the Composition Clause is clear and established.

And the District has undermined its own position by arguing in various locales that sometimes it is a state, sometimes it is not.

Mr. SCOTT. Well, Professor Dinh, this word "state" means different things, and sometimes it includes D.C. and sometimes it doesn't. Do you believe that we can include D.C. in the Composition Clause by statute?

Mr. DINH. Yes, because I think Jonathan is correct as it goes. He is saying that "state" means one thing in the Composition Clause. And I think he is just asking the wrong question, or failing—it may be willfully or otherwise—failing to ask the right question, which is what about this competing power that is plenary and majestic under Article I, Section 8, called the District Clause.

And that is the essence of the question that Chief Justice Marshall even in the Hepburn case said that that is a matter for the legislature to decide, not for us to grant diversity jurisdiction, which is exactly what this body did and which it aims to do with H.R. 157.

Mr. SCOTT. And you will not violate what appears to be a clear definition in Section 2, which says "several states." You won't violate that anymore than you did where you decided that D.C. can't form treaties, can't coin money, can't grant powers of titles of nobility, can't engage in war.

Those are limited to states, and you can include D.C. in that.

Mr. DINH. Exactly—especially when you have an affirmative grant of exclusive jurisdiction under the District Clause and only a negative implication in the Composition Clause.

It does not say "shall only be composed of representatives elected by the several states." So it is a negative implication. It is a strong negative implication, but you have to weigh that against the express plenary authority under the District Clause.

And I think in terms of reconciling the provisions, you know, as Chief Justice Marshall suggested in Hepburn, Congress is the one that has the ability to do that. And the court will see to that, as it has done in diversity jurisdiction, in privileged communities, and all the other examples you have cited.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. NADLER. Thank you.

I now recognize for 5 minutes the gentleman from Georgia, Mr. Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman.

Professor Dinh, do you believe that the framers, who had just gone to war based in part on the belief of no taxation without representation, intended to deny citizens of the Nation's capital the rights to representation?

Mr. DINH. On this issue, Congressman, Madison wrote very clearly. He said, look it—we have a provision—we have an intention to get some land in order to make the capital, right? The states who cede the land will protect the rights of its citizens—and provide for the vote. And Congress accepted that, because they—it needs the land.

That is exactly what happened in the historical example of that that I gave you, which is that in 1790 Congress accepted the land,

even though the residents are no longer citizens of Virginia or Maryland, and it ceded to them by grace of Congress the right to vote as if they were citizens of Maryland and Virginia.

Only by the Organic Act of 1801 by omission did D.C. residents lose that right to vote. So while I do not have a clear answer to you about what the framers thought regarding depriving citizens of the vote, I suspect the omission was not intentional, for all the historical reasons that you stated.

They did have a mechanism in order to provide for D.C. residents to vote, and that is in the District Clause.

Mr. JOHNSON. Why is it that the framers did not include provisions for residents of Washington, DC, to have voting representation?

Mr. DINH. I think that it is encapsulated in James Madison's notes that said that the right to vote is so fundamental that I cannot imagine—that he could not imagine that a state would give up land without protecting that right to vote of the citizens.

I have tried, and I have talked with Professor Turley about this. We tried to go back to the historical record around the passage of the Residence Act and the Organic Act, but unfortunately that record is very, very scarce as to what happened during those 10 years interval, and specifically in 1801 why the omission in the Organic Act was made such that we don't have the right to vote today.

Mr. JOHNSON. Professor Turley, what are your opinions on those two questions?

Mr. TURLEY. Well, I cite in the article attached to my testimony what I think is an explanation. It is there. We may not agree with it. I certainly don't agree with the concept of having a capital with nonvoting citizens, which I do find it incredibly offensive as an American.

The framers I believe did not find it that offensive, that when you look at what the statements were made, people did realize the problem. Alexander Hamilton tried to solve the problem. And Alexander Hamilton articulated, offered an amendment, which didn't pass.

He was not the only one who raised this issue. There were other people, who were talking about this weird thing out there, this non-state you know capital.

But the emphasis was that it would not be a state. That is what they wanted. They wanted the capital to be represented by Congress as a whole. And part of the problem is that when you start to change the meaning of "state" for the purpose of the Composition Clause, you then have a snowballing effect that goes into, for example, the qualifications clause, which is also in Section 2.

There you have state legislatures deciding the qualifications of Members. And if you start to say that Congress can create a non-state voting member, you begin to have this snowballing effect on these other provisions.

I think that the more reasoned approach is to take their framers at their word. They wanted a non-state entity. And when you are a non-state entity, you are not represented in Congress in the sense of an individual representative. You represented by the entire Congress.

Mr. JOHNSON. All right. Well, let me ask this question, Mr. Turley. What is the constitutional issue with declaring the District of Columbia to be a state by statute, as was proposed in House bill—well, I don't know the name of the bill or the number of the bill, but it was in 1993 when it was proposed?

Mr. TURLEY. Yes, I haven't actually looked at this question very closely, but that has never been a burden for me in the past.

And so I will certainly give you what I think would be the answer, which is that you can create the state of Columbia, but you would still have to resolve the status of the Federal enclave within. And you would be in the same position as if New York had won the fight with the District of Columbia and that the capital was in New York.

I expect that there would have been a Federal enclave that would not be part of New York. And in the same sense I think they would—unless you amend the Constitution, there would still be a Federal enclave here.

Mr. NADLER. Thank you. The gentleman's time has expired. I thank the gentleman.

Mr. JOHNSON. Thank you.

Mr. NADLER. I now recognize for 5 minutes the gentle lady from Texas, Sheila Johnson Lee—Jackson Lee. I am sorry. I don't know how I did that.

Ms. JACKSON LEE. We are all related. [Laughter.]

Let me thank the Chairman for his kindness. And I truly thank the panel.

Professor Turley, I think your provocative testimony is instructive for what may come before the United States Supreme Court. And it certainly gives us an opportunity to be vetted on this legislation, which I happen to support—H.R. 157.

So please accept our appreciation to all of the panel and for your insight and allow me to meander, as my colleague from Virginia mentioned, trying to suggest that there is great reason to be able to support this legislation.

I am going to ask some quick, abbreviated questions. I just need you to say "yes."

Did the Supreme Court make new law in Brown vs. Topeka Board of Education?

Mr. TURLEY. Did it make new law?

Ms. JACKSON LEE. New law.

Mr. TURLEY. I would like to say that it recognized the existing law, but yes, it made new precedent. I would say that.

Ms. JACKSON LEE. I accept that.

Professor Dinh, would you suggest that the act of 1801 was an accidental omission? Now, you suggested that that is where by chance the individuals of D.C. lost their right to vote or it became unclear. Would you consider that an accidental act of omission?

Mr. DINH. No. I think it is certainly an omission. I do not know whether it was intentional or accidental. Simply, we don't have the record.

Ms. JACKSON LEE. And it is a rule without record, and so it could be that it was accidental.

Mr. DINH. Absolutely.

Ms. JACKSON LEE. Professor Turley, do you consider the individuals living in Washington, DC, citizens of the United States?

Mr. TURLEY. Yes, I do.

Ms. JACKSON LEE. Let me now just tried to take you through this. And my argument is that by being citizens of the United States, the constitutional right to vote or the right to vote, however it be statutory or otherwise, inures to those citizens.

And I would take you through—and I am going to quickly; hopefully, we will have enough time for you to just comment. Article 1, Section 2 indicates that the House of Representatives should be composed of Members chosen every second year by the people of the United States.

And ended it mentions electors. Washington, DC, in the presidential elections had electors. I don't know how that was achieved, but they have the semblances of citizenship and states. States have individuals that go to the Electoral College, and so they have that. They have that right.

Then if we go to article—if we go to I think it is Section 8, where here again this is the one that you—I think Professor Dinh mentions to exercise exclusive legislation all cases whatsoever over such District.

I just stop right there, which means that the Congress has a right to exercise legislation, which is what this particular legislative initiative is.

And then lastly, I would take you through—and I wonder if your argument prevails, even though I am sure that you will find a appropriate response, then amendments 13, 14 and 15 seemingly should not in essence be subjected to those who live in Washington, DC.

If you are suggesting that they cannot have the right to have a representative in the United States Congress that would vote, they are citizens. They are able to participate in the Electoral College.

The 13th amendment indicated that slavery was over. That means that it shouldn't have covered them. It talked about the 14th amendment. All persons born or naturalized in the United States and subject to jurisdiction are citizens of the United States.

It shouldn't have covered them at that time, if you are suggesting that they don't have the basic right that would come to all citizens, which allows all citizens to be represented in the United States House of Representatives.

And in the 15th amendment, the right of citizens of the United States to vote shall not be denied or abridged, then that means that that you are abridging the rights of those here in Washington, DC, to not have the right to vote, or their vote being counted.

My point, if you would answer, is it seems as if, if you meander through the Constitution, there are interchangeable interpretations. I could make the argument and join you in saying, "You know what? Those living in the Washington, DC, area did not have the right to be under the 13th, 14th and 15th amendment."

I could make that argument. They were ceded, et cetera. Why would you suggest that there could not be growing interpretation to this Constitution, which has been called a living document?

Mr. TURLEY. I——

Mr. NADLER. The time of the gentlelady has expired. The witness may answer the question—hopefully briefly. We didn't say answer the various questions hopefully briefly.

Ms. JACKSON LEE. You could probably answer one.

Mr. TURLEY. No, I appreciated the point of the gentlelady, and I—first of all, the reason they do have that power——

Mr. NADLER. Professor, could you get closer to the mic, please?

Mr. TURLEY. Oh, I am sorry.

The reason they do have that power is partially because of the 23rd amendment. And the 23rd amendment actually works against the District's argument here, because the 23rd amendment says we are giving you this electoral power as if you were a state. I mean so the amendment itself reflects the fact that we had to do the amendment because you are not a state.

And so when you look at the 23rd amendment, when you look at the failed amendment, Congress has repeatedly acknowledged that this isn't a state, and we have to amend the Constitution to get state-like authority like participating in a presidential election.

Mr. NADLER. I thank the gentlelady.

This concludes the second panel. I thank the panelists.

Without objection, all Members will have 5 legislative days to submit to the Chair addition no written questions for the witnesses, which we will forward, and ask the witnesses to respond as promptly as they can so that their answers may be made part of the record.

Without objection, all Members will have 5 legislative days to submit any additional materials for inclusion in the record.

And with that, the business of this hearing is concluded, and the hearing is adjourned.

[Whereupon, at 12:01 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Opening Statement: D.C. Voting Rights
Congresswoman Tammy Baldwin
Judiciary Constitution Subcommittee
January 27, 2009

Thank you, Mr. Chairman. Before I begin my short statement, I want to express my thanks to you for welcoming me on the Subcommittee on the Constitution, Civil Rights, and Civil Liberties. I look forward to working with you, Ranking Member Sensenbrenner, the Subcommittee staff, as well as my colleagues on both sides of the isle in the 111th Congress.

Chairman Nadler, I am especially pleased that our Subcommittee's first hearing of the year is on D.C. Voting Rights. Like you, I think it is an important follow-up to such an historic election in American history. More than 131 million Americans voted for president in November 2008 – 9 million more than cast ballots in 2004. Here in the District of Columbia, voter turnout increased by a staggering 13 percentage points – one of the biggest turnout increases anywhere in the country.

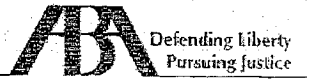
Despite D.C. residents' unparalleled participation in the democratic process this past fall, they were still unable to secure voting representation in the U.S. House of Representatives. I am extremely troubled that over half a million D.C. residents' voices are not adequately heard by our government and firmly believe the District of Columbia should have voting Congressional representation.

I am thankful to my colleague, Eleanor Holmes Norton, for her work on H.R. 157, "The District of Columbia House Voting Rights Act of 2009." She has been an unwavering advocate to improve our democracy and ensure that all citizens are allowed equal voting rights.

It is my hope that we can move this bill quickly through our Committee and that we will have the opportunity to vote in favor of voting rights for the residents of the District of Columbia as soon as possible.

~~I regret that I may have to leave our hearing early as I am required to attend a markup in another Committee. But until then,~~ I look forward to hearing from our distinguished panels of witnesses and learning more about this issue.

Mr. Chairman, thank you for this time.



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January 26, 2009

The Honorable Jerrold Nadler
Chair, Subcommittee on the Constitution,
Civil Rights and Civil Liberties
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

The Honorable James Sensenbrenner
Ranking Member, Subcommittee on the
Constitution, Civil Rights and Civil Liberties
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman and Ranking Member Sensenbrenner:

Last week nearly two million Americans gathered in our nation's capital to witness the inaugural ceremony heralding the peaceful transition of our government's leadership--an affirmation and celebration of the strength of our representative democracy. Many of those attending the festivities are unaware that there is a large number of Americans, some of whom were standing among them, that do not enjoy the full benefits of our democracy. In a country that cherishes the principle of a government "of the people, by the people, and for the people," it seems inconceivable that American citizens residing in the capital do not have voting representation in the United States Congress. It is time to correct this injustice. The American Bar Association enthusiastically supports providing congressional voting representation to the residents of the District of Columbia and commends the Committee for moving expeditiously to approve legislation that takes an important step toward accomplishing this goal.

H.R. 157, the District of Columbia House Voting Rights Act of 2009, would establish the District of Columbia as a Congressional district for purposes of representation in the House of Representatives. Legislation similar to H.R. 157 was approved by the House by a bipartisan vote in 2007. It would provide one voting seat in the House for the District of Columbia and an additional House seat for the state that would have been next in line according to the last Census, the state of Utah. This bill is a product of years of cooperative effort and carefully considered compromise to ensure that the goal of giving D.C. residents their right to voting representation in the House is accomplished by a mechanism fully consistent with our Constitution and is implemented in a manner that does not disadvantage any citizen or state.

For over two hundred years, residents of our nation's capital have been disenfranchised. Residents of the District of Columbia pay taxes and are subject to the military draft and the laws of our nation. Yet they are not allowed to select voting members of Congress to represent their views in determining the formulation, implementation and enforcement of those laws. This violates a central premise of representative democracy and the ideal, voiced by Thomas Jefferson, that governments "derive their just powers from the consent of the governed."

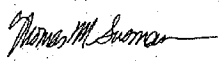
January 26, 2009
Page Two

This not only is contrary to our own system of representative government, it also undermines our leadership in promoting the international rule of law and democratization. The United States is the world's only democratic nation that does not grant citizens of its capital voting representation in the national legislature. Our nation is devoting significant resources to promoting representative democracy abroad, and yet we have more than 500,000 American citizens residing in the District of Columbia who are not afforded that right at home. Depriving a sizeable segment of our own population of the fundamental right to voting representation undermines the U.S. message of equality under the law.

There has been an ongoing debate regarding the appropriate mechanism by which voting representation in Congress for the District of Columbia may be established. The American Bar Association concurs in the conclusion reached by numerous constitutional and legal experts that Congress has the authority to provide voting representation in the House of Representatives to residents of the District of Columbia under the "District Clause" of the Constitution (U.S. Const. art. I, § 8, cl.17). We would be pleased to provide the Committee with further analysis on this subject at your request.

Some have stated that this issue is a matter of politics; the ABA believes it is a matter of principle. Congress should use its constitutional authority to provide the citizens residing in our capital the fundamental right to voting representation in the House. It is within Congress' power to correct this longstanding inequity, and we urge you to work toward enactment of H.R. 157 or similar legislation as soon as possible.

Sincerely,



Thomas M. Susman

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January 26, 2009

The Honorable Nancy Pelosi
Speaker of the U.S. House of Representatives
Office of the Speaker
H-232 U.S. Capitol
Washington, DC 20515

Re: H.R. 157 – District of Columbia House Voting Rights Act of 2009

Dear Madame Speaker:

I write to you today, in my capacity as President of the Federal City Council, to urge you to schedule a floor vote for H.R. 157, District of Columbia House Voting Rights Act of 2009, to take place on or before February 12, 2009, the bicentennial anniversary of President Abraham Lincoln's birth. The Federal City Council, a nonprofit business-supported civic organization made up of over 200 of the D.C. area's top business and civic leaders, wholeheartedly supports the bill and looks forward to its favorable consideration in both the House and Senate this year.

The time has come to end the disenfranchisement of residents in the Nation's Capital. As you know, H.R. 157 is similar to legislation introduced in the last Congress, which passed the House and came within three votes of obtaining cloture in the Senate. It essentially treats the District of Columbia as a congressional district to allow direct and full representation of D.C. residents in the House of Representatives. It also provides an additional congressional district for Utah, which is due for an increase in its delegation based on its population growth. The bill has had numerous hearings, mark-ups, and debate in both houses of Congress over the past five years, so the issues have been discussed sufficiently and with great care. For this reason, we urge you to act on this legislation by scheduling a floor vote early this year.

Constitutional scholars Ken Starr and Georgetown University Professor Viet Dinh, among others, have shown the legislation passes constitutional muster, given Congress's wide latitude with respect to the affairs of the District of Columbia. The Supreme Court has said that *"no right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live."* Although residents of the District of Columbia do not reside in a state, they are American citizens. It is a fundamental belief that all American citizens have earned the right to have a vote in our national legislature.

With the nation facing some of its most difficult challenges since the Great Depression, we cannot afford to prevent any American citizen from being fully represented in these critical discussions. A vote to extend such representation to citizens of the District of Columbia on the 200th anniversary of President Lincoln's

birth would be a worthy memorial to the president who saved a divided nation in the name of equality and fairness.

In the strongest possible terms, we urge you and your colleagues move forward on this most worthy piece of legislation. We ask that you allow the citizens of the Nation's Capital to finally enjoy the fundamental, democratic right to voting representation in Congress – a right which, as a nation, we are promoting around the world.

With warmest regards,

Frank Keating
President, Federal City Council

Cc: The Honorable Harry Reid
The Honorable Richard Durbin
The Honorable Steny Hoyer
The Honorable James Clyburn
The Honorable John Conyers
The Honorable Eleanor Holmes Norton

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The Honorable Jerrold Nadler
Chairman
Subcommittee on the Constitution, Civil Rights and Civil Liberties
2334 Rayburn House Office Bldg.
Washington, D.C. 20515

The Honorable F. James Sensenbrenner, Jr.
Ranking Member
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
2149 Rayburn House Office Bldg.
Washington, D.C. 20515

January 26, 2009

Dear Chairman Nadler & Ranking Member Sensenbrenner:

The NAACP Legal Defense & Educational Fund, Inc. urges you to support H.R. 157, the "District of Columbia House Voting Rights Act of 2009" ("D.C. Voting Rights Act"). Founded in 1940 by Thurgood Marshall, the NAACP Legal Defense Fund has supported every major piece of voting rights legislation over the past fifty years, including the first modern civil rights statute, the Civil Rights Act of 1957; the original enactment of the Voting Rights Act in 1965 and its subsequent reauthorizations; the National Voter Registration Act of 1993; and the Help America Vote Act of 2002.

The D.C. Voting Rights Act is as important as any historic voting rights legislation passed by Congress. The right to vote and to have that vote count is paramount. As the Supreme Court acknowledged in one of its major reapportionment cases, *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964), "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which we, as good citizens, must live." Indeed, more than a century ago, the Supreme Court recognized that the "political franchise of voting . . . is regarded as a fundamental political right, because [it is] preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

It is nothing short of a national travesty that over one half million of our nation's citizens cannot fully participate in our democratic process simply based on where they choose to live. Full and meaningful exercise of the franchise is absolutely imperative for *all* of our citizens, regardless of geography. It is fundamentally inconsistent with the principles of a representative democracy that a citizen must surrender representation in Congress just because he or she happens to reside in the District of Columbia.

The legislation is long past due. We are well into the third century of operating the most progressive democracy in the world. At every turn, we hold ourselves out to other nations as the paradigm when it comes to guaranteeing voting rights and ensuring full

political participation for our citizens. Yet the residents of our own capital continue to be denied a vote on the floor of the House of Representatives, often called the "People's House" and known as the heart of American democracy because it was the first component of the legislative branch created by the Constitution.

Most importantly, the denial of the right to full representation in Congress has a significant impact on African-American citizens in particular. Fifty-seven percent of the residents of the District are African-American.[1] No state in the union has a larger percentage of African-American residents. Given our nation's long and sordid history of first denying the franchise to African Americans and then obstructing its full exercise, it is difficult to imagine that Congress would not take all steps possible to ensure that African Americans everywhere can fully participate in our democratic processes. We are doubtful that history will look kindly upon the stark injustice that continues to deprive hundreds of thousands of African Americans of fair and equal representation in Congress.

The D.C. Voting Rights Act comes on the heels of Congress' 2006 reauthorization of the expiring provisions of the Voting Rights Act of 1965. During hearings preceding the reauthorization, Congress compiled significant evidence illustrating the persistence of voting discrimination against African Americans and reaffirmed its commitment to dismantling barriers that inhibit access to the polls. In our view, the D.C. Voting Rights Act represents a measured effort to dismantle a barrier that has long disenfranchised substantial numbers of otherwise eligible African-American voters.

We fully support efforts by Congress to remedy the continued disenfranchisement of the citizens of the District of Columbia. The compromise by which the District of Columbia obtains representation and Utah gains a fourth seat has generated substantial bipartisan support. Delegate Eleanor Holmes Norton has demonstrated extraordinary leadership and commitment in forging an agreement that is both legally and politically supportable. The pathway should be clear for final passage by Congress this session.

For over 200 years, the citizens of the District of Columbia have been denied the right to meaningfully participate in the federal legislative process. We urge you to support H.R. 157 which represents a vital step toward eliminating a form of historic voter disfranchisement.

Sincerely yours,

John Payton, Director-Counsel and President
Leslie M. Proll, Director, Washington Office
Kristen Clarke, Co-Director, Political Participation Group

Leadership Conference on Civil Rights

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COMPLIANCE/ENFORCEMENT COMMITTEE CHAIRPERSON
Karen K. Narasaki
Asian American Justice Center
PRESIDENT & CEO
Wade J. Henderson

January 14, 2009

The Honorable Nancy Pelosi, Speaker
United States House of Representatives
Washington, DC 20515

Dear Speaker Pelosi:

On behalf of the Leadership Conference on Civil Rights (LCCR) and undersigned individual organizations, we are writing to ask you to bring H.R. 157, the "District of Columbia House Voting Rights Act," ("DC VRA") to a vote as soon as possible. Before Congress begins to consider an economic recovery package and many other proposals that so greatly affect our nation's future, it should assure the citizens of Washington, DC and Utah that Congress is committed to giving them a fair and equal voice.

Washington, DC residents pay federal income taxes, serve on juries, and die in wars to defend American democracy, but they do not have voting representation in the U.S. House of Representatives or the Senate. As we work to promote democracy around the world, we simply cannot afford to leave hundreds of thousands of our own citizens out in the cold.

In addition, since 2001, Utah residents have had their right to vote undermined. Because thousands of state residents living abroad were not counted in the 2000 census, Utah was given only three congressional districts instead of four. As a result, the votes of Utah citizens have been diluted.

The DC VRA will provide Washington, DC residents with their own voting member of the House of Representatives for the first time ever, and give Utah an additional House district through 2012. Because each party would likely gain one additional House seat under the bill, its political impact would be neutral. As you know, in 2007, the House passed a similar version of the DC VRA with bipartisan support.

The DC VRA is well within Congress' broad constitutional powers to govern the District of Columbia. Furthermore, given the principles upon which the American Revolution was fought, we believe that our Founders would never accept the "taxation without representation" of more than 500,000 Americans today.

Please help expand democracy to the residents of DC and Utah by promptly bringing the DC VRA to the House floor. Thank you for your consideration. If you have any questions, please contact Rob Randhava, LCCR Counsel, at (202) 466-6058.

Sincerely,

American Association for Affirmative Action
American Association of People with Disabilities
American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)
American Federation of Teachers
American Jewish Committee

"Equality In a Free, Plural, Democratic Society"

Americans for Democratic Action, Inc.
Anacostia Coordinating Council
Anti-Defamation League
Association of Community Organizations for Reform Now (ACORN)
Asian American Justice Center
Bazelon Center for Mental Health Law
Blacks in Government
Capital Area Food Bank
Center for Responsible Lending
Central Conference of American Rabbis
Children's Defense Fund
Coalition to Stop Gun Violence
Common Cause
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League of Women Voters of the United States
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Mexican American Legal Defense and Educational Fund
NAACP
NAACP Legal Defense and Educational Fund, Inc.
National Alliance of Postal and Federal Employees
National Association of Human Rights Workers
National Association of Social Workers
National Black Justice Coalition
National Congress of American Indians
National Council of Jewish Women
National Disability Rights Network
National Education Association
National Fair Housing Alliance
National Gay and Lesbian Task Force Action Fund
National Treasury Employees Union
National Urban League
National Women's Law Center
OCA
Open Society Policy Center
People For the American Way
Pride At Work
Sasha Bruce Youthwork, Inc.
Southeast Asia Resource Action Center
Union for Reform Judaism
Unitarian Universalist Association of Congregations
U.S. Public Interest Research Group

Subcommittee on the Constitution, Civil Rights. and Civil Liberties
Hearing on: H.R. 157, the "District of Columbia House Voting Rights Act of 2009"
January 27, 2009 at 10:00 A.M. in 2141 Rayburn House Office Building

Response of

Prof. Viet D. Dinh

to

Question for the Record Submitted by Rep. Louie Gohmert

What is your view of the constitutionality of Rep, Rohrabacher's bill in the 111th Congress numbered H.R. 665?

I have not had the opportunity to review and analyze fully H.R. 665, The District of Columbia Voting Rights Restoration Act of 2009. At first blush, I believe that section 3 of H.R. 665, restoring the rights of D.C. residents to participate as Maryland residents in Congressional elections, is a constitutional exercise of Congressional authority under Article I, section 8, clause 17 (the District Clause). However, I have strong reservations about the constitutionality of section 4 of H.R. 665, restoring the right of D.C. residents to participate as Maryland residents in Presidential elections, in light of the clear language providing otherwise in the 23rd Amendment.

Section 3 of the bill would effectively make the District of Columbia a Maryland Congressional district and restore the rights of DC residents to vote as Maryland residents. As I opined in commenting on the constitutionality of H.R. 157, The District of Columbia House Voting Rights Act of 2009, Congress has broad authority under the District Clause to "exercise exclusive Legislation in all Cases whatsoever" for the land that is currently the District of Columbia. That plenary authority includes the power to make the District a Congressional district--notwithstanding the provision in Article I, section 2, clause 1, that representatives shall be chosen "by the People of the several States." That is so because Congress has the authority under the District Clause to treat DC resident as if they were citizens of the several states, as the Supreme Court has held in a variety of contexts highlighted in my written testimony. This analysis means that, a fortiori, Congress has the authority to make the District a Congressional district within the state of Maryland.

At the same time, I have constitutional concerns about section 4 of H.R. 665, restoring the right of D.C. residents to participate as Maryland residents in Presidential elections. The 23rd Amendment provides that the District shall appoint electors for President and Vice President, and Section 4 seeks to divest the District of this constitutional authority through simple legislation. I do not think Congressional authority, under the District Clause or elsewhere, extends this far.

First, as I noted in my testimony on H.R. 157, the Electoral College is an entity established by Article II of the Constitution. Congressional authority thereunder is very circumscribed—indeed, limited to its authority under Article I, section 1, Clause 4, to determine the time of choosing the electors and the day on which they cast their votes. But whatever the scope of this Congressional authority, it does not extend to contravening the plain text of the 23rd Amendment, providing that the District shall appoint electors it would be entitled if it were a state.

Second, it is not availing to look to language in section 1 of the 23rd Amendment providing that the elector shall be appointed "in such manner as the Congress may direct." This provision harkens to Article II, section 1, clause 2, specifying that each state shall appoint electors "in such Manner as the Legislature thereof may direct" and thus speaks to the regulation of the electoral process in selecting the electors. I do not think this power to regulate electoral procedures includes the authority to eliminate the substance of section 1 of the 23rd Amendment, that the District shall appoint the electors it would be entitled if it were a state.

Third, I do not think section 2 of the 23rd Amendment provides Congressional authority to negate the substantive meaning of section 1. The Supreme Court has interpreted similar language in the enforcement clauses of the 13th, 14th, and 15th amendments to vest Congressional authority only to remedy violations of the respective constitutional protection, and not to define the meaning or substance of those provisions. Negating the meaning or effect of the substantive constitutional provision, here that the District shall appoint electors it would be entitled if it were a state, is a paradigmatic transgression of Congress's remedial power. *See generally Printz* v. *United States*, 521 U.S. 898 (1997).

SUPPLEMENTAL RESPONSE TO COMMITTEE QUESTION

JONATHAN TURLEY
SHAPIRO PROFESSOR OF PUBLIC INTEREST LAW
GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

THE DISTRICT OF COLUMBIA
HOUSE VOTING RIGHTS ACT OF 2009

MARCH 25, 2009

COMMITTEE ON THE JUDICIARY
THE UNITED STATES HOUSE

SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND CIVIL LIBERTIES

QUESTION: What is your view of the constitutionality of Rep. Rohrabacher's bill in the 111th Congress numbered HR 665?

RESPONSE:

I am familiar with Rep. Rohrabacher's proposal, which presents an intriguing alternative for achieving voting representations for the residents of the District of Columbia. Rep. Rohrabacher has a long-standing interest in and a long-demonstrated understanding of the constitutional issue regarding the District's representational status. His proposal is highly creative and should be given serious consideration by all members, even if with the reservations discussed below.

H.R. 665 has obvious advantages over the current proposal. First, it achieves full, not partial, representation. At a recent town hall meeting in Washington this month where I spoke with CRS staffer Kenneth Thomas (who has done extraordinary work in this area), leading supporters of the D.C. Vote bill made clear that they do not want simply a single vote in the House of Representatives and, even if the current bill passes, they will next press for two Senators for District residents. H.R. 665 would give residents such full representation in both houses without trying to extend the congressional claim of plenary authority to the creation of two Senators for the District.

Second, unlike the curious new district created under the current bill, the House representation under H.R. 665 could expand to more than one district. It would not be a rigid district frozen in statutory amber. Under the current bill, the residents would have one vote regardless of whether the population expands to two million or shrinks to two thousand residents.

Third, H.R. 665 would be based on the accepted model of retrocession, which can be ordered by Congress without a constitutional amendment.

H.R. 665, however, would invite challenge over the ambiguity of whether the District representative is truly a representative of one of the several states. The traditional definition of a state includes the area demarked by borders, physical control, and legal jurisdiction by compose a government entity. That definition also includes the power to tax residents and control over such things as local police and National Guard forces. Clearly, political control and determination is part of that equation:

> A "State" within the meaning of the Constitution is not merely a piece of territory, or a mere collection of people. It is, as this court has said, "a political community." Who constitute the State in that sense? Clearly the people who exercise the political power. That is to say, the electorate and those whom the electors of a State choose to clothe with the governmental power of the State.

Leser v. Garnett, 258 U.S. 130, 131 (1922). Yet, while there are arguments that can be made in favor of H.R. 665, prior cases will present a challenge for the hybrid creation under the legislation. There is no question that Maryland is a state under such traditional definitions, but there would be a

question of whether the District was truly part of Maryland absent true retrocession.

Making the district part of Maryland politically, but not physically, will raise constitutional concerns as to whether the District representative is actually a representative of the State of Maryland. District residents would not be able to do many things accorded to Maryland residents, from voting for Maryland state representatives to enjoying state benefits from education to welfare. Likewise, the State of Maryland could not exercise full legal authority over the District.

Congress would continue to exercise authority over the District and thus the District would remain on some level what the Supreme Court decribed as a "mere instrumentality of [the federal] Government."[1] The result would be a constitutional equivalent to a "marriage of convenience" with a joinder in principle but something less than full commitment.

The concern is that H.R. 665 does not actually retrocede the land back to Maryland. This novel model appears built on the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA).[2] UOCAVA remains controversial because it allows non-residents to vote as members of states. Yet, a couple of courts have found the statute to be constitutional.[3] This is a precarious model upon which to premise the representation of the District. Aspects of this theory were rejected in *Attorney General of the Territory of Guam v. United States*,[4] where citizens of Guam argued that the meaning of "state" has been interpreted liberally and that the Overseas Act relieves any necessity for being the resident of a state for voting in the presidential election. The court categorically rejected the argument and noted that the act was "premised constitutionally on prior residence in a state."[5] The court quoted from the House Report in support of this holding:

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1 *United States v. Carter*, 409 U.S. 418, 422 (1973).

2 Pub. L. 99-410, 100 Stat. 924 (1986) (codified at 42 U.S.C. §§ 1973ff et seq. (2006)).

3 *See Romeu v. Cohen*, 265 F.3d 118 (2d Cir. 2001); *De La Rosa v. United States*, 842 F. Supp. 607, 611 (D.P.R. 1994).

4 738 F.2d 1017 (9th Cir. 1984).

5 *Id.* at 1020.

> The Committee believes that a U.S. citizen residing outside the United States can remain a citizen of his last State of residence and domicile for purposes of voting in Federal elections under this bill, as long as he has not become a citizen of another State and has not otherwise relinquished his citizenship in such prior State.[6]

Under H.R. 665, the "prior residence" would possibly refer to the residency pre-1790,[7] but certainly not any living resident. There is a strong argument to be made that Congress can retrocede the District without the approval of Maryland. However, absent retrocession, the bill would create a land that is technically under the control of the federal government while politically a part of a state. The representational status of the member would be subject to challenge.

As you know, in prior testimony, I have long advocated what I call a "modified retrocession plan." Like Rep. Rohrabacher's legislation, it is an attempt to achieve full—rather than partial – representation. However, it would involve the District's retrocession both politically and physically to Maryland. The difference is that the legislation would be designed to allow the District to remain unique and largely independent *within the state of Maryland.*

Retrocession plans have the advantage of following a well-trodden and widely accepted model. Over one hundred and sixty years ago, Congress retroceded land back to Virginia under its Article I authority. Retrocession has always been the most direct way of securing a resumption of voting rights for District residents. Replacing Washington, DC with Washington, MD is a conceptual leap that many are simply not willing to make. However, it is the most logical resolution of this problem.[8]

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[6] *Id.* (quoting H.R. Rep. No. 94-649, at 7 (1975), *reprinted in* 1975 U.S.C.C.A.N. 2358, 2364).

[7] Theoretically, one could argue 1801 when the Organic Act of 1801 was passed given the fact that residents continued to vote during the final formulation of the District.

[8] At first blush, there would seem to be a promising approach found in legislation granting Native Americans the right to vote in the state in which their respective reservation is located. 8 U.S.C. § 1401(a)(2). After all, these areas fall under congressional authority in the provision: Section 8 of

Under my proposal, the District of Columbia would be the area running from the Capitol to the Lincoln memorial with either no residents (which I would prefer) or only the first family. The proposal would implement a three-phase process for retrocession. In the first phase, a political transfer would occur immediately with the District securing a House seat as a Maryland district and residents voting in Maryland statewide elections. In the second phase, incorporation of public services from education to prisons to law enforcement would occur – under agreement with Maryland. In the third phase, any tax and revenue incorporation would occur. Thus, while Washington would retrocede to Maryland, it would be left to the two jurisdictions to work out the degree to which the city and state become fully incorporated.

These phases would occur over many years with only the first phase occurring immediately upon retrocession. Indeed, I recommended the creation of a three-commissioner body like the one that worked with George Washington in the establishment of the original federal district. These commissioners would recommend and oversee the incorporation process. Moreover, Maryland can agree to continue to treat the District as a special tax or governing zone until incorporation is completed. Indeed, Maryland may chose to allow the District to continue in a special status due to its historical position. The fact is that any incorporation is made easier, not more difficult, by the District's historic independence. Like most cities, it would continue to have its own law enforcement and local governing authority. However, it could also benefit from incorporation into Maryland's respected educational system and other statewide programs related to prisons and other public needs.

In my view, this approach would be unassailable on a legal level and highly efficient on a practical level. I realize that there remains a fixation with the special status of the city, but much of this status would remain.

Article I. However, the District presents the dilemma of being intentionally created as a unique non-state entity – severed from Maryland. For this approach to work, the District would still have to be returned to Maryland while retaining the status of a federal enclave. *See also Evans v. Cornman*, 398 U.S. 419 (1970) (holding that residents on the campus of the National Institutes of Health (NIH) in Maryland could vote as part of that state's elections).

While the city would not technically be the seat of government, it would obviously remain for all practical purposes our Capitol City.

This is not to suggest that a retrocession would be without complexity. Indeed, the Twenty-Third Amendment represents an obvious anomaly. Section 1 of that amendment states:

> The District constituting the seat of government of the United States shall appoint in such manner as the Congress may direct:
>
> A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a state, but in no event more than the least populous state; they shall be in addition to those appointed by the states, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a state; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.[9]

Since the first family may be residents of the District (depending on its design), this presents something of a problem. There are a couple of obvious solutions. One would be to repeal the Amendment, which is the most straight-forward and thus the preferable approach. Another approach would be to leave the Amendment as constructively repealed. Most presidents vote in their home states. A federal law could also bar residences in the new District of Columbia. A third and related approach would be to allow the clause to remain dormant since it states that electors are to be appointed "as the Congress may direct."[10] The only concern is that a future majority could do mischief by directing an appointment when electoral votes are close. The White House, which has no constitutional significance as a physical structure, should not be a barrier to such a plan.

None of this means that H.R. 665 is clearly unconstitutional. It is novel and would present some challenging questions. However, it is far closer to the constitutional mark than the current D.C. Vote legislation by

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[9] U.S. CONST. amend. XXIII.

[10] *See generally* Peter Raven-Hansen, *The Constitutionality of D.C. Statehood*, 60 GEO. WASH. L. REV. 160, 187-88 (1991); Philip G. Schrag, *The Future of District of Columbia Home Rule*, 39 CATH. U. L. REV. 311, 317 (1990).

tying the district's representation to an actual state. Nevertheless, I believe that it would be better to avoid such questions with a tried and true approach – either a constitutional amendment or a modified retrocession plan. I believe that H.R. 665 is most valuable in shifting the debate to a more productive and promising debate. The difference between H.R. 665 and the modified retrocession plan (or other similar retrocession-based plans) can be resolved. It is a debate, however, that Congress has never entertained. The current legislation is an example of "path dependence" in economics where a person becomes so invested in one idea or model that he or she cannot entertain better alternatives due to that investment. Models like H.R. 665 hold the promise of a resolution that is both final and constitutional. By working out slight differences in the models, District residents would achieve not only lasting but full representation in Congress. I would eagerly join such an effort with leaders like Rep. Rohrabacher and other members committed to securing full representational rights for the citizens of the District of Columbia.

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