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S. Hrg. 113–713

# EQUALITY FOR THE DISTRICT OF COLUMBIA: DISCUSSING THE IMPLICATIONS OF S. 132, THE NEW COLUMBIA ADMISSION ACT OF 2013

## HEARING

BEFORE THE

COMMITTEE ON
HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

ONE HUNDRED THIRTEENTH CONGRESS

SECOND SESSION

SEPTEMBER 15, 2014

Available via the World Wide Web: http://www.fdsys.gov/

Printed for the use of the
Committee on Homeland Security and Governmental Affairs

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U.S. GOVERNMENT PUBLISHING OFFICE

92–904 PDF WASHINGTON : 2015

For sale by the Superintendent of Documents, U.S. Government Publishing Office
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# EQUALITY FOR THE DISTRICT OF COLUMBIA: DISCUSSING THE IMPLICATIONS OF S. 132, THE NEW COLUMBIA ADMISSION ACT OF 2013

**MONDAY, SEPTEMBER 15, 2014**

U.S. SENATE,
COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS,
*Washington, DC.*

The Committee met, pursuant to notice, at 3:03 p.m., in room SD–342, Dirksen Senate Office Building, Hon. Thomas R. Carper, Chairman of the Committee, presiding.

Present: Senators Carper and Coburn.

## OPENING STATEMENT OF CHAIRMAN CARPER

Chairman CARPER. Good afternoon, everyone. The hearing will come to order. When I assumed the chairmanship of this Committee in January 2013 and Dr. Coburn became the Ranking Member, a Committee with broad jurisdictions over the Federal Government operations and homeland security. I took on the responsibility for Federal legislation on matters concerning the District of Columbia whose more than 600,000 citizens are denied a vote in Congress.

I take that responsibility seriously, which is why last year I introduced the New Columbia Admissions Act to create a path, if you will, to end the voting inequality that exists. The District of Columbia is not just a collection of government offices, museums and monuments. It is a home to a little more than 632,000 people, more than both Wyoming and Vermont, and these residents pay over $20 billion in Federal taxes. That is more than the Federal taxes paid by States like Nebraska, South Carolina, and New Hampshire. These residents work, study, raise families and start businesses here, just like people do in all 50 States. They also serve in the military.

Yet when it comes to having a vote in Congress, these men and women really do not count, at least not in the same way. In truth, they never have. And while they bear the full responsibilities of funding our Federal Government and dealing with the consequences of the laws that it enacts, they do not enjoy the benefits and protection of having voting representation, in our Congress. In my view, this situation is simply not fair. Neither is it consistent with our values as a country. Perhaps most importantly, though, it is not consistent with the Golden Rule, that is to treat other people the way we would want to be treated.

Voting rights is a passionate cause for many of the citizens of the District of Columbia. It has been for years and I believe it should be a cause for concern for all of us. It is the major reason why we are here today, 20 years after the last testimony before Congress on District of Columbia statehood. My goal for this hearing is to educate a new generation of people about this injustice and to restart the conversation about finding a more thoughtful solution.

I was personally surprised to learn last year that the United States is the only democracy in the world that denies voting representation to the people who live in its capital city. Not one of 100, not one of 10, the only one. The United Nations Human Rights Committee has called us out on that. They have deemed the District of Columbia's lack of voting representation a human rights violation.

But there is more to this injustice and inequality. The District of Columbia's disenfranchisement places its citizens in a doubly vulnerable political position. Unlike any other city in the United States, Congress holds ultimate control over the District of Columbia's laws, and even its day-to-day operations. In recent years, Congress has shown less of an inclination to meddle in the District of Columbia's affairs that it has in the past.

But the fact remains that my colleagues and I can, if we choose to, overrule the voters of the District of Columbia and their local officials on any of a number of local issues that we want. So without their own vote in Congress or the ability to spend money and pass laws without Congress' consent, the District of Columbia is, at times, used as a political pawn for some of our colleagues looking to impose their own agenda on the city without regard for the views of the citizens who must live with the consequences.

Just last fall, the District of Columbia was caught up in the Federal shutdown and was nearly blocked from using local tax dollars to keep basic city functions running, functions like schools, libraries, trash collection, just to name a few. Some determined and creative efforts by city officials avoided that outcome, but only after incurring needless costs and uncertainty in planning for the Federal shutdown.

We have tolerated this situation for a long time. I think most people know it is just not right. It is incumbent upon those of us who enjoy the right and privilege of full voting rights to take up the cause of our fellow citizens here in the District of Columbia and to find a workable solution.

I would be the first to acknowledge this is not a new cause. As soon as the capital city was organized in 1801, citizens of the District of Columbia began fighting for equal representation, and since that time, Congress has considered several legislative options. In 1978, Congress passed a constitutional amendment to give the District of Columbia full voting rights in Congress. In 2009, the Senate voted to give the District of Columbia a voting seat in the House. And for many years, members have offered bills to provide statehood for the District of Columbia.

The bill I introduced is the latest chapter of that ongoing effort. It may not be the last chapter, but it attempts to right a wrong that should have been righted by now. S. 132 would pave the way for the potential creation of the 51st State called New Columbia

with full voting rights in Congress. Under the bill, a full district called Washington, DC. encompassing the White House, the Capitol, the Supreme Court, the National Mall, some other pieces of land would still remain under the control of Congress as the Constitution mandates.

Now, I realize that not everyone will agree that this is the right solution and there are a number of legitimate questions about how this would work. I have a few myself. Our witnesses today will discuss some of these questions, and most, but not all of them, will lay out a strong case for why this approach is appropriate, why it is constitutional, and the preferred approach for many of the residents who live here in the District of Columbia.

The Senate bill currently has 18 cosponsors. I am told it is the most cosponsors ever on a Senate District of Columbia statehood bill. I know Congresswoman Eleanor Holmes Norton, who is here today, has introduced companion legislation in the House which has a record number, I am told, of cosponsors. I think it is 104.

Today we are going to hear from two panels of witnesses who are going to shed some light on this topic. On our first panel, we have three elected officials from the District of Columbia who will speak on how its current status affects its residents and their own abilities to govern effectively. Then our second panel will have six witnesses who will discuss other issues surrounding the topic of statehood, including its constitutionality, feasibility and practicality.

Dr. Coburn, with whom I am privileged to serve, we have worked together for a number of years, we agree on a whole lot of issues. This is one where we just have an honest difference of opinion. I respect his opinion, as he knows. With that, let me just turn to Dr. Coburn so we can hear some of his views, and then we will hear from our witnesses today. Thank you. Dr. Coburn.

## OPENING STATEMENT OF SENATOR COBURN

Senator COBURN. Thank you, Mr. Chairman. Welcome to our honorable guests from the District of Columbia. Since 1888, there have been hundreds of bills and amendments proposed to address the representation of the District of Columbia. Since 1964, Congress has held no less than 10 hearings on it. The House debated statehood in 1992. They heard from over a dozen witnesses and got another 20 opinions from every segment of the government.

Witnesses identified numerous problems from constitutional to financial to administrative. The 1992 Minority Staff Report does an excellent job of laying all those issues out. Yet here we are again debating this issue even though it has no chance of success in this chamber and is dead on arrival in the House, and will not and cannot possibly be considered before we go sine die.

This bill makes a state out of the neutral land that houses the Federal Government. It is unprecedented. Little effort was made to hold a hearing that seriously debates this bill. More than half the witnesses are representation from the District of Columbia in their elected capacities, all with the same agenda and voicing the same interests. They are legitimate.

With the exception of a witness I invited, none of the witnesses here provide an alternate opinion. None. You can learn a lot about the seriousness of this hearing by looking at who is not here.

Where is the Department of Justice (DOJ)? Every Department of Justice that has issued a report or testified about legislated District of Columbia statehood—Kennedy, Carter, Reagan, Bush—has concluded it is unconstitutional and would come with other extremely complex legal challenges.

Where is the Congressional Budget Office (CBO), the Office of Management and Budget (OMB), the Interior, Transportation, State, Defense, the General Services Administration, and the Treasury? District of Columbia statehood would significantly affect the Federal Government's operations, including use and access to water and sewer services, utilities, police and fire services, infrastructure, communication networks, the District of Columbia National Guard, District of Columbia's unfunded liabilities and other benefits, and ability to control the aesthetics and conditions of our nation's capital.

District of Columbia statehood would also come at an unknown cost to the United States. Who here is representing the interests of other States? District of Columbia statehood would significantly affect the sovereignty of other States, becoming the first among equals. Nothing in the bill prevents New Columbia from still getting the special funding the District of Columbia gets, $674 million each year by virtue of being the nation's capital.

District of Columbia residents got more than eight times the national average of Federal aid per capita, and more than two times the next highest State. Who is here to represent Virginia and Maryland? There is a serious question as to whether Maryland's consent would be necessary to create a new State, since it gave the land to the capital. The bill even gives New Columbia control over certain land in Virginia and Maryland, a serious affront to their sovereignty.

I will pass on that the District of Columbia residents suffer an injustice, I agree, by not having a vote, but Congress cannot bypass the constitutional amendment process simply because it is inconvenient. The Framers designed the District to be an autonomous Federal area, separate from any State's influence, and different from all other Federal land. It is patently false to say the Framers could not have predicted the city would thrive. The District was envisioned prior to 1800 as a large, powerful city with 800,000 people—more than the District of Columbia has now, more than even Paris had at the time. President Kennedy's Attorney General said Congress cannot reduce the District's size any more than it can remove a State from the Union.

Attorney General Kennedy said, a small enclave clearly does not meet the concept of the permanent seat of government, which the Framers held. President Reagan's Attorney General said he would recommend the President veto any bill providing statehood without a previous constitutional amendment.

Lee Casey, who wrote that report, could not testify today, but sent a letter with an original copy and reiterating its findings, the last report an Administration has issued on this. I would ask unanimous consent that that be added to the record.[1]

Chairman CARPER. Without objection.

[1] The letter submitted by Lee Casey appears in the Appendix on page 245.

Senator COBURN. This bill also largely ignores the 23rd Amendment, which recognized the District of Columbia and gave its residents three electoral votes. Granting statehood without first repealing the 23rd Amendment creates a legal and political absurdity, allowing a few residents, including the White House occupants, to be the decisive votes in a close Presidential contest.

Howard Law Professor Adam Kurland says as much in a Law Review article, and I would like to ask unanimous consent that that be entered into record.[1]

Chairman CARPER. Without objection.

Senator COBURN. And then finally, George Washington Law Professor Jonathan Turley, who could not be here today to testify, but wrote an informative article about the political and constitutional implications of this bill. I would like to have that admitted for the record.[2]

Chairman CARPER. Without objection.

Senator COBURN. I will close with a quote from one of our witnesses today. Alice Rivlin, in 2009 said this: "I think statehood is so unlikely to happen in the foreseeable future that pursuing it is a serious distraction from more important and feasible policies that could both improve the autonomy and fiscal health of the District." I agree. I yield back.

Chairman CARPER. Dr. Coburn, thanks very much. Again, our purpose here today is to start an old conversation. We look very forward to the testimony of the witnesses here and, frankly, the input of other people that are not here.

Our first witness today is the Honorable Eleanor Holmes Norton, Washington, DC native. Congresswoman Norton has fought for the interests of the District of Columbia citizens on Capitol Hill since 1991. I was privileged to serve with her in the House for 2 years before going on and becoming Governor of Delaware. She has been the city's sole elected delegate to the House of Representatives, although, unfortunately, not a voting one.

She has a long history in the field of civil rights, including serving as Chair of the Equal Employment Opportunity Commission. Congresswoman Norton is also a tenured law professor at Georgetown University. Congresswoman Norton currently serves as the Ranking Member of the House Subcommittee on Highways and Transits, and we thank you for joining us today and for sharing your thoughts with us. It is always good to be with you. Thank you.

Our second witness is the Honorable Vincent Gray. Mayor Gray has served as Mayor of the District of Columbia since 2011, and prior to that chaired the City's legislative branch, the Council of the District of Columbia. Mayor Gray was also born and raised in Washington, DC, has been active in city politics at many levels, and is closely familiar with the issues that citizens of the District face every day. Mayor, thank you for joining us this afternoon.

And our final witness on this panel is the Honorable Chairman, Phil Mendelson, and Chairman Mendelson serves on the District of Columbia Council since 1998 and was elected Chairman in 2012. As Chairman, he leads the Council on all legislative matters and

[1] The Law Review article appears in the Appendix on page 216.
[2] The article from Mr. Turley appears in the Appendix on page 247.

presides over the Committee of the Whole. Chairman Mendelson also serves as the Chairman of the Board of Directors for the Metropolitan Washington Council of Governments.

Again, we thank you all for being here today. Congresswoman Norton, I am going to ask you to lead us off and then we will recognize the Mayor and Chairman Mendelson and then we will have some questions. Please proceed. Your entire statement will be made part of the record. Feel free to summarize as you see fit. Thank you.

**TESTIMONY OF THE HON. ELEANOR HOLMES NORTON,[1] DELEGATE OF THE DISTRICT OF COLUMBIA, U.S. HOUSE OF REPRESENTATIVES**

Ms. NORTON. Thank you very much, Mr. Chairman, and for that reason, I am going to try to summarize most of my testimony. Chairman Carper, Ranking Member Coburn, I know I speak for the enthusiastic, record number of residents who have come to attend this hearing. I thank you for the opportunity to testify this morning and this afternoon on their behalf, because this hearing is the leading indicator of their work and the work of our elected officials to get the unusual progress we have now made on advancing the District of Columbia statehood and its individual components.

Let me thank you, Chairman Carper, as the new Chair. You have been very energetic in helping us in many significant ways, of which this first hearing on statehood is perhaps the most high profile. But elected officials and I know of your work for the District and appreciate it very much.

With your early initiative in introducing the bill, the record number of Senators you have gotten as cosponsors. You have now broken the record on Senators who support the bill led by the Majority Leader who generally does not cosponsor a bill, and the four top Democratic leaders all go to the support that is building in the Senate for the bill.

Mr. Chairman, the residents are grateful for today's hearing, not because they are naive. They live in the belly of the beast here. They understand the Congress, what it does and does not do and how long it takes to do what it does do. They are grateful for this hearing and have considerable appreciation for it because they understand what a hearing is. It is a significant and necessary step to putting an issue on the official congressional agenda. It is the most important vehicle that Congress has, not only to educate members, but to signal that the matter constitutes a serious national issue that can move to passage.

At the same time, Mr. Chairman, I want to be clear that the elected officials, and you see by the number of residents who are here, and I are clear that your willingness to hold this hearing, as I requested, carries a reciprocal responsibility on all of us who live in the District to continue to build support for the bill in Congress and in the public. Mr. Chairman, we have learned many lessons. For example, from the more than the hundred years it took us to get home rule, living in the District with no government whatso-

[1] The prepared statement of Ms. Norton appears in the Appendix on page 50.

ever and no delegate, we learned that there could be no collective action until residents engaged the city and engaged the Nation.

You have a very distinguished panel of expert witnesses to testify before you today, so I think my best contribution would be to speak from the vantage point of the member who represents the District in the Congress, which allows me to put this hearing in some context and to say why I believe it is particularly timely.

We do not believe that the fact that this is a historically unproductive Congress or that we have been in the minority for most of my service in the Congress should discourage us from seeking what is an indispensable remedy to achieve our full citizenship, and we believe it is achievable.

During this same period in the Congress, with the support of residents and members of the House and Senate, we have made continuing progress on the major elements of statehood, the elements that the Ranking Member spoke about when he said that Dr. Rivlin thought that we ought to be working on other aspects leading up to statehood as well. This is exactly what we have been doing.

Even as we have continued to press for statehood itself, most recently, for example, budget and legislative autonomy and anti-shutdown legislation, all have moved further than at any point since the Home Rule Act of 1973. The President has put both the budget and legislative autonomy in his budget, the first time that any President has put both in his budget.

Representative Darrell Issa, my good friend in the House, called a hearing last Congress on the District of Columbia budget, and after hearing Republican and Democratic witnesses alike testify about the District of Columbia's financial condition, its reserve, its growth in population, was among the best in the Nation. He himself endorsed budget autonomy and has worked tirelessly with local officials and me and Republican interest groups to secure budget autonomy.

Last Congress, House Majority Leader Eric Cantor endorsed the District of Columbia budget autonomy bill. The District of Columbia appropriations bills enacted for the current fiscal year (FY) have anti-shutdown language for the District of Columbia, permanent language, and we have been able to keep shutdowns from occurring even if, once again, the Congress shuts down, because for the first time, we have been spared the threat of a shutdown for the entire fiscal year.

The House version of the District of Columbia Appropriation bill for the next fiscal year also prevents shutdown for that following year. We are grateful that the pending budget and legislative appropriation bills of this House, the Senate would permanently grant the District anti-shutdown authority and also budget and legislative autonomy are in the Senate Appropriations Bill.

So we are making progress on the components of statehood and we believe, over time, that the Congress will see that the components of statehood should add up to Statehood itself.

Now, your panel will show the details and I am not going to reiterate the details of why we should have statehood. I am only going to summarize one or two of the indicators that I think should and would impress any American.

They are going to show, Mr. Chairman, that the District's economy has become one of the strongest in the Nation. A $12.5 billion budget, larger than the budget of 12 States. A $1.75 billion surplus and growing, the envy of the States. A per capita personal income higher than that of any State. And resident income expenditures that are equally impressive. A growth rate of people are flocking to live in the District of Columbia. We are having to build housing for them, a larger population than Wyoming or Vermont, putting us in a league with seven States which have less than a million residents.

You are going to hear why statehood is necessary for District of Columbia residents, but as the District's elected congressional representative, I want to say to you, Mr. Chairman, that it hit me in the face every single day. I feel it when the bell rings and I cannot vote for or on behalf of the 650,000 residents who live in the District, paying $12,000 per capita, higher taxes than any American anywhere.

I know I will feel it this week when I go to the floor to debate our country's military engagement in Islamic State of Iraq and the Levant (ISIL) because I have gone to the floor every time there has been a war since becoming a member of Congress and I shall never forget the purple fingers in Iraq and Afghanistan that signaled that they now had representation in their national legislature, while our residents fought and died in those wars and came home once again without the same rights they had gone to war and obtained for others.

In all of the 20th Century wars, we lost residents disproportionately, most tragically in Vietnam, when there were more District of Columbia casualties than 10 States of the union. You are going to hear testimony that you have the authority to grant statehood. You are going to hear testimony about the accident in Philadelphia that resulted in Federal control.

Finally, Mr. Chairman, ever since the creation of the capital, we have been an outlier in our own country, integral to the Nation, but divorced from its democratic principles. My own family has lived here for 150 of the 224 years that we have been the nation's capital, ever since my great-grandfather, Richard Holmes, a slave, walked off of a plantation in Virginia and made his way to the District of Columbia.

Three generations of the Holmes' family have gone to segregated schools in the District of Columbia, as required by the Congress. We do not wish, Mr. Chairman, to be second-class stepchildren in the union, or voyeurs of democracy as you vote on how much in taxes we will pay or how many of our sons and daughters will go to war.

We believe you have two choices, Mr. Chairman. The Congress can continue to exercise autocratic control over the District of Columbia or it can live up to the Nation's promise and its ideals by passing the New Columbia Admission Act. That is what we are asking today. Thank you, Mr. Chairman.

Chairman CARPER. Thank you so much. Thank you for your passion, for your leadership, and for your testimony today. We look forward to asking you some questions. Mayor Gray, please. I am going to ask you just to—we want to have a good back and forth

with this panel. We have another panel with six more witnesses, so I would ask you if you could speak for 5 minutes. If you can stay close to that, we would really appreciate that. Thank you.

**THE HON. VINCENT C. GRAY,[1] MAYOR, DISTRICT OF COLUMBIA**

Mr. GRAY. Thank you, Mr. Chairman. Chairman Carper and Ranking Member Coburn, I want to thank you for the opportunity to be here this afternoon. As you indicated, I am Vincent Gray. I am the Mayor of the District of Columbia and I am grateful for this hearing having been convened today. I think it is yet another step in the direction of bringing full democracy to the District of Columbia, and we hope to see, at some point in the not too distant future, the approval of the New Columbia Admissions Act.

If enacted, this bill would grant the long-awaited status of statehood to much of the District of Columbia while also preserving a Federal District that would contain the principal monuments and significant Federal buildings that already exist in this city, which would continue to conserve the Federal control over space in the capital city.

We are the only place in America where Americans are serving in the military, where they are fighting, where they are dying, serving in wars, serving on juries, and are taxed in the same way as other Americans without any voting representation at all in the Congress of the United States. Gentlemen, that is just plain wrong.

The proposed bill is an important step in lighting the way to new justice in the city and to achieving political equality for what is a population of 660,000 people who live in the city because we are growing at the rate of 1,000 to 1,200 people a month.

As a native Washingtonian, I absolutely love the District of Columbia. It is a place of strong community and a place of American pride; except for our failure to provide the full democracy and adhere to full democratic principles as is done in the rest of America. It is home, as I indicated, to over 660,000 people, which is more than the population, as has been pointed out, of two States, Wyoming and Vermont.

We have hard-working families here, and incredibly—and I have witnessed this in another State legislature—there are some who do not even know that people live in the District of Columbia. They believe that it is just home to Federal monuments, Federal buildings, and Federal activity and that people go home to Maryland and Virginia and other places each day and do not live in the District of Columbia.

But we are far more than the Federal Government. We have a substantial economy in this city and we have a decade-and-a-half, some 15, 16 years of a record now of passing balanced budgets, as well as a strong fiscal status at present. As you heard Mrs. Norton say, we have a reserve fund of $1.75 billion, which is the largest in the history of the District of Columbia.

We also developed a State apparatus, a Medicaid agency, state school board, a state homeland security agency, a state level attorney general's office, a state level national guard, and more. We have a body of laws that already are accorded state level status by

[1] The prepared statement of Mayor Gray appears in the Appendix on page 54.

courts, as well as the Federal Government for numerous purposes. Our residents are the only residents of a major capital city—and you pointed this out, Mr. Chairman—in the free world who have no voting voice in our national legislative body.

Though Congress has, since the 1973 Home Rule Act, provided for partial Home Rule by the District of Columbia, we have, for the last 40 years, been forced to function within a political structure that cannot determine a local budget without the approval of Congress, even though those dollars are raised, in large part, by the people of the District of Columbia.

We also have to be wary of a Congress that at any time can overturn local laws here in the city. These barriers to full autonomy present numerous practical problems for the District's elected leadership, government workers, and residents. The District of Columbia annually raises, in our own tax dollars through income taxes, property taxes, and sales taxes, $6 billion, and that is then used as a part—as the lion's share, frankly—of our budget. And while not all of it, but the lion's share of the Federal dollars we get, we get in the same way as any other State does, through the Medicaid program, through the Temporary Assistance for Needy Families (TANF) program, through the Federal Highways program, and others.

Despite the fact that we have followed the budget process required of us by Federal law, and passed a balanced budget every year religiously and diligently, we have been forced to operate under continuing resolutions passed by Congress each year, often for months after the beginning of the fiscal year.

By congressional mandate, the District of Columbia is forced to send every piece of legislation passed by the Council and signed by me as Mayor to Congress for review, and we think that is unnecessary and it is just plain wrong. This delays implementation of our laws by weeks and sometimes months because of the vagaries of the congressional calendar. The forced dependence on congressional approval not only can potentially paralyze the core functions of the District of Columbia, in the past it has.

The numerous threats of Federal shutdown directly impact the District of Columbia Government because we are treated as a Federal agency rather than a municipality or a state government. We just saw this happen last October when there was an effort to shutdown the District of Columbia as if we were the National Park Service, the Interior Department, the Commerce Department, or some other Federal entity, and we were able to actually keep our government open for the 16 days of the Federal shutdown using our own reserves to do that.

And what a travesty it would have been to shut down a city that was living essentially off of its own dollars in order to be able to accomplish what we think was an ill-advised purpose in the first place, and I am glad that we ultimately were not part of that.

I think the Ranking Member and the Chairman both know that we have adopted the motto that has been known for centuries in this Nation, "Taxation Without Representation." That is obviously what motivated the creation of America in the first place, and hopefully it will motivate the freeing of the people in the District of Columbia from the bondage that we suffer at this stage.

People who pay taxes for the upkeep of their government, we think, we hope, everybody else agrees, should have a voice in how their government is run. In early 2011, I testified before the House Committee on Oversight, Subcommittee on Health Care, District of Columbia, Census and the National Archives about our then-2012 budget.

During that hearing, I noted that the District has unfairly been subject to the political whims of Congress because, frankly, of Congress's control over our budget. The full Committee Chairman, as you heard, Darrell Issa of California, and then Subcommittee Chair, Trey Gowdy of South Carolina, both noted their surprise in learning of the extent to which the Federal budget process interferes with the District of Columbia's ability to operate efficiently.

Over the course of the past few years, the District worked with Chairman Issa on developing broad principles on which we could agree that would provide the District with the autonomy to do what every State does in its budget process, develop a budget based on the priorities set by the Executive and Legislature, pass that budget according to the laws of the State, and then sign that budget into law.

Chairman Issa, in concert with Congresswoman Norton, developed a bill that would move the District significantly forward in terms of budget autonomy. Unfortunately, because many Members of Congress do not recognize or acknowledge that autonomy for the District is not and should not be a partisan political issue, that bill simply did not advance.

And so, Mr. Chairman, I want to underscore the importance of this bill. I want to thank you again for the opportunity to be here to testify on behalf of our city, which we hope will become a State. It has to be recognized that, as you pointed out, $20 billion in taxes being paid to the Federal Government, we do the things that virtually every other State does, and in the course of it, Mr. Chairman, we are deprived of the opportunity to enjoy the full freedom and democracy that is a promise to every American.

Chairman CARPER. Mayor, thank you for joining us, for that testimony and we look forward to having a chance to ask some questions. Chairman Mendelson, please proceed. We are delighted to see you here.

**TESTIMONY OF THE HON. PHILIP H. MENDELSON,[1] CHAIRMAN, COUNCIL OF THE DISTRICT OF COLUMBIA**

Mr. MENDELSON. Thank you, Chairman Carper, and good afternoon. I am Phil Mendelson, Chairman of the Council of the District of Columbia and I want to note that joining me in the audience are a number of Councilmembers. I might miss a few, but they include Councilmembers Muriel Bowser, Anita Bonds, Mary Cheh, David Catania, Kenyan McDuffie, Vincent Orange, and Tommy Wells. I want to thank them for being here as well.

I am pleased to testify today in support of S. 132, the New Columbia Admissions Act of 2013. Full and fair representation for the over 646,000 United States citizens residing in the District of Columbia is only possible through achieving statehood. You have my

[1] The prepared statement of Mr. Mendelson appears in the Appendix on page 62.

prepared statement. I want to summarize and make four fundamental points.

First, that the limited home rule granted by Congress in 1973 is inadequate and problematic. Second, that statehood is about restoring rights, the rights that the citizens of the District had before Congress took them away. Third, that this legislation is about providing the United States citizens of the District of Columbia with the same rights and privileges enjoyed by the United States citizens of the 50 States. And fourth, that the District of Columbia is in good shape and compares favorably to the 50 States.

One needs to look no further than last year's government shutdown to see the problem with the current governance structure. Year after year, Congress has done little with our budget except add social policy riders. In 25 years since 1990, Congress has adopted our appropriation only three times before the start of the fiscal year. We cannot even get Congress to change the dates of our fiscal year, which we know would save money, as well as align with the academic calendar of our school year. And then last year, not for the first time, we struggled with shutdown because of a nonlocal fight in Congress.

We could instead look at our legislative process. It has been over two decades since Congress disapproved a bill adopted by the District Government. And still, every bill goes to Congress for a 30- or 60-day layover and these are congressional days, so we never know how long it will actually take, for a bill to become law.

The Council adopted fine proportionality legislation for our criminal code on November 1, 2012, and the bill did not become law, that is, passed the congressional review process, until June 11, 2013, over 6 months later. Our General Counsel has estimated that at least 26 percent of our legislative measures are solely the result of the congressional review process.

Or we could look at the details of government. When the District's former Chief Financial Officer (CFO), Natwar Gandhi, announced his retirement, the national search quickly revealed that the CFO salary was too low. We have shown ourselves to be a responsible government, providing appropriate salaries for national figures like our Public Schools Chancellor and our Chief of Police, but we are helpless to do anything about our CFO's salary. Only Congress can set his salary.

We cannot fix inequities in our criminal sentencing without the approval of the United States Attorney General, and we cannot update the limits on small claims, that is the Small Claims Court, or strengthen our Anti-Strategic Lawsuit against Public Participation (SLAPP) law because we cannot legislate the judicial process. Current home rule is inadequate.

Nowhere in the history of the Founding Fathers is there evidence that it was their express intention to deny the citizens of the national capital the rights enjoyed by the citizens of the rest of the Nation. Rather, the Founding Fathers' focus was on having a permanent seat of government under Federal control.

When the District of Columbia was selected, the residents thereof, principally but not entirely in Georgetown and Alexandria, enjoyed all the benefits of statehood, fully controlling their affairs and electing representatives to Congress. By seeking statehood, today's

citizens of the District ask for a restoration of our rights, something the Founding Fathers never intended to take away.

For me, the bottom line for supporting this bill is that only statehood can provide the United States citizens of the District of Columbia with the same rights and privileges enjoyed by the United States citizens of the 50 States. We have sought incremental gains since the 1973 Home Rule Act. Besides the fact that much of what we have asked for—take budget autonomy for instance—is widely supported, these gains take years; no, decades, and most have yet to be granted.

But incrementalism still would leave us short. As other witnesses have and will testify, we pay our dues, our taxes, we go to war, and District citizens have done everything asked of United States citizenship. Only statehood gives us all the rights and privileges in return.

For many years, opponents of statehood claimed that the District is not worthy of the self-governance that comes with statehood. But now we have a track record and it is very good.

For 17 consecutive years, we have ended our fiscal year with a budgetary surplus. We have grown our fund balance, which is one of the healthiest of State governments in the Nation. Our bond rating is good. We manage our capital budget better than Congress has required of us in the Home Rule Act. Our retirement accounts are second best in the Nation. Our city is growing in population, not declining, and our per capita income is among the highest. We are healthy. We are responsible.

We have sufficient population and resources to support State government and to provide our share of the cost of the Federal Government, a standard Congress has set forth in the past for statehood.

Throughout the world, there are only one or two national capitals—and none in the free world—where citizens do not enjoy a vote in the national legislature. We, the District of Columbia, are unique in this regard. It is a distinction we do not want and a stain on our Federal system.

The Council appreciates the Committee's consideration of the New Columbia Admissions Act of 2013, and urges that it be brought before the Committee for action and before both houses for a vote.

I also appreciate the Committee's past support for the District and look forward to continuing our working together in the future, I hope with a newly-elected Senator of our own, on the Committee, from the State of New Columbia. Thank you.

Chairman CARPER. Chair Mendelson, thanks so much and thanks for that summary. That was a good one.

Mr. MENDELSON. Thank you.

Chairman CARPER. I want to just start, before I ask a question, when Joe Lieberman stepped down and basically said to me, It is all yours, I thought of all the challenges we faced with respect to protecting our homeland, cyber challenges, terrorist attacks, Jihads, fear of someone blowing up our chemical facilities, wasteful spending, and huge budget deficits, a postal system that is sort of twisting in the wind these days because of inaction of the Congress.

Those are all issues that I considered, worked on with Senator Lieberman, before Dr. Coburn and Senator Collins as well.

The press would say to me, What do you want to focus on as a new Chairman of the Homeland Security and Governmental Affairs Committee? The items I just mentioned are really what I thought about and this is not the issue that came to mind. I noticed that this is something that Senator Lieberman felt passionately about and he has been good to continue to mentor me from time to time.

Congresswoman Norton has as well. What I have finally done is related the issue of equity for those who live in the District of Columbia with my core values and the way that I was raised, I spent about 23 years of my life in the Navy, active and reserve as well.

But the way that I was raised and trained as a leader was basically: We ought to figure out the right thing to do and try to do it. We should treat other people the way we want to be treated. We should focus on excellence in everything we do. I like to say, if it is not perfect, make it better. In the Preamble of the Constitution, it says, In order to form a more perfect union, and that is why we have amended the Constitution thousands of times.

And finally, the fourth core value I would mention is just the notion of not giving up. If you are convinced you are right, just do not give up. So with that thought of mind, that is really sort of like my moral compass, those four values. Say what should we do in this instance? We need to do something. We can do better. We can improve on the status quo.

I am not going to suggest we are going to move this piece of legislation through Committee and through the House and the Senate this year, but we do need to restart our conversation. And my hope is, if nothing else happens from this hearing today, that we are going to do that. We appreciate your helping us to do so.

I want to come back, I think it was something that you said, Chairman Mendelson, near the end of your remarks. You talked about how the United States, the District of Columbia, Washington, DC, we may be the only nation among the democratic nations of the world, in which we do not allow our residents of our capital city to have the ability to vote and to be heard in their national assemblies, national elections. Did I hear you right on that?

Mr. MENDELSON. Yes. I believe there are only one or two national capitals in the world, and they are not free countries, where the citizens do not have a vote in the national legislature. We are unique in that regard.

Chairman CARPER. I wonder if there was a time when we were not unique, when other democratic nations had a system similar to what we have. Anyone know whether that was ever the case?

Mr. MENDELSON. Ever? If you are talking about 19th Century, I suspect it would be that we were not alone then. But, democracy has changed across the globe and we are alone now.

Chairman CARPER. In my previous role as Governor, I remember presiding at any number of cabinet meetings and we were talking about a particular issue or challenge we faced in Delaware, and I would say to my cabinet secretaries, somebody in some other State has dealt with this problem or issue. They figured out how to solve it. And what we need to do is to find that State, find that person, and see what they have done.

Are there any national capitals in other, if you will, democratic nations that have dealt with this issue and maybe from whom we could learn something?

Ms. NORTON. Mr. Chairman?

Chairman CARPER. Delegate Holmes Norton?

Ms. NORTON. Yes.

Chairman CARPER. Congresswoman.

Ms. NORTON. It has not occurred to most countries if they were, in fact, giving the vote not to give it to their capital. So this has not been a matter that some countries have gradually realized that as the vote, in fact, was widened, it ought to also include their own capital. Of course, most of the countries are parliamentary governments, but I do not think that had very much to do with it.

I think this is an American anomaly. It is a violation of international law. It violates treaty that we have signed and there is no way around it, and it is not because we are among a number of outliers and everybody else had to also incrementally correct this injustice. This anomoly came at the birth of the Nation and it came because of an accident of history when the Continental Congress got chased out of Philadelphia and the Framers did not quite know what to do, and they said, OK, let us just make this a Federal District.

Mr. GRAY. Mr. Chairman, I get the opportunity to meet with a lot of international delegations. They come to the Wilson Building, our city hall, and in virtually every instance, we have had an opportunity to talk about the political status, talk about democratic principles, et cetera. And people are absolutely astounded that the capital of the United States of America does not accord democracy, does not accord a vote, does not accord representation to the 660,000 people who live here.

Again, I have not encountered anyone in the free world that does not have representation in their national legislative body. The same thing with the budget issues and the legislative issues. People really are aghast that we have to send our local budget, we have to send all of our local laws to the national legislature for approval.

The example that I give is having to send—this has happened when I was the Chair of the Council. We changed the term "handicapped" to "disabled," which is pretty minor, it seems to me. Important to people who are affected, obviously. But why should we have to send something like that to the Congress of the United States or approval.

On its face, that is obviously, and those are the things, and there are so many other things that we have to send up here in terms of our local laws that really should be left to the approval of the people of the District of Columbia.

Chairman CARPER. All right. Thank you. Dr. Coburn raised a number of questions or concerns about the legislation that we have introduced, I have introduced and others have cosponsored. One of the concerns that he raised dealt with the 23rd Amendment to the Constitution. I will not attempt to paraphrase, but basically he said, you cannot have the 23rd Amendment to the Constitution and have the District of Columbia with full rights of statehood. Would

you all just speak to that for us just briefly, please? Congresswoman?

Ms. NORTON. Mr. Chairman, Dr. Coburn mentioned any number of issues that the District is fully aware it would have to come to grips with. It certainly would expect to have a right to vote, which took a constitutional amendment, to remain in force, until the statehood Bill is passed.

But as you said, Mr. Chairman, this is a threshold hearing. You are restarting a conversation. This is a serious issue. We had no intentions to lay before you all of the transition issues that would be very important were this a hearing further along the way.

There has been almost an entirely new Senate since this bill was last discussed. We ought to deal with first things first and the 23rd Amendment, which is a very technical issue but one we are fully prepared to deal with, we fully understand, would no longer be necessary and our bill would provide for that.

Chairman CARPER. The 23rd Amendment, as I recall, basically says that the District of Columbia will have three electoral votes.

Ms. NORTON. Yes. The 23rd Amendment in 1960 gave the District the right to vote for President. We went that long without the right to vote for President. And, of course——

Chairman CARPER. Hold on. The concern that he has raised is that if we are not careful, we cannot only have the 23rd Amendment to the Constitution, but also a State with also the ability to vote twice. So what he raised is a legitimate question, but I think there could be a problem with the sequencing.

If we, for example, were to repeal the 23rd Amendment with the expectation that we are going to pass some kind of legislation that would give the residents of the District of Columbia the chance to vote, like in a State, and that never happens, then we would have a problem.

Ms. NORTON. The timing would have to be simultaneous.

Chairman CARPER. Yes, there you go. I think Dr. Coburn raised an issue about Federal funds, and I have heard this from others. I think, Mayor, you spoke to this, I believe. Just revisit what he said, share what you heard him say, and then just respond to that, if you will.

Mr. GRAY. I think he used the number $674 million, which I would like to see the details of, Mr. Chairman. We follow that fairly closely and, when you look at Medicaid, every State gets Medicaid, like Delaware gets Medicaid and TANF and Federal highway funds. We do receive some special funds. We have had support for our education programs. We have had support, a very small amount of support, for our HIV/AIDS programs.

But when you total up those funds they do not come anywhere near $674 million. Let me underscore a principle for us. We are not asking for special treatment. We are asking for the same treatment that all Americans get, and that is to be able to make decisions for ourselves, to be able to determine how we spend our money, and then be accorded the same rights as other Americans.

If you look at our budget, the 2011–2012 billion dollar budget, almost $7 billion which we raise locally, when you look at the Federal funds that are contained there, you are not going to find that

being largely a picture that is very different than any other of the 50 States.

Chairman CARPER. OK.

Mr. MENDELSON. If I could add to that?

Chairman CARPER. Please.

Mr. MENDELSON. I do not think Senator Coburn was saying this, but I know some folks have said that they think that our budget, the money that the District uses, is entirely Federal dollars, and it is not. We raise something like $6 billion annually from local taxes and fees, just like any other jurisdiction does, and those are our local dollars. So if there is any misunderstanding, there is a substantial portion of our budget that is local dollars.

I addressed this in my prepared statement. We do get additional dollars that are Federal and almost every dollar is through a Federal subsidy program that all the States get, probably the biggest being Medicaid. That is substantial. But every State gets it. So we are not unique in that regard. We use to get a Federal payment. We got that Federal payment for a time, but we have not gotten that Federal payment for many years. It was something like a half billion dollars and then it was discontinued in the late 1990s.

And as the Mayor put it, we are not looking for special treatment. We are looking for the same treatment that every State has. But I would note, and this is also in my prepared statement, that there are some Federal programs such as the Payment in Lieu of Taxes (PILOT) program. The District gets something like $18,000 a year compared with, for example, $28 million a year for Alaska or $34 million a year for Arizona.

And then there is also a Federal Mineral Royalties program. Wyoming got $932 million last year. We are not asking for that. So there are Federal payments to States and we are not asking for that. But that is not unusual, Federal payments to the States.

Chairman CARPER. All right. When I was 29 years old, I got elected to State treasurer. I was just out of the Navy, got a Master of Business Administration (MBA), and nobody wanted to run for State treasurer in my State as a Democrat, so I got to run because there was nobody who wanted to run. And we, at the time, we were the best in the country. Delaware was the best in the country in over-estimating revenues and under-estimating spending. Not a good combination.

We had no pension fund, we had no cash management system. In order to raise money so we could be able to meet payroll and pay pensions, we would issue taxes and revenue notes, taxes and revenue notes just for short-term financing. We ended up with nobody who would lend us any money, we were closed out of credit markets. We ended up with the worst credit rating in the country.

From that, Pete duPont became Governor. I served as State treasurer. I thought he was an excellent Governor. And we now have triple A credit ratings across the board and, I think, respected by most financial folks in terms of our economy and budget and fiscal policies.

It was not all that long ago that the District of Columbia labored in terms of managing its own affairs, and it was not all that long ago, as I recall, we had a control board that was put in place to help manage the District of Columbia. And today when I hear you

talk about the District of Columbia in terms of your economic growth and vitality and your budget reserves and level of employment and people coming into the city, it is rather an extraordinary turn around.

I am going to ask Chairman Mendelson, then the Mayor, and Congresswoman Holmes Norton just to take maybe a minute apiece and say, why did that happen? Why did that transform? I think in our State it was leadership. I think leadership was the key. I think that is the key in most areas, but go ahead, Mr. Chairman.

Mr. MENDELSON. Well, I would agree that it was leadership, but we have put a number of practices in place and I think that we have at this point a culture in the government about financial discipline. So sometimes we have arguments, like with our retirement fund, which is pretty good, second best in the country, whether we should make it better or just accept it at second best out of all the States and all the cities and counties.

As I said, we put a number of practices in place and we value very much our financial health. It allows us a lot in terms of policymaking because the resources are there. And further, I think, is the reason why the city is growing in population, because, I think, people are attracted to a city that is healthy financially.

Chairman CARPER. OK. Thank you. Just very briefly, Mayor, please.

Mr. GRAY. I want to agree with the Chairman. First of all, I think it has become now, since the mid-1990s, a part of the culture of the District of Columbia, that it is hugely important for us to be fiscally responsible. We did have a control board for several years that essentially became dormant, I think, in 2001 and 2002.

We have continued, and Chairman Mendelson pointed this out, with a Chief Financial Officer who essentially is independent. There are days when I think that is a vestige of control that we should not have; on the other hand, I think it is very helpful on many days because we cannot pass a piece of legislation without there being a fiscal impact statement. In essence, the structures that we have in place now, the rigorous structures we have in place, prevent us from becoming fiscally irresponsible.

One of the things that we do is we work very closely with the rating agencies, with Moody's and Standard & Poors and Fitch, and we are very proud, Mr. Chairman, that we have now reached on our income tax secured bonds, we have now reached triple A rating, which is unprecedented in the District of Columbia, and frankly imbues what we do every day with the pride of being able to demonstrate that we are a place that takes fiscal responsibility seriously.

I do not think the District of Columbia will ever go back to a time when irresponsible decisions around money were made, and that finds its way into our decisions about legislation and, obviously, about budgets. We have passed very responsible budgets and, again, to point out, we have done it on time. We passed our fiscal year 2015 budget, which begins October 1. That budget was passed in July and now is just sitting.

Chairman CARPER. OK. Thank you, sir. And Congresswoman Holmes Norton, would you just wrap this up for us briefly, please?

Ms. NORTON. In a word, why did this happen or how did this happen? I would summarize it by saying local prudence. We were not the first city to have a control board. New York, Philadelphia both had control boards. In the District, it will focus your mind. We are the only city in the United States as a result that has a CFO, the kind that the Mayor has spoken of, and the legislation that we designed in this Congress almost makes it impossible for the District of Columbia ever to need a control board again. And that is why you see balanced budgets and surpluses.

Finally, if I could just thank you for the principled approach, Senator Carper, that from the very first time we sat down with you, you have taken to your Chairmanship of this city, and you mentioned Senator Lieberman who you regard as a mentor who took us with great passion through several attempts to get statehood. And I must say, if he is your mentor, you are——

Chairman CARPER. He says we mentor each other.

Ms. NORTON. OK.

Chairman CARPER. Probably giving me too much credit.

Ms. NORTON. Let us call it the Joe Lieberman tradition. And how much we appreciate that you have afforded us this hearing and given us, what I must tell you, renewed energy in the city to do what we have to do to meet what you have already done in affording us this hearing. Thank you very much, Mr. Chairman.

Chairman CARPER. Well, let me just say, in full disclosure, I may just do a quick segue here, I am a huge baseball fan, huge Detroit Tigers fan, and if the Nationals end up in the World Series with my Tigers, I hope that renewed energy thing falls a little short of the ninth inning of the seventh game of the World Series.

Mr. GRAY. Not too late to become a Nationals fan this year.

Chairman CARPER. The Phillies fans in my State would kill me. [Laughter.]

I am reminded here, talking about the turn around in the District of Columbia in the last 20 years, it is really pretty remarkable. Delaware had a pretty remarkable turn around as well wherein during the late 1970s, 1980s, and even more recently, it reminds me of a story, and I will close with this. During the Civil War, the North was not doing well and Lincoln kept looking for the right military leader for our country. He would try this person for a while and that person for a while, and finally he heard that Grant was doing pretty well in his assignments, so he made him the military leader of our Union forces.

Folks on the Lincoln Cabinet did not like it very much. Some regarded Grant as a drunkard, an alcoholic, just drank too much. And in one particular Cabinet meeting, President Lincoln called them to order and the Cabinet members were prepared to pounce on Grant and just call him all kinds of things and say the President should get rid of him, fire him.

And at that time, the North was starting to move and doing a whole lot better. Lincoln listened to them for a while and just cut them off. He finally cut them off and he said—this is sort of looking at how much better you guys are doing in the District of Columbia. He listened to them for a while and he finally cut them off and he said, Find out what Grant is drinking and give it to the rest of my generals. [Laughter.]

So you all are obviously doing some good things and we applaud those. My hope, at the very least, and I hope we can do better. I hope this addresses some of the very real inequities that we have discussed here today. Dr. Coburn is a highly principled person, really understands fairness and equity, and I think most of my colleagues know in their hearts that what is going on here, what has been going on here for a long time is just not fair and equitable and there is something we ought to do about it. And hopefully, with your help and encouragement, we can find a good path to get there.

With that, I am going to recess the Committee just for a moment and we will assemble with our second panel. Again, thank you all for joining us today.

Mr. GRAY. Thank you very much, Senator.

Mr. MENDELSON. Thank you, Senator.

Chairman CARPER. Please take your conversations outside the room, if you would. Thanks so much.

Beginning now the second part of our hearing. Welcome our second panel. Very nice to see some of you I have known for a million years, well, maybe half a million. But it is great to see you all and to welcome those that I have never had the privilege of meeting before. I am going to take a moment just to briefly introduce our witnesses. It could be a long introduction. It is a distinguished panel. But let me just do this briefly so we can hear from you.

First we are going to hear from the Honorable Viet Dinh. Professor Dinh, when I saw your name, I spent some time over in Southeast Asia during the hot war of a few decades ago. Where is your family from?

Mr. DINH. I was born in Saigon and I grew up in Vietnam. Thank you for your service to our country here and my country there.

Chairman CARPER. And we thank you for yours. Thank you. Professor Dinh is a founding partner of Bancroft, LLC. He is also a professorial lecturer in law and distinguished lecturer in public policy at Georgetown University where he specializes in constitutional law and corporate governance. He has previously served as U.S. Assistant Attorney General for Legal Policy from 2001 to 2003 where he played a key role in developing legal policy and issues to combat terrorism.

Next we will hear from my friend, the Honorable Alice Rivlin. Ms. Rivlin is a senior fellow in the Economic Studies Program at Brookings, a visiting professor at the Public Policy Institute of Georgetown University, and the Director of the Engelberg Center for Health Care Reform. She is an expert on fiscal and monetary policy and also chaired the District of Columbia's Financial Management Assistance Authority, generally known as the control board, and has held many senior service positions. It has always been a great joy to serve with you and to see you and to hear from you today. Thank you, Alice.

Next witness is Wade Henderson. Mr. Henderson is President and Chief Executive Officer (CEO) of the Leadership Conference on Civil and Human Rights in the Leadership Conference Education Fund. He is also a professor of public interest law at the University of the District of Columbia. Mr. Henderson is well known for his

expertise on a wide range of civil rights, civil liberties, and human rights issues.

Next we have Mr. Roger Pilon? Pilon. Is that a French name?

Mr. PILON. It is.

Chairman CARPER. Bienvenue. Dr. Pilon currently holds the B. Kenneth Simon Chair in Constitutional Studies at the Cato Institute, where he is also the Vice President for Legal Affairs. As a noted constitutional scholar, Dr. Pilon gives lectures and participates in debate regarding the Constitution at universities across our Nation.

Our next witness is the Honorable Paul Strauss. As a Senior Shadow Senator for the District of Columbia, Senator Paul Strauss advocates within the Senate on behalf of the citizens of the District of Columbia for the District's admittance to the Union as the Nation's 51st State. Prior to being elected, Senator Strauss served in several locally elected government positions and is a founder and principle of Law Offices of Paul Strauss and Associates. Welcome.

Our final witness today is the Honorable Michael D. Brown. Senator Brown was elected as the District of Columbia's Shadow Senator in 2006 and in this role, he lobbies elected officials in Congress on behalf of the citizens of the District of Columbia In 2009, Senator Brown launched the nationwide Teach Democracy, a District of Columbia organization, to inform the country of the District of Columbia's struggles for statehood.

Thank you all for joining us today. We look forward to hearing from each one of you. I would ask you, again, we are going to go into session. In fact, I think we are in session now. We are going to start voting within about an hour and we have a series of votes and I do not want to miss them. So I am going to ask you to stick pretty close to the 5-minute limit that we have asked you to use. Your entire statement will be made part of the record. But if you go much beyond that, I am going to have to ask you just to halt. I do not want to do that, though. All right. Mr. Viet Dinh, we are delighted to hear from you first. Thank you. Welcome.

## TESTIMONY OF THE HON. VIET D. DINH,[1] PROFESSOR, GEORGETOWN UNIVERSITY LAW CENTER

Mr. DINH. Thank you, Mr. Chairman. I have been asked to advise on the constitutionality of the New Columbia Admission Act, and I will limit my comments here to those legal and constitutional matters and not to the Act's wisdom as a policy matter. My conclusion is that the courts would likely decline to adjudicate any constitutional challenge to the Act, and in all events, were to reach the merits would likely hold the Act to be constitutional.

As an initial matter, the courts would likely avoid ruling on the merits of any constitutional challenge. In many ways, Congress's admission of new States is the paradigm of a political question that is not justiciable in courts. The Constitution commits the task exclusively to Congress under Article IV and it is difficult to imagine judicially manageable standards for assessing the legality of the admission by this chamber.

[1] The prepared statement of Mr. Dinh appears in the Appendix on page 74.

And any decision would disrespect the political branches while risking conflicting judgments on a State's existence. And here, I think history is very helpful. When the 1846 retrocession of Arlington and Alexandria from the District to Virginia was finally challenged some 40 years later, the courts avoided ruling on the merits on non-justiciable local question grounds. But it is likely that the courts would do the same if faced with the challenge of the admission of New Columbia.

In all events, courts reaching the merits would likely find the New Columbia Admission Act to be constitutional, in my opinion. Under the New States Clause of Article IV, Congress has the constitutional authority to accept new States through simple legislation. This is how States are constitutionally admitted. Aside from the original 13 colonies, the 37 remaining States were all admitted through simple legislation pursuant to Article IV.

And quite analogous to the current situation, Congress formed the State of Ohio with the Enabling Act of 1802 from the eastern portion of the Northwest Territory, which territory itself came from lands that were previously ceded to the Federal Government from the other States.

Congressional authority under Article IV to admit new States is broad and subject to just three requirements within the Constitution. First, Congress must guarantee new States a Republican form of government. Second, new States formed from within or combining existing States must receive State legislature approval. And third, new States must be admitted on an equal footing with existing States. The New Columbia Admission Act meets each of these three constitutional requirements.

Adjudicating courts would not likely find any contravening constitutional provisions. The District clause under Article I, Section 8, contemplates an exclusively Federal district and is satisfied because the Act would preserve an exclusively Federal District not larger than 10 miles square, the requirement of Article I, Section 8, Clause 17.

The district clause actually supports the Act because it grants Congress sweeping and exclusive authority over the Federal District, and thus affirms congressional authority to alter the size and shape of that district. In fact, again, history shows that Congress can alter the district. The first Congress altered the Southern boundaries of the original District of Columbia, and as I noted before, in 1846, Congress returned Alexandria and Arlington to Virginia.

Likewise, those historical examples, it seems to me, confirms Congress's action here, which at its base, only alters the core size of the District and not exceeding 10 miles square. Some also have interposed objections based on the 23rd Amendment, but I believe the 23rd Amendment, which allows the District of Columbia to participate in the Electoral College, is not violated just because the Federal District is smaller.

Although granting the First Family and a few other citizens that remain in the shrunken Federal District three electoral votes would, I think, indeed be bad policy, the Constitution does not prohibit it. It would be better, I think, to repeal the 23rd Amendment concurrent with admission of New Columbia, but it is not a con-

stitutional requirement, nor will courts likely require Maryland's consent just because the land was part of Maryland before 1790.

The Constitution requires a State's consent when a new State is created from within an existing State's jurisdiction. But the land that would form New Columbia is not within and no longer is within Maryland's jurisdiction. Maryland lost that authority as soon as the Federal Government accepted Maryland's absolute cessation of the land.

While the Act presents a handful of other concerns, for instance, New Columbia would have a uniquely Federal character, as some have noted, it would have an outsized influence in the Senate and would lack the internal diversity of interests that most view as ideal characteristics of statehood. These are policy issues for Congress's, your, consideration. In my view, the mechanism is constitutional and is for this Committee and Congress to decide whether or not it is wise. Thank you.

Chairman CARPER. Professor Dinh, thank you so much. Dr. Rivlin, welcome. Great to see you. Please proceed.

**TESTIMONY OF THE HON. ALICE M. RIVLIN, Ph.D.,[1] SENIOR FELLOW AND LEONARD D. SCHAEFFER CHAIR IN HEALTH POLICY STUDIES, THE BROOKINGS INSTITUTION**

Ms. RIVLIN. Thank you, Mr. Chairman.

Chairman CARPER. You have probably testified before just about every panel in the House and Senate, but I do not know if you have ever testified before this one.

Ms. RIVLIN. Yes, I have.

Chairman CARPER. Oh, good. I should have known.

Ms. RIVLIN. I am delighted that you are holding this hearing, Mr. Chairman. I think it is high time that you brought attention to this outrageous situation that citizens of the District of Columbia find themselves in. We are not, in fact, full citizens with full self-governing rights. I think this is both an anomaly in a great democracy and an anachronism and I hope this hearing will start the process leading to statehood for the District of Columbia.

It is hard to explain to anyone why a nation that sees itself as a beacon of democracy keeps the more than half-million inhabitants of its capitol city from normal participation in the governance of the country. We are very proud of our Constitution. We fight wars in faraway places to guarantee the democracy of others.

My favorite metaphor is that in television pictures you see of long lines of people in Afghanistan or Iraq standing waiting to vote because our country has guaranteed them the right to do that, and yet, those networks never mention the fact that right here in the District of Columbia we cannot vote for full representation in our national legislature.

As has been pointed out, we pay taxes, we serve in the armed forces, we do everything that other citizens do, if necessary die in foreign wars, but we do not have the full rights of democracy. And this is also a very strange anachronism. I think two centuries ago, despite what Dr. Coburn said, one would not have expected this lit-

[1] The prepared statement of Ms. Rivlin appears in the Appendix on page 87.

tle enclave to be a vibrant urban economy. There were not very many people here.

Moreover, at the time, the concept of voting rights was very narrow. Most of the people who work here would not have been able to vote anyway because they were female, because they were slaves, because they were African-American or other people of color, or because they did not own property.

But over the period of the last couple of hundred years, our concept of what democracy is has broadened and voting rights have been achieved for all adult citizens. And at the same time, this little enclave has become a vibrant city with a growing population. Various statistics have been quoted, like we have more people than Vermont and Wyoming. The one I like is we have an economy that is larger than the gross domestic product per State of 16 other States. We are well up there as economies go. And one of the smaller ones is Delaware.

But let me speak particularly——

Chairman CARPER. When you describe that, in boxing we have this saying like punching above our weight. Sort of reminds me of this. [Laughter.]

Ms. RIVLIN. Absolutely. Let me speak particularly to the fiscal viability of the District of Columbia because I had the honor of chairing the infamous control board to which reference was made earlier. And indeed, in the mid-1990s, the District of Columbia, like many other cities, was in pretty bad fiscal shape. We had lost much of our middle class, the population was declining, we had distressed neighborhoods, we had a declining tax base, and we had some mismanagement into the bargain.

The situation was not as serious as facing Detroit at the moment, fortunately, but it was serious and it warranted a Federal intervention in the form of a control board. The Clinton Administration worked with Delegate Norton and with the Republican Congress. It was a very bipartisan thing to put in place, this board, and restored the city to fiscal health.

Since then, we have done very well. The combination of fiscal reform, the Chief Financial Officer, which was in the control board legislation and remains, and a recovering economy and building traditions of fiscal discipline in the city have given us a serious turn around. Population is increasing.

Our population grew faster than any other State except North Dakota last year, and we do not have oil. The city weathered the storm of the great recession better than most cities. It has balanced its budget every year for the last 17 years. So I believe there is no longer any reason to worry that the District would not be a fiscally viable State.

Finally, there are other steps toward fiscal autonomy and legislative autonomy and voting representation in the Congress that the Congress could say. When Dr. Coburn quoted what I had said in 2009, he omitted the first sentence that said I was in favor of statehood, but I did point out that there were some other high priority things that could be done, some of which actually have been done, but some remain.

So in sum, I commend the Committee for holding this hearing and I urge Congress to get on with statehood for the District of Columbia. Thank you.

Chairman CARPER. Thanks so much. Thanks for being here today and for your leadership of the control board all those many years ago. Mr. Henderson, great to see you. Welcome. Please proceed.

Mr. HENDERSON. Pleased to see you.

Chairman CARPER. Let me say for the first two witnesses, you were very good at staying close to your 5 minutes. I applaud you for that and you set a good example for the rest of us.

Mr. HENDERSON. She set an excellent example.

Chairman CARPER. There we go.

**TESTIMONY OF WADE HENDERSON,[1] PRESIDENT, LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS**

Mr. HENDERSON. Good afternoon, Mr. Chairman, and thank you, your Ranking Member Senator Coburn, and Members of the Committee for the opportunity to speak today in support of the New Columbia Admission Act. I am here today, of course, as President of the Leadership Conference on Civil and Human Rights, a coalition of more than 200 national organizations working to build an America as good as its ideals. You have also noted that I am the Joseph L. Rauh, Jr. Professor of Public Interest Law at the University of the District of Columbia. It is an honor to be here.

Now, I would like to speak about this bill today, both as a lifelong civil and human rights advocate as well as a native Washingtonian. This issue means a great deal to me on a very personal level, and I would like to focus my remarks primarily in those terms.

As a civil and human 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 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.

At the same time, our government at all levels continues to more closely reflect the make-up of the Nation it represents. And, of course, progress has never occurred in a straight line, but it has been undeniable, and I have great faith that it will continue.

Now, I have seen this progress in Washington, D.C. as well. When I was born in the old Freedmen's Hospital on Howard University's campus, the city's hospitals were segregated along racial lines by law. Our nation's capital and many Southern States functioned under a form, a virulent form of apartheid that is no longer the case. LeDroit 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. But today, my neighbors include people of all races and from all around the world.

Even the public accommodations of 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

[1] The prepared statement of Mr. Henderson appears in the Appendix on page 90.

once off limits to those of us born on the other side of the color line. Thankfully, and I say quite proudly, we have moved on. Yes, Washington, D.C. has become a great American city.

Yet in spite of all the progress we have seen, one thing has still not changed. In spite of all of my efforts to speak out on behalf of other Americans, I have never had anyone on Capitol Hill with a real ability to speak for me. 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, as you have noted, fight courageously in the wars in Iraq and Afghanistan, 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 District of Columbia residents understand the unique location of our city and we have understood its unusual relationship with the Federal Government, we are not even given a single vote in decisions that only affect the District of Columbia residents alone. Perhaps the most egregious example occurred when the District of Columbia could not even cast a vote several years back when Congress decided to prevent city officials from using our own local tax dollars to advocate for a voice in our Nation's democracy.

Taxation without representation is enough to make people want to dump crates of tea into the Potomac River. Now, this continued disfranchisement of the District of Columbia residents before Congress stands out as one of the most blatant violations of the most important civil rights that we Americans have, the right to vote and to have that vote count for something.

Now, without the ability to hold our Nation's leaders accountable, all other rights are illusory. Our Nation has made great progress throughout its relatively brief history in expanding the right to vote, and in the process, it has become a role model to the rest of the world. Yet, one thing remains painfully clear.

If citizens do not have anyone to vote for, they are not substantially better off than African-Americans in the South were prior to 1965 when President Johnson signed the Voting Rights Act into law, and until that vote is achieved, the efforts of the civil rights movement will remain incomplete.

For those reasons, extending representation and self-governance to the District of Columbia residents is one of the highest legislative priorities of the Leadership Conference on Civil and Human Rights, as it is for me on a very personal level. I know that Professor Dinh and former Director Rivlin have spoken eloquently and at length about the constitutional and economic issues surrounding the District of Columbia Admission Act.

In the interest of time, I would simply like to associate myself with their analyses. Thank you, Mr. Chairman, and I look forward to your questions.

Chairman CARPER. Mr. Henderson, thank you so much for those words. Dr. Pilon.

**TESTIMONY OF ROGER PILON, Ph.D.,J.D.[1] VICE PRESIDENT FOR LEGAL AFFAIRS AND B. KENNETH SIMON CHAIR IN CONSTITUTIONAL STUDIES, CATO INSTITUTE**

Mr. PILON. Thank you, Mr. Chairman. I want to thank Senator Coburn as well for inviting me to offer a discordant note.

Chairman CARPER. We are glad you could be here, though, nonetheless.

Mr. PILON. If enacted, this bill would create a 51st State called New Columbia from the present District of Columbia, leaving a tiny enclave around the National Mall as the District and the seat of the Federal Government. It is both unconstitutional and unwise. Let me summarize my prepared statement and ask that it be put in the record.

As a preliminary matter, given that the District has existed in its present form for over 200 years, save for a small Virginia portion retroceded in 1847, at this point in time there must be a strong presumption against the kind of radical changes envisioned by this bill. The Framers could not have imagined anything like the arrangements here contemplated.

I will summarize three constitutional objections and then raise a few practical problems. First, the Enclave Clause gave Congress exclusive authority over such district, not exceeding 10 miles square, as may be created pursuant to it as the seat of the Federal Government. In 1790, Congress accepted 10 square miles from Maryland and Virginia ceded for that purpose.

To be sure, the Framers set no minimum size for the District, and that has led this bill's proponents to believe that Congress, by statute, may shrink the District to this tiny area and turn the rest of the District into a new State. But the Framers' mention of "10 square miles," together with Congress's nearly contemporaneous creation of the District from 10 square miles, is strong evidence of what they intended and evidence against the tiny enclave envisioned by this bill.

Moreover, Congress was granted exclusive authority not simply over the seat of the Government, but over the district in which the Government is seated, which for over 200 years has been far larger than the small area where the Government literally sits. This bill would strip Congress of this authority.

A closely related objection, rooted in Congress's enumerated powers, was well-stated in 1963 by then-Attorney General Robert Kennedy, commenting on a bill that would have retroceded the District of Maryland, and I quote, "While Congress's power to legislate for the District is a continuing power, its power to create the District by acceptance of cession contemplates a single act. The Constitution makes no provision for revocation of the act of acceptance, or for retrocession."

In short, Congress has no power to do what this bill proposes. Every Justice Department from the Kennedy Administration on that has addressed the question has concluded that Congress has no authority to alter the status of the District legislatively—save for Attorney General Holder, who sought a second opinion from the

[1] The prepared statement of Mr. Pilon appears in the Appendix on page 95.

Solicitor General after the Department's Office of Legal Counsel found to the contrary.

But second, even if Congress had such a power, it is all but certain that Maryland's consent would be needed. Were Congress to put the land Maryland ceded not to the purpose for which it was ceded, but to create a new State, not only would the terms of the original cession be violated, but so would Article IV, Section 3, which provides that no new State may be created out of the territory of an existing State without that State's consent.

Congress cannot do in two steps, simply from the passage of time, what it would be forbidden to do originally in one fell swoop, namely, accept the grant for Federal purposes and then turn it into a State.

Finally, the 23rd Amendment, which enables the District to appoint Presidential electors, poses yet another constitutional challenge. The tiny enclave this bill preserves as the District would still contain voters with constitutional rights afforded by the amendment. Those rights cannot be eliminated by mere statute, as Section 2035 seems to do. The 23rd Amendment authorizes Congress to direct the manner in which the District appoints electors, not to eliminate the District's power to appoint them.

Let me conclude with just a few practical objections. As Madison explained in Federalist 43, a "Federal district", separate from any State, was necessary to preserve the independence of both, which means that any such district must be large enough to serve that purpose.

It was imperative, he argued, that the Federal Government not be dependent on any State, and equally important that no State be either dependent on the Federal Government or disproportionately influential on that Government.

Yet, S. 132 fails on both counts. Today Congress has authority over the entire District, albeit largely delegated to the District Government. That authority would cease under this bill making the Federal Government dependent on New Columbia for everything from electricity to water, sewer, snow removal, police and fire protection, and much else that today is part of an integrated jurisdiction under Congress's ultimate authority. Nearly every foreign embassy would be beyond the Federal jurisdiction, dependent mainly on the services of the new State. Ambulances, police and fire equipment, diplomatic entourages, Members of Congress, and ordinary citizens would be constantly moving over State boundaries in their daily affairs and in and out of jurisdictions, raising vast jurisdictional complications.

But neither would New Columbia be independent of the Federal Government. Madison's "multiplicity of interests" defining statehood attributes hardly defines the District. Washington is a wholly urban, one-industry town, dependent on the Federal Government far in excess of any other State. Moreover, with Congress no longer having authority over New Columbia, but dependent on it, New Columbia could exert influence on the Federal Government far in excess of that of any other State, raising the kinds of problems Madison detailed.

I conclude, therefore, that this proposal is not only unconstitutional, but impractical as well. Thank you, Mr. Chairman.

Chairman CARPER. Mr. Pilon, thank you very much for those comments. One of the things I will just telegraph, one of the things I like to do at hearings like this where we have diversity of opinion on important issues on a panel, I like to come back at some point in the questions and answers and say, if not this proposal, what makes sense and where might lie some consensus to address the inequity that I think we all agree exists.

Mr. PILON. I have a modest proposal along those lines.

Chairman CARPER. Oh, good. Well, I was hoping you would. We will come back to you. Thank you so much. Senator Strauss, please proceed. Again, try to hold it to 5 minutes, you and Senator Brown.

**TESTIMONY OF THE HON. PAUL STRAUSS,[1] SHADOW SENATOR, DISTRICT OF COLUMBIA**

Senator STRAUSS. Thank you, Senator Carper. I appreciate the opportunity to be here today. As the Shadow Senator for the District of Columbia, I stand in a long tradition of Shadow Senators representing territories in their efforts to become States.

As the student of history that I know you are, Shadow Senators first were elected by the Southwest Territory, now of Tennessee and used several times during the pre-Civil War era when pro-slavery States tried to block the admission of free States into the Union. Most recently, the Territory of Alaska elected Shadow Senators who served for 3 years until the State of Alaska was finally admitted into the Union. I appreciate making us part of this historic panel.

Let me begin briefly by answering some questions that you posed to the other panel. When you do not have to cast votes or write legislation, you have a little bit of time to do some research. The Republic of Argentina actually copied our Constitution so closely that initially they disenfranchised the citizens of their own nation's capital.

They quickly realized it was a mistake, and one of the first things they rectified was securing full Federal representation for the "Districto Federal" and amending their Constitution to provide equality. Australia's capital, as well as the new capital of Brazil, also briefly experimented with political disenfranchisement and realized that it was a mistake. To my knowledge, the United States remains the only country without representation of its capital citizens.

On a recent trip to the country of Belarus, a country that nobody necessarily holds out as a model of human rights, I went there to take my father to the land of his father and I participated in a meeting with our own State Department where we talked about political prisoners and a variety of human rights issues. They raised the issue of America's violating human rights in the District of Columbia.

When you are being called out, and with some legitimacy, by the Government of Belarus, that is a problem. The amendment which gave us the right to vote for the President took place in the era of the Cold War. Khrushchev would point out that if you lived in Washington, D.C., you could not vote for President. If you lived in

[1] The prepared statement of Mr. Strauss appears in the Appendix on page 100.

Moscow, you could. Sure, there was probably only one name on those ballots, but that was one more name than anybody in the District of Columbia ever got to cast a vote for.

In response to Senator Coburn's comments about the 23rd Amendment, the last time I checked the boundaries of New Columbia, there really was only one family there and I think they vote in Chicago. But your bill includes expedited repeal of that amendment, so it addresses, I think in a productive way, dealing with that issue.

As for embassies being outside the Federal district, I grew up in New York City. The United Nations is there. The State and city of New York are host to hundreds of embassies of foreign governments. Foreign governments have consular offices which are essentially diplomatic property in a variety of States around the Union.

And the idea that somehow the United States needs to exclusively control its territory to protect itself is rendered ludicrous when you think of the most sensitive government institutions that are located outside the boundaries of the seat of government, the Pentagon, the Central Intelligence Agency (CIA), the National Security Agency (NSA), agencies that are frequently the jurisdiction of oversight hearings before this Committee. Not once has it ever been suggested by Senators from any party that their location outside of the seat of government hampers America's ability for those agencies to do heir jobs.

Everybody recognizes, at least initially, that this is a great injustice, and if not this remedy, what? We have tried other remedies, voting rights, amendments, arguments where we would have voting representation in the House but not the Senate. Maybe the District of Columbia residents could vote on even-numbered legislation on Wednesdays but not on Tuesdays.

This is the solution! It is the solution that has been chosen by the District of Columbia residents in a democratic election and it is the solution that in all frankness does most accurately reflect the vision of our Nation's founders. A Federal district remains under the exclusive control of Congress. Everybody who walked in this building today and entered this room followed Federal rules when they came in this building. Whether it was being security screened or the prohibition against bringing fruit, that was an exclusively Federal decision relevant to Congress's control over its own territory.

The new Congress and the new Federal District will have its own police force, be able to maintain its own laws, and I promise you, the new State of New Columbia will not try and a collect sales tax on any meals in the Senate dining room. We seek only equality of our fellow citizens, the same rights as everybody else. And of all the arguments that people make against statehood, there is one, in closing, that I just want to say bothers me the most and that is, if you do not like it, move.

Well, I came here of my own free will to pursue an education at one of the many fine institutions we have here, but I brought my daughter Abigail with me here today. With all due respect, she did not have a choice about living here in the District of Columbia. That was where her parents decided to be when we gave birth to her.

By the time she is ready to make that choice, she will have formed bonds and put down roots. It is inappropriate to tell an American citizen that if you want a right you have to move, especially when you live in the United States of America. Thank you, Mr. Chairman.

Chairman CARPER. Senator Strauss, thank you very much for the thoughtful testimony. Senator Brown.

**TESTIMONY OF THE HON. MICHAEL D. BROWN,[1] SHADOW SENATOR, DISTRICT OF COLUMBIA**

Senator BROWN. Thank you, Mr. Chairman. I am proud to be the clean-up batter here, so I will try to wrap things up. I want to thank you. I remember the first time I ever talked to you about the District of Columbia statehood. You said, Push and keep pushing. Your cause is just and you will prevail. So I come here today to push.

My constituents have been denied their basic rights of citizenship and this is unacceptable. In spite of this, they have never shirked a single responsibility of democracy. They have always been exemplary citizens, paying taxes, serving in our military, taking on every obligation and receiving only partial compensation in return. I know there are many proud veterans on this Committee who know what it means to risk life and limb in defense of their country, but imagine what it was like to serve in a world war knowing that you did not even have the right to vote for President.

I am proud to represent people with this kind of character, proud to call myself a Washingtonian knowing that the District of Columbia residents have always cared more about America than their own self-interests. Our Founding Fathers established this great nation to a sacred covenant with the people based on freedom, liberty, and mutual obligation.

Although we have faithfully fulfilled our end of the bargain, our government has consistently failed in its responsibility to reciprocate and has defaulted on the solemn pledge of citizenship that forms the basis of all legitimate governments. One nation indivisible, not separate but equal. That is the promise of democracy and we have been denied for 200 years.

Once the contract has been breached, all that flows from it is tainted and the covenant that binds us is diminished. We are tired of hearing irrelevant excuses, too small, never meant to be, a violation of the Constitution. Insults like move if you do not like it, stop whining, go back from where you came only perpetuate the misconception that we expect to be given something rather than reclaiming that which is ours.

The Framers may have given the power to Congress, but the right was given us by God. I am here to say enough. We have earned our citizenship, paid with our sacrifice, our money, our service to America, and the time has come to right a wrong which violates every principle that Americans hold dear.

You heard testimony today using words like budget autonomy, legal autonomy, voting rights. Make no mistake. Only statehood makes us whole. Any other solution glosses over the inherent in-

[1] The prepared statement of Mr. Brown appears in the Appendix on page 170.

equity in our subjugation and perpetuates our second-class citizenship. Only statehood makes us equal. Only statehood resolves the injustice that has resulted in us becoming colonists rather than citizens.

You asked, what are the implications of S. 132. They are simple. Fulfillment of an indenture as old as America itself. The final righting of a wrong that has perpetuated a political anachronism that has outlived its usefulness by more than a hundred years. On this date in 1814, a member of the District of Columbia Militia, Lieutenant Francis Scott Key, wrote a poem that became our National Anthem.

This morning, a group of veterans and District of Columbia citizens presented each Member of this Committee a flag with 51 stars and the inscription, in recognition of the 200,000 who have served during wartime and our special connection to the American flag. This was done to remind members that we are asking for nothing more than the restoration of our rights. We ask for no favors, no special treatment, no dispensation. Only that justice of equality that democracy demands.

You are right, Senator. Our cause is just and we will prevail. The President said I am for it, Senator Reid said we deserve it, and 80 percent of America in a nationwide poll said, We support it. As a child, I stood up every morning, put my hand over my heart and said, "with liberty and justice for all." I believed it then, I believe it now, and I call upon the Members of this Committee and in both houses to make it true and show the same courage that the residents of the District have always exemplified. Not asking what is in this legislation for me, but rather, what is in it for our democracy.

Dr. King said injustice anywhere is a threat to justice everywhere. And this injustice can no longer stand. Our democracy can no longer tolerate it. Our government can no longer support it. And the way to abolish it is statehood. The partisan politics that characterize this struggle must end. We must rise above the rancor and divisiveness, act selflessly to pass this legislation, and continue to form a more perfect union.

I close by answering the question my fellow Washingtonian asked 200 years ago. Yes, Lieutenant, that star spangled banner yet waves, and it is time to add another star so that it finally waves for all of us. Thank you.

Chairman CARPER. Senator Brown, thank you very much. I think it was Senator Strauss who said something to the effect, if not this solution—I think referring to what we have introduced in the Senate with, I think, 17 cosponsors and what Congresswoman Holmes Norton has introduced in the House with over 100 cosponsors—if not this solution, then what?

We learned here fairly early in our time in the Senate, and in the House as well, never negotiate against yourself. If you are going to negotiate with somebody, then negotiate with somebody who has a different point of view. So I would start off before I ask this question just to say, Well, for those who are advocates of statehood or addressing this inequity, you do not want to negotiate necessarily against yourself.

But let me just ask each of you, and I will start with Dr. Rivlin. If not this solution, then what?

Ms. RIVLIN. I think this is the right solution. That does not mean that there would not be intermediate steps that you could take toward statehood, like budget autonomy, for instance. That is pretty easy and it is a good thing. But it does not solve the problems that we are talking about here. So I do not see an alternative to statehood, ultimately.

Chairman CARPER. OK. Professor Dinh, if not this solution, then what?

Mr. DINH. First of all, I just want to emphasize I do not have a dog in this hunt because as a lifelong Republican living in the District, I doubt that my vote will count for much anyway. So it seems to me, however, that there are a number of choices that the Congress or the people can make. One of those steps was enacting the 23rd Amendment in order to give Electoral College votes to the District short of statehood. That was a policy choice that I think was obviously the right decision for the country at the time.

I do not think anything in the 23rd Amendment limits the Congress from pursuing the traditional route of admitting new States, which is, as I noted and as Roger noted, is under the New States Clause by simple legislation under Article IV of the Constitution.

I think the easiest way to illustrate that point is to consider the 23rd Amendment, and this bill, were it to have passed in 1960 prior to the enactment of the ratification of the 23rd Amendment, I do not think the 23rd Amendment obviously has nothing to say about whether or not Congress had the power to enact this bill in 1960 prior to the 23rd Amendment. And the 23rd Amendment itself does not speak to limiting the power of Congress in any way; rather, just simply to give the power to Congress of Congress to enforce the terms of the 23rd Amendment. So I think that Amendment does not independently add anything to the entire statehood legality objection.

Chairman CARPER. All right. Thank you. Mr. Henderson, if not this solution, then what?

Mr. HENDERSON. Well, Chairman Carper, I have come to the conclusion that this is the only viable option that guarantees the right to vote for District of Columbia residents in a way consistent with that of other American citizens in having both a vote in the House of Representatives and in the U.S. Senate.

We have concluded that this is the only approach. We have explored options of retrocession under the assumption that Congress would never provide an affirmative right for District of Columbia residents consistent with that principle, and the State of Maryland, as we have explored, not having an official position, but unofficially was not interested in retrocession for a variety of political reasons.

We have explored options that were intermediate in step, providing, first, for a vote in the House of Representatives with, hopefully, speaking recognition in the Senate. But even that proposal, which was supported by Jack Kemp, Republican Tom Davis in the Senate, Congresswoman Eleanor Norton was subverted by efforts to, if you will, corrupt District of Columbia's gun control laws.

Every approach that has been explored, even those that have been considered woefully inadequate, have been rejected by oppo-

nents for those who seek to block the ability of District residents to have equal rights. So in the final analysis, we have come to the conclusion that only statehood provides the full equivalent of rights that we believe American citizens are entitled to have and that those in the District have.

I would simply close with this one fact. It is especially galling to know that District of Columbia residents have fought to bring democracy to Bhaghdad, have fought to bring democracy to Kabul, Afghanistan, and are yet denied that same right here at home, and to be questioned as we are at the U.N. conventions and various international gatherings, by those countries that seek to really highlight the contradiction between what we say as a Nation, and what we practice at home is profoundly disturbing.

The only way to address that concern is, well, not regret to say—the only solution to this problem, I will say quite openly, is the bill that you have proposed and are supporting.

Chairman CARPER. All right. Thank you, sir. Dr. Pilon, I think you said you had a solution and we are anxious to hear it.

Mr. PILON. Well, a modest proposal. Let me begin on the point that my good friend, Viet Dinh, just made. He knows what it is like to not have his vote count because he lives in the District. I am in the same boat because I live in Maryland.

Chairman CARPER. You are not going to tell us you are a Democrat, are you?

Mr. PILON. In any event, the problem with this bill, as I said, is with the Constitution. It will take a constitutional amendment to get this bill through, and therein lies the problem, because we know that it is not likely to come out of the Congress, and if it did, the last time the Congress tried something along these lines, only 16 States joined on.

Chairman CARPER. But it did make it through the House and Senate, did it not? Did a constitutional amendment not make it through the House and Senate?

Mr. PILON. Yes. But now, given that unlikelihood let me come to my modest proposal. We heard the Mayor speak about "taxation without representation," and all the focus is on the second part of that slogan rather than on the first part. If we focused on the taxation part and treated the District, keeping it as it is, like Puerto Rico, like Guam and other territories, and stopped taxing the residents of the District, since they do not have representation, this loss of revenue would be a drop in the bucket to the Federal treasury in a country of 300 million people, but it would be a giant windfall of opportunity for the District, which would attract all kinds of business and other potential for the District, and it would have a tax base for itself and the independence that goes with that, and I should think that would be the best of all worlds because it is a win-win all around. Think about it.

Chairman CARPER. Let me just ask Senator Strauss and Senator Brown, would you just respond to what Dr. Pilon has put before us?

Senator STRAUSS. Certainly. And I probably should not admit this, but for procrastinators like me, it was actually today, September 15, as opposed to April 15 when I paid my Federal taxes,

and as painful as that was, what I really want is to be an equal citizen of this Republic, not to shirk our responsibilities.

The District contributes a lot more than a mere drop in the bucket. Billions of dollars in Federal revenue come from District of Columbia taxpayers that seek not more than to be equal citizens. There are other solutions that have been discussed to the question of Federal representation, but this is the only solution to the question of both Federal representation on an equal basis and self-determination, which is becoming more and more important to the citizens of the District of Columbia.

Senator Coburn frequently has been an advocate, and it is one of the things I respect about him, for fighting government waste and repetition. But how many times has this Committee had to have hearings on family court judges in the District of Columbia, something where no Federal interest has evolved at all because of the way our limited home rule is set up?

Congress wastes thousands of taxpayer dollars doing things that it need not do for the District of Columbia, when it should be focusing on national problems. And so, this is the best solution because it is permanent. A constitutional amendment can always be repealed. It preserves a seat of government in the way that the Framers envisioned. And it provides for self-determination as well as Federal representation.

Chairman CARPER. Senator Brown, would you just respond to the proposal of Dr. Pilon, please?

Senator BROWN. Well, the only thing I have to add to what Senator Strauss said is that we have tried other things, Senator. We have been in court. We have tried the constitutional amendment. We decided to, a few years ago, try one vote method based on the Missouri Plan. We have tried everything else.

So it seems to me that since equality is a prerequisite of our democracy, that this really is the only viable solution. There was even a case one time in front of the Supreme Court where we tried to sue on the basis of taxation without representation, and Justice Marshall ruled that taxation without representation was a catchy slogan and not a principle of government.

So I do not know. We have done everything, I think, we can do creatively and I think as much as I admire the Framers, they were not particularly inclusive guys. They left out women, they left out African-Americans, Native Americans, and all these people have been brought back into the system and made whole. I think that the only way to do that for Washingtonians is through statehood.

Chairman CARPER. I am not sure who mentioned the State of Ohio. Professor Dinh, it was you, was it not?

Mr. DINH. Yes.

Chairman CARPER. Would you just revisit with us what you said, please, and how it might be instructive here?

Mr. DINH. Yes. The State of Ohio was admitted by the Enabling Act of 1802 from what was then Federal land, the Northwest Territory, I think, by simple legislation. I think that example I cite as an answer to the concern that Maryland's consent is now needed just because the original land that is now making up the current District of Columbia was originally ceded by Maryland in 1789 and accepted by the Federal Government in 1790.

The argument is that despite the fact that it has been in Federal possession for 200 years, we still now need to relate back to Maryland's original possession in order to seek its consent. I think that is misguided just for the simple fact that the 200 years has convened of Federal control and possession, including under Article I, Section 8 of the District clause for the Congress to have that control and have absolute power to do with it as it wishes, including, in the first Congress in 1791 and 1846, to adjust the size of the District just as Congress contemplates to do with this bill.

The second reason why I think that that objection is misplaced is exactly the example of Ohio, because if you will not recall, you were not there, I hope—the Northwest Territory, which originally was created by cessation of land and claims from the Eastern States, many of which had claims or the land that made up the Northwest Territory, all of those States ceded land to the Federal Government in order to create the Northwest Territory, including the State of Connecticut, portions of which became the State of Ohio.

In the cession of land to the Federal Government, the State of Connecticut did not include any grants or approvals or consent for the territory later to become a State, and yet, the Federal Government obviously had the power later with the Enabling Act in order to create the State of Ohio.

Just so here. The cession in 1788 of Virginia, in 1789 of Maryland of land to the United States which the United States accepted in 1790, did not impose any condition that is relevant to our discussion, and the Congress has possessed that land for over 200 years and it now can exercise its power under Article I, Section 8 in order to lessen the District, and under Article IV, in order to admit a new State.

I think that is fairly simply, fairly straight forward, and lest we be accused of maligning the Framers, I do not think the Framers' statements are instructive or conclusive in this regard. I think the fact that the Framers themselves, who were sitting as legislators in 1791, adopted a bill to adjust the Southern boundaries of the District, show that the District's size and boundaries are not sacrosanct, but, rather, can be adjusted legislatively under Article I, Section 8.

And also, the Framers' statements regarding the independence of the Federal seat are still satisfied by the enclave that the Act would preserve the Capitol and the White House and the other Federal seat. The only thing that Congress has done is to shrink the size of the Federal enclave.

And again, as Dr. Pilon has noted, there is no lower limit to the size of the District in the Constitution. There is only an upper limit of no more than 10 miles square, and I think the Framers knew how to draw a floor just as well as it knew how to specify a ceiling. And the latter cannot be converted into the former.

Chairman CARPER. Dr. Pilon, would you just react to what Professor Dinh has said?

Mr. PILON. Yes, I would like to respond to the first point that he made, namely, that the consent of Maryland would not be required for retrocession pursuant to Article IV, Section 3, which provides

that no State may be created out of the territory of an existing State without that State's consent.

The reason it would not violate that, he says, is because the District is no longer part of the State of Maryland. Well, the problem with that is, that it is an invitation to mischief. Imagine this scenario. Maryland cedes the territory to the Federal Government for the creation of a District and then the Federal Government turns right around and turns that into another State. That would be pure mischief and it would be because it would be violative of the original terms of the agreement.

And indeed, it would be doing in two steps what it is prohibited from doing in one fell swoop. And indeed, the Supreme Court just decided an analogous case along those lines, the Brandt decision, *Brandt v. United States*, in the term just ended. That is the Rails-to-Trails decision, and that was an eight to one decision and the parallel here is almost exact.

Chairman CARPER. All right. Someone mentioned that earlier when there was an effort to pass a constitutional amendment, which actually was approved in the House and the Senate, two-thirds vote in the Senate and in the House, the States had a period of time to consider that amendment. Only 16 States voted to ratify that constitutional amendment.

Somebody or several of you who have a better understanding than I have of why, after Congress had done what I think is some pretty heavy lifting on this subject, the States chose not to, except for those 16 States, to ratify. Anyone know why?

Senator BROWN. Well, I think there are several reasons, Senator, and one is that, when you look at constitutional amendments in general, there have only been 17 of them since the passage of the Bill of Rights. So it is a very difficult thing to do on every level. There were other problems with it. Very often I have heard that the equal rights amendment, which was proposed at the same time, was an interference in the process.

It is much easier to become a State. We have made 37 States in the same period of time that we have made 17 constitutional amendments, and I think that, for me anyway, says it better than anything, that it is just a very difficult process, and I see it as a red herring, that people throw this up all the time.

Chairman CARPER. OK. Others, please? Why do you think only 16 States said, yes, we would like to ratify that?

Senator STRAUSS. I cannot speak to what happened in the other States, but in the District of Columbia, realizing the difficulties associated with this amendment as well as the fact that it only dealt with one-half of the problems that this bill addresses, that is, Federal representation only and not self-determination, in the District of Columbia the movement toward District of Columbia statehood began to gain momentum as a way of achieving even more than a constitutional amendment would give us with less intrusion into the political process.

We did not need the consent of a majority of States. We needed only a simple majority of Congress, which we had at that point, and we would have gotten both self-determination and full Federal representation, and preserved the Framers' idea of a Federal dis-

trict separate and autonomous and under the exclusive control of Congress.

So statehood was then the better solution. It remains the better solution today because it solves all of those problems, while at the same time preserving the Federal District.

Chairman CARPER. Thank you. Any other thoughts? Mr. Henderson.

Mr. HENDERSON. I guess my only additional comment, Mr. Chairman, and I completely agree with my colleagues who have given you some sense of why a constitutional amendment has been difficult to achieve on behalf of the District of Columbia. But it should be noted that one of the States that ratified the amendment was Maryland in 1978, which by implication suggests that they would not have a problem with giving the District the ability to become a State, and that retrocession in the formal sense, as Dr. Pilon suggests, may not be required.

I will say that there are many issues that come into play with statehood. For example, the assumption that the District of Columbia's electorate is likely to weigh in one direction or another, thus tipping the balance of power that may exist in the Congress today.

Or that somehow the District is not deserving because of its previous history of some economic insolvency at a particular point in time. Those collateral factors help cloud the ability of the District to have a pure vote on the question of whether District of Columbia residents are entitled to the same rights of participation in our democracy as other residents.

I think when the issue is framed in isolated terms, the right to vote stands above all else as the most important right that Americans have. Other rights are dependent upon our ability to vote. So really, voting is the language of democracy. If you do not vote, you do not count, and that is, unfortunately, the rule that affects issues like this and does affect how the country sees an amendment.

Chairman CARPER. Dr. Pilon, please.

Mr. PILON. Yes.

Chairman CARPER. And then I think we are going to wrap it up here.

Mr. PILON. We have heard that the amendment process would be difficult if not impossible. We have also heard, I believe, that it, therefore, is a red herring. I do not believe the Constitution should be conceived of as a red herring, nor do I believe, as Professor Dinh, suggested that the Court would treat an effort by the Congress to achieve statehood through mere legislation as a "political question."

I think that the court would very seriously look at both Article I, Section 2 and Article I, Section 8, Clause 17, put the two together and conclude that there is a real constitutional problem with trying to achieve this end through mere legislation.

Chairman CARPER. All right. Thank you. I think I will wrap up with this thought: We have a chaplain here in the U.S. Senate, some of you have seen him, heard him, great guy. Retired Navy Admiral. Barry Black is his name. And he is the first African-American ever to be Chief of Chaplains for the Navy and Marine Corps, first African American ever to be Chaplain of the U.S. Senate.

Sometimes he meets with us in the Bible study group that meets a lot of Thursdays. I like to say that six, seven, or eight of us who need the most help show up. Last Thursday we were gathered for about half an hour or so, and one of the things that he made a big point of is just encouraging all of us sometime during the day, I think when most people probably pray, I like to say I met a kid in the eighth grade in inner city school in Wilmington, and I always like to say that there will always be prayer in schools as long as there are math tests.

But whatever the cause, whether it is math tests or world peace or something else, most of us pray sometime during the day or the week. One thing he urges us to pray for is wisdom, and he has a lot of admonitions that he gives and every now and then one of them falls on fertile soil, and for me one really falls on fertile soil. I pray for wisdom a whole lot, and I know my colleagues do, too, more than you probably would imagine.

And one of the things we ask God for is to give us the wisdom to know what is the right thing to do, and then when we know the right thing to do, or have a pretty good idea of really the courage and strength to do that which we think is the right thing to do.

I have asked this question a couple of different ways and before we conclude, I just want to ask, short of statehood, if each of you could give us maybe one idea, something that you think we can agree on in the interim. We have a lot of very wise people here on this panel, folks who have thought a lot about these issues, and we appreciate very much your testimony today.

But could you just give us maybe one? You can repeat. You can all come up with the same idea. But just one thing, if we cannot agree on statehood this year, this Congress, or maybe the next Congress, what should we be able to agree on that would move us forward in this debate? Professor Dinh.

Mr. DINH. Mr. Chairman, the last time I was in before this Committee, I was sitting next to the late great Jack Kemp, as Wade Henderson has just noted, and both of us spoke in favor, one on legality, the other one on policy of the District of Columbia Representation bill, which was a compromise to add District of Columbia representation in addition to the Utah representation in the House.

We thought it was sensible thing and legal then, and I think if you allow us to repeat an old policy proposal, that is one I would.

Chairman CARPER. Thank you, Professor. Dr. Rivlin.

Ms. RIVLIN. I would join that, but if you want another one, I think budget and legislative autonomy could be achieved very easily. And since, as was noted earlier, the Congress has not overturned District of Columbia legislation in I do not know how many decades, you are not giving up anything. You are just making it possible for the District to move ahead without having to wait. Budget autonomy again, a very simple thing: Allowing the District of Columbia to spend its own raised tax dollars in accordance with the wills of the Council and the Mayor.

Chairman CARPER. All right. Thank you, Dr. Rivlin. Mr. Henderson.

Mr. HENDERSON. As Professor Dinh noted, I, too, was a supporter of the District of Columbia Representation Bill. But having said

that, it has been overtaken by events and is no longer a viable initiative, even to respond to the need to provide a vote in the House of Representation and speaking privileges in the Senate. I support budget autonomy for the District.

But in each instance, that is an inadequate solution to the fundamental problem of providing voting representation for the District in both houses of Congress, and in providing the self-determination that a vote for Members of Congress provides. And so, while I believe change occurs incrementally, would love to see a change occur in that direction for the District.

I fear that there is nothing that has been discussed that is a satisfactory alternative to providing the structure and providing the right to vote that the bill that you have introduced would do. And so, these interim measures, though they may be attractive for building bipartisan support, do not ultimately go to the fundamental question of how you treat District residents with the equality that citizenship demands.

Chairman CARPER. All right. Mr. Henderson, thank you. Dr. Pilon.

Mr. PILON. You asked what it is we can all agree upon. I am going to offer just a very simple point, namely, as the person here who is offering the discordant note, I think we can all agree that you have conducted an eminently fair hearing.

Chairman CARPER. Doctor, you are welcome to take more time to speak. [Laughter.]

You do not have to stop there. Thank you. Thank you for your kindness. Senator Strauss.

Senator STRAUSS. Mr. Chairman, I am on record as supporting legislative autonomy and budget autonomy, bills that have been introduced by one of your colleagues and aptly titled the Paperwork Reduction Act because of their positive impact on reducing superfluous Federal oversight on things that the——

Chairman CARPER. Did you mention judges? One of you mentioned judges.

Senator STRAUSS. I did mention judges.

Chairman CARPER. Would you expand on it just a little bit?

Senator STRAUSS. Well, one of the things that makes me a more frequent visitor to this Committee is that when this Committee, not the Judiciary Committee, has to conduct confirmation hearings on Federal judges nominated by the President, confirmed by the Senate, who have exclusively local purview for the courts of the District of Columbia. And while these judges tend to be extraordinarily well qualified and worthy of all of the pomp and tradition that comes from a Presidential nomination and confirmation by this body, a greater dignity to them and to the people who they serve on the bench would be to be treated equally as full citizens.

And so, it is something, frankly, your Committee has done a decent job of moving those along, but there are times when vacancies sit on our court because they are, understandably, not a priority, and the administration of justice in the District of Columbia is handicapped because, frankly, your Committee has more important things that it should be doing rather than confirming local judges that would not be involved with the Federal Government or any other State.

Chairman CARPER. Thank you. I think you make a very good point. Senator Brown.

Senator BROWN. Well, I have to agree with Mr. Henderson. I mean, I think all of us up here, Senator, have tried to stand behind interim measures, but none of them have worked. We have had all sorts of governments in the District of Columbia, commissioners, mayors, sometimes our Delegate has a vote, sometimes she does not.

We need a permanent solution to this problem, and I think equality is a prerequisite to democracy, and any other solution that does not give us full equality, I think, is like asking us to sit in the middle of the bus. I think if we pay the fare, that we have to pick our seat just like everybody else, and I think statehood is really the only solution for that.

Chairman CARPER. All right. Thank you. It has been a wonderful hearing. I think one of the reasons why it is not better attended is that people are coming in from all over the country, as we speak here, in order to be on hand when we start voting in a few minutes. There are a number of my colleagues who do have a strong interest in these issues, and my guess is they are going to write to you and they will have that opportunity over the next 15 days to submit statements for the record and to submit questions to you for the record. I would just ask you, when you receive those questions, that you respond as promptly as you can.

I said earlier, and I will close with this. I mentioned my moral compass, the four principles that help guide me. I should add this. I usually violate at least one of them a week, sometimes more. But the nice thing about having a compass is when you get off course, you know how to get back on the right course. Very helpful to me in that regard.

As it turns out, I am not the only one who has really almost verbatim those core values. Figure out the right thing to do, just do it. Not the easy thing, not the expedient thing. What is the right thing to do and try to do that.

Second, to treat other people the way we want to be treated. Third, if it is not perfect, make it better. Not to form a perfect union, but a more perfect union. And last, just do not give up. If you know you are right, you are sure you are right, just do not give up. You would be amazed how many of my colleagues I talk to about those core values and how many of them say, Well, those are really my core values.

I will close on a hopeful note and just say that given that Democrats, Republicans, even a couple of those radical Independents, I hear have values like that here in the Senate. I have some hope that we can do better and we are going to. I think this has been a very good hearing. Both the first panel and this panel, we are grateful to you for your preparation, for your heartfelt commitment and your willingness to spend this time with us today.

With that having been said, this hearing is adjourned. Thank you so much.

[Whereupon, at 5:24 p.m., the hearing was adjourned.]

# APPENDIX

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**Opening Statement of Chairman Thomas R. Carper:**
**"Equality for the District of Columbia: Discussing the Implications of S. 132, the New Columbia Admission Act of 2013"**
**September 15, 2014**

*As prepared for delivery:*

When I assumed the chairmanship of this Committee in January 2013 with its broad jurisdiction over federal government operations and homeland security, I also took on responsibility for federal legislation on matters concerning the District of Columbia, whose more than 600,000 citizens are denied a vote in Congress. I take that responsibility seriously, which is why last year, I introduced the "New Columbia Admissions Act" to create a path to end that voting inequality.

The District of Columbia is not just a collection of government offices, monuments and museums. It is home to a little more than 632,000 people –more than both Wyoming and Vermont. These residents pay over $20 billion in federal taxes. That's more than the federal taxes paid by states like Nebraska, South Carolina and New Hampshire. These residents work, study, raise families and start businesses here, just like people do in all 50 states. And they serve in the military and die for our country, just like other Americans.

Yet when it comes to having a voice in Congress, these men and women do not count. In truth, they never have. While they bear the full responsibilities of funding the federal government and dealing with the consequences of the laws it enacts, they do not enjoy the benefits and protection of having voting representation in our Congress. In my view, this situation is simply not fair. Neither is it consistent with our values as a country. Perhaps most importantly, though, it's not consistent with the Golden Rule: treat other people the way we want to be treated.

Voting rights is a passionate cause for many of the citizens of the District of Columbia. It has been for years. I believe it should be a cause for concern of all of us. That's a major reason why we are here today. Twenty years after the last testimony before Congress on District of Columbia statehood, my goal for this hearing is to educate a new generation of people about this injustice and restart the conversation about finding a thoughtful solution.

I was surprised to learn last year that the United States is the only democracy in the world that denies voting representation to the people who live in its capital city. Not one of one hundred, not one of ten, the only one. And the United Nation's Human Rights Committee has called us out on that. They've deemed the District of Columbia's lack of voting representation a human rights violation. But there's more to this injustice than inequality. The District of Columbia's disenfranchisement places its residents in a doubly vulnerable political position.

Unlike any other city in the United States, Congress holds ultimate control over the District of Columbia's laws and even its day-to-day operations. In recent years, Congress

has shown less of an inclination to meddle in District of Columbia affairs than it has in the past, but the fact remains that my colleagues and I can – if we choose to – overrule the voters of the District of Columbia and their local officials on any local issue we want. So without their own vote in Congress or the ability to spend money and pass laws without Congress' consent, the District of Columbia is, at times, used as a political pawn by some Members looking to impose their own agenda on the city without regard for the views of the citizens who must live with the consequences.

And just last fall, the District of Columbia was caught up in the federal shutdown and was nearly blocked from using local tax dollars to keep basic city functions running – functions like schools, libraries, and trash collection – just to name a few. Some determined and creative efforts by city officials avoided that outcome, but only after incurring needless cost and uncertainty in planning for the federal shutdown.

We have tolerated this situation for a long time. I think most people know it just isn't right. It is incumbent upon those of us who enjoy the right and the privilege of full voting rights to take up the cause of our fellow citizens here in the District of Columbia and find a workable solution.

This is not a new cause. As soon as the capital city was organized in 1801, citizens of the District of Columbia began fighting for equal representation. Since that time, Congress has considered several legislative options. In 1978, Congress passed a constitutional amendment to give the District of Columbia full voting rights in Congress. In 2009, the Senate voted to give the District of Columbia a voting seat in the House. And for many years, members have offered bills to provide statehood for the District of Columbia.

The bill I introduced is the latest chapter of that ongoing effort. It may not be the last chapter, but it attempts to right a wrong that should be righted. S. 132 would pave the way for the potential creation of a 51st State, called New Columbia, with full voting rights in Congress. Under the bill, a federal district called Washington, D.C. – encompassing the White House, the Capitol, the Supreme Court and the National Mall – would still remain under the control of Congress as the Constitution mandates.

I realize everyone may not agree that this is the right solution and that there are a number of legitimate questions about how this would work. Our witnesses today will discuss these questions. Most–but not all of them–will lay out a strong case for why this approach is appropriate and constitutional and the preferred approach for many of the residents here in the District of Columbia.

The Senate bill currently has 18 co-sponsors – the most co-sponsors ever on a Senate District of Columbia statehood bill. Congresswoman Eleanor Holmes Norton, who will testify here today, has introduced companion legislation in the House which also has a record number of co-sponsors; 104.

Today, we will hear from two panels of witnesses who are going to shed some light on this topic. On our first panel, we have three elected officials from the District of

Columbia who will speak to how its current status affects its residents and their own abilities to govern effectively. On our second panel, we will have six witnesses who will discuss other the issues surrounding the topic of statehood including its constitutionality, feasibility and practicality.

Dr. Coburn and I agree on many issues, but on this one, we have an honest difference of opinion. With that, let me turn to him so we can hear those views. Then we will hear from our witnesses today.

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**Opening Statement of Senator Tom Coburn**
**"Equality for the District of Columbia: Discussing the Implications of S. 132, the New Columbia Admission Act of 2013"**
**September 15, 2014**

Today we're debating an issue that has been thoroughly debated by Congress for hundreds of years.

Since 1888, there have been hundreds of bills and amendments proposed to address DC representation. Since 1964, Congress has held no less than 10 hearings on it.

The House debated statehood in 1992. They heard from over a dozen witnesses and got another twenty opinions from every segment of the government.

Witnesses identified numerous problems, from constitutional to financial to administrative. The 1992 minority staff report does an excellent job of laying them out.

Yet here we are again debating this issue, even though it has no chance of success in this chamber, and is dead on arrival in the House.

This bill makes a state out of the neutral land that houses the Federal government. It's unprecedented.

Yet little effort was made to hold a hearing that seriously debates this bill.

More than half the witnesses are DC politicians, all with the same agenda and voicing the same interests.

With the exception of a witness I invited, none of the witnesses here provide an alternate opinion.

You can learn a lot about the seriousness of this hearing by looking at who is not here.

Where is the Department of Justice?

Every Department of Justice that has issued a report or testified about legislated DC statehood – (Kennedy, Carter, Reagan, Bush, Sr.) has concluded it is unconstitutional and would come with other extremely complex legal challenges.
Where is CBO, OMB, the Interior, Transportation, State, Defense, the General Services Administration, and Treasury?

DC statehood would significantly affect the Federal government's operations including: use and access to water and sewer services, utilities, police and fire services, infrastructure, communication networks, DC National Guard, DC's unfunded liabilities and other benefits, and ability to control the aesthetics and condition of our nation's capital.

DC statehood would also come at an unknown cost to the U.S.

Who is representing the interests of other states?

DC statehood would significantly affect the sovereignty of other states, becoming the first among equals.

Nothing in the bill prevents New Columbia from still getting the special funding DC gets, approximately $674 million each year just by virtue of being the nation's capital.

DC residents got more than eight times the national average of federal aid per capita, and more than two times the next highest state.

Who is here to represent Virginia and Maryland?

There is a serious question as to whether Maryland's consent would be necessary to create a new state, since it gave the land to be the Capital.

The bill even gives New Columbia control over certain land in Virginia and Maryland, a serious affront to their sovereignty.

DC residents suffer an injustice by not having a vote, but Congress can't bypass the constitutional amendment process simply because it's inconvenient.

The framers designed the district to be an autonomous federal area, separate from any state's influence and different from all other federal land. It is patently false to say the framers could not have predicted the city would thrive: the District was envisioned prior to 1800 as a large, powerful city with 800,000 people - more than DC has now, and more than even Paris had at the time.

President Kennedy's Attorney General said Congress can't reduce the district's size any more than it can remove a state from the Union.

Attorney General Kennedy said a small enclave "clearly does not meet the concept of the 'permanent seat of government' which the framers held."

President Reagan's Attorney General said he would recommend the President veto any bill providing statehood without a constitutional amendment.

Lee Casey, who wrote that report, could not testify today, but sent a letter with an original copy and reiterating its findings. It's the last report an administration has issued on this. (*I ask unanimous consent to enter in record*)

The bill largely ignores the 23rd Amendment, which recognized DC and gave its residents 3 electoral votes.

Granting statehood without first repealing the 23rd amendment creates a legal and political absurdity, allowing a few residents, including the White House occupants, to be the decisive votes in a close Presidential race.

Howard Law Professor Adam Kurland says as much in a law review article. (*I ask unanimous consent to enter in record*)

GW Law Professor Jonathan Turley also could not be here to testify today but wrote an informative article about the political and constitutional implications of the bill. (*I ask unanimous consent to enter in record*)

I'll close with a quote from one of our witnesses today, Dr. Alice Rivlin, in 2009:

"I think statehood is so unlikely to happen in the foreseeable future that pursuing it is a serious distraction from more important and feasible policies that could improve both the autonomy and fiscal health of the District." I agree.

ELEANOR HOLMES NORTON
DISTRICT OF COLUMBIA

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE

SUBCOMMITTEES

RANKING MEMBER, HIGHWAYS AND TRANSIT

ECONOMIC DEVELOPMENT, PUBLIC BUILDINGS, AND EMERGENCY MANAGEMENT

WATER RESOURCES AND ENVIRONMENT

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# Congress of the United States
## House of Representatives
## Washington, DC 20515-1501

Statement of Congresswoman Eleanor Holmes Norton
Senate Homeland Security and Governmental Affairs Committee
"Equality for the District of Columbia:
Discussing the Implications of S. 132, the New Columbia Admission Act"
September 15, 2014

Chairman Carper, Ranking Member Coburn, members of the Committee, I appreciate the opportunity to testify before you at today's hearing. Your hearing is the leading indicator of the unusual progress the District of Columbia has now made in advancing D.C. statehood, including its individual components.

Chairman Carper, let me begin by thanking you for taking energetic leadership, even as a new chair of this Committee, in assisting the District of Columbia in many significant ways and particularly for holding a hearing that is justifiably called historic because it is the first Senate hearing on statehood for the District. We especially appreciate your early initiative in introducing the New Columbia Admission Act, and for setting the record for the most cosponsors for the bill since it was first introduced in the Senate, in 1984, before either you or I was in Congress. With your leadership, the top four Democratic leaders are among the cosponsors of the bill, led by Majority Leader Harry Reid, who, as majority leader, generally does not cosponsor bills. Your hearing also has enabled us to break the record for cosponsors in the House, at 106, more than it has ever had since it was first introduced in the House, in 1983, by my predecessor, Congressman Walter Fauntroy. To complement this unprecedented growth in congressional support, President Obama endorsed D.C. statehood in July.

Our residents are grateful for today's hearing even though they doubt statehood will come tomorrow. The considerable appreciation in the District for this hearing comes because residents know that a hearing is a significant and necessary step in putting an issue on the congressional agenda. Your hearing is the most important vehicle afforded by Congress to educate Members and the public and to signal that the matter constitutes a serious national concern that should move to passage. At the same time, the city's elected officials and residents are well aware that your willingness to hold a hearing carries a reciprocal responsibility for all of us who live in the District to continue to build support for the bill in Congress and with the public. We need friends in the Senate and House, but residents learned many lessons from their experience in achieving home rule just 40 years ago. Although Democrats were in power for most of the 100 years after Congress eliminated D.C.'s limited home rule after Reconstruction, home rule did not return until there was collective action from residents. For that reason, I particularly appreciate the rapidly growing number of D.C. statehood activists and their help in gathering cosponsors for the bill.

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You will be hearing from a distinguished and expert set of witnesses about every aspect of statehood and the effects of its denial. Therefore, I believe that my best contribution would be to speak from the unique vantage point of the Member who represents the District of Columbia in Congress, which allows me to give context to why we requested this hearing and believe that it is particularly timely.

Neither the historically unproductive Congress in recent years nor the fact that I have been in the minority for most of my service has discouraged us from believing that statehood is both indispensible and achievable. During this same period, with support from residents and Members of Congress, we have made bipartisan progress on the major elements of statehood, while continuing to press for statehood itself as the only remedy that affords equal citizenship rights. Nevertheless, as Members of Congress continue to accept and move on the major components of statehood, statehood itself should become clearer as a logical and appropriate result.

Recently, for example, D.C. budget and legislative autonomy and anti-shutdown legislation have all moved further than at any time since the Home Rule Act of 1973. The President put both budget and legislative autonomy in his fiscal year 2015 budget, the first time both have been in a president's budget. The Republican chairman of the House committee with D.C. jurisdiction, Representative Darrell Issa, held a hearing last Congress on the local D.C. budget, and after hearing the Republican and Democratic witnesses all testify that D.C.'s financial condition, reserves and growth were among the best in the nation, endorsed budget autonomy, and has worked tirelessly with local officials and me as well as Republican interest groups to secure budget autonomy. The House Majority Leader, Eric Cantor, last Congress endorsed budget autonomy. The D.C. Appropriations bill enacted for the current fiscal year prevents the D.C. government from shutting down in the event of a federal government shutdown during the next fiscal year, marking the first time the D.C. government will be spared from the threat of a shutdown for an entire fiscal year. The House-passed D.C. Appropriations bill for the next fiscal year would also prevent the D.C. government from shutting down for the following fiscal year. At the same time, progress in the Senate also has been particularly rapid and steady. The pending Senate D.C. Appropriations bill would grant D.C. both budget and legislative autonomy, the first appropriations bill ever to do so, and would permanently prevent shutdowns. Both our budget and legislative autonomy bills are now pending for the first time ever in the Senate. As Congress sees the importance of these components of statehood, the logic of statehood itself becomes more apparent. While insisting on statehood, residents also have supported these components because they want any and all their rights now, in any way they can get them, and because they understand that these are steps toward statehood itself.

However, because progress in obtaining the various components of statehood does not automatically yield statehood itself, we have simultaneously continued to introduce our statehood bill. Your panel of expert witnesses will offer details that show that there are no financial, economic, constitutional or historical reasons that the 650,000 Americans who live in the District of Columbia should not be granted statehood.

They will show how the District's local economy has become one of the strongest in the nation – its $12.5 billion budget, larger than the budgets of 12 states; its $1.75 billion surplus, the envy of the states; its per capita personal income, higher than that of any state; its total personal income, higher than that of seven states; its per capita personal consumption expenditures, higher than those of any state; and its total personal consumption expenditures, greater than those of seven states. They will detail D.C.'s population growth rate, among the highest in the nation -- an almost 50,000 increase since the 2010 Census, giving the District a larger population than Wyoming and Vermont, and putting it in the league with the seven states that have a population under one million.

You will hear the many reasons why statehood is necessary for D.C. residents. As the District's elected representative to Congress, many of those reasons hit me in the face every day. I feel it when the bell rings for votes on bills, and I cannot cast a vote for the 650,000 American citizens who live in the District, despite the $12,000 per resident they pay in federal taxes, more per capita than any other Americans. I will feel it this week when I go to the floor to debate our country's military engagement to stop the advance of ISIL. I have gone to the floor to debate our entry into every war since becoming a Member of the House. The purple fingers in Iraq and Afghanistan signaled that our country had given them votes in their national legislature. Our D.C. servicemembers fought and died in those wars, but the veterans came home without the same rights themselves, just as our residents did during all the 20th century wars, when D.C. casualties were disproportionate, particularly in Vietnam, when there were more D.C. casualties than from 10 states.

You will hear expert testimony that shows that Congress has the authority to make New Columbia a state because of its Article IV, Section 3, Clause 1 power to admit new states to the Union, combined with its Article I, Section 8, Clause 17 power over the seat of the federal government.

I believe that when this hearing is over, this Committee will understand that the accident of history in Philadelphia that led the Framers in the 18th century to create a nation's capital under federal control is today an embarrassing anachronism, recently found for the second time to be a violation of the International Covenant on Civil and Political Rights, to which the United States is a signatory. Congress can preserve federal control over the core national capital area and make hometown District of Columbia the 51st state. It is impossible to lay to the framers of our Constitution, who went to war on the slogan of no taxation without representation, the intent to leave any Americans without the rights of others in the Union or without the local control the Framers believed was central to democratic government.

Ever since the creation of the capital, the District of Columbia has been an outlier, integral to the nation yet needlessly divorced from its core democratic principles. Enormous change has come to the nation and to the District over the 224 years since the city became the official capital and hometown to its first residents. My own family has lived through more than 150 years of these changes, ever since my great-grandfather, Richard Holmes, as a slave, walked away from a plantation in Virginia and made his way to the District. This city has been transformed from a sleepy Southern city, where three generations of the Holmes family went to segregated schools, as required by the Congress of the United States, to one of the nation's most

cosmopolitan and vibrant places to live. Today's District of Columbia is no less than the equal of the states.

In short, everything about the District of Columbia has changed except its status as a second-class stepchild within a union of states. As the growing statehood movement attests, residents are fed up with the chasm between national democratic rhetoric and local undemocratic practices.

In the 21st century, Congress simply cannot ask our residents to continue to be voyeurs of democracy, as Congress votes on matters that affect them -- how much in federal taxes they must pay, whether their sons and daughters will go to war, and even their local budget and laws -- without the vote in the House and Senate required for consent of the governed.

Congress has two choices. It can continue to exercise autocratic authority over the American citizens who reside in the District of Columbia, treating them, in the words of Frederick Douglass, as "aliens, not citizens, but subjects." Or it can live up to this nation's promise and ideals and pass the New Columbia Admission Act.

**Public Hearing on S.132, "The New Columbia Admission Act"**

Testimony of

**Vincent C. Gray**
Mayor

**COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS**
**UNITED STATES SENATE**
**Honorable Thomas Carper, Chairman**

**September 15, 2014**

**3:00 pm**

**Room 342**
**Dirksen Senate Office Building**
**Washington, D.C.**

Committee on Homeland Security & Governmental Affairs

September 15, 2014

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Good afternoon Chairman Carper, Ranking Member Coburn, and members and staff of the Committee on Homeland Security and Governmental Affairs. My name is Vincent C. Gray and I am the Mayor of the District of Columbia. I am grateful to you, Mr. Chairman, for holding this hearing and for introducing S. 132, the New Columbia Admission Act. If enacted, this bill would both grant the long-awaited status of statehood to much of the District of Columbia, while also preserving a federal district with all the principal monuments and significant federal buildings to serve as the seat of the national government – thus conserving federally controlled space in our capital city. The District of Columbia is the only place in the United States of America where Americans serve in the military, fight and die in wars, serve on juries, and are taxed, without voting representation in either house of Congress. That is wrong. The proposed bill is an important step forward in righting that injustice and achieving political equality for the 660,000 residents of our nation's capital. I urge you to give it favorable consideration.

As a native Washingtonian, I love the District of Columbia. It is a place of strong community and a place of American pride. It is home to more than 660,000 Americans – more than the populations of several States.

The District of Columbia is home to hard working families. Some Americans do not know that people actually live in D.C. The District of Columbia is often viewed only as the home of the federal government and federal monuments. We are much more than just the federal government. The District of Columbia has a substantial local economy and a decade and a half track record of passing balanced budgets, as well as a strong current fiscal status. We have a developed state apparatus -- for example, a Medicaid administering agency, a state school board, a state homeland security agency, a state-level Attorney General's office, and a state-level National Guard. We have a body of laws that are already accorded state-level status by courts as well as the federal government for many purposes. Our residents are, however, the only residents of a major capitol city in *any* country who have no voting voice in the national legislature. Statehood is a matter of full civil rights and this bill is a path forward.

Though Congress has, since the 1973 Home Rule Act, provided for partial home rule by the District, the District has for the last forty years been forced to function with a political structure that cannot determine a local budget without affirmative congressional approval. We must also constantly be wary of a Congress that could at any time overturn any local enacted law. These barriers to full autonomy present numerous practical problems for the District's elected leadership, government workers, and residents. The District of Columbia annually raises more than $6 billion dollars from its own locally generated tax dollars, but is prohibited by federal law from spending these local dollars without congressional

approval. With respect, I note that the impact of this is demonstrated by the fact that Congress has not approved a budget for the District of Columbia on time in more than sixteen years. Despite the fact that the District followed the budget process required of it by federal law, and passed a balanced budget annually for the past sixteen years, the District has been forced to operate under continuing resolutions passed by Congress each year, often for months after the beginning of the fiscal year. By congressional mandate, the District of Columbia is forced to send every piece of legislation passed and signed by me as Mayor to Congress for review. This delays implementation of our laws by weeks, and sometimes months, because of the vagaries of the congressional calendar, and creates costly and inefficient uncertainties for the agencies, residents, and businesses that have to plan their affairs under the District's laws.

This forced dependence on congressional approval can potentially paralyze the core functions of the District of Columbia. The numerous threats of federal shutdown directly impact DC government because we are treated as a federal agency rather than a municipality or state government. With the exception of this year, the District of Columbia government must perform emergency operations to prepare for a federal shutdown. As you can imagine, this extreme budgetary uncertainty wreaks havoc with planning and ends up costing the District millions in unnecessary emergency planning and overtime costs. In 2011 alone, the District spent over $1 million planning for threatened shutdowns that fortunately never happened.

This fiscal year, however, I made the decision to keep the District government open during the federal shutdown, and refused to participate in the fiction that the District of Columbia government did not have money to continue operations, meet its financial obligations or provide key services to our residents. We were casualties of national politics. I am just as concerned with the national debt and its effect on our country as any other American, but I see no reason why a debate over such an important issue should have an impact on whether the children in the District of Columbia get to go to school tomorrow or if trash is picked up. These are clearly local issues and we ought to have the ability to serve our residents' needs. Congress has many important issues to address. Requiring District residents and our needs to be continually pushed to the back burner by the stagnated legislative process in Congress is unfair, unjust and undemocratic.

Mr. Chairman, the District of Columbia has adopted the motto "Taxation Without Representation," which motivated the creation of an independent America in the first place, because we believe the treatment the District of Columbia receives is patently un-American. Citizens who pay taxes for the upkeep of their government should have a voice in that government's decision making.

**Why does being a State matter?**

Early in 2011, I testified before the U.S. House Committee on Oversight's Subcommittee on Health Care, District of Columbia, Census and the National Archives about the District's FY2012 budget. During that hearing, I noted that the District was unfairly subject to the political whims of Congress because of their control over our budget. Full Committee Chairman Darrell Issa of California and Subcommittee Chairman Trey Gowdy of South Carolina both noted their surprise in learning of the extent that the federal budget process interfered with the District government's ability to operate efficiently.

Over the course of the past few years, the District worked with Chairman Issa on developing broad principles on which we could agree that would provide the District with the autonomy to do what every state does in its budget process: develop a budget based on the priorities set by the Executive and Legislature, pass that budget according to the laws of that state, and sign that budget into law. Chairman Issa, in concert with Congresswoman Norton, developed a bill that would move the District significantly forward in terms of budget autonomy. Unfortunately, because many Members of Congress fail to recognize or acknowledge that autonomy for the District is not and should not be a partisan political issue, that bill did not advance.

The New Columbia Admission Act would ensure that the District's local budget would not be subject to the political whims of Congress. And with the admission of New Columbia, our residents, like their neighbors in

Virginia and Maryland, would have full voting representation in both the House and Senate, and our local laws would take effect without Congressional review.

**Constitutional concerns**

Lawyers in and out of the District government have reviewed the bill and agree it is carefully designed to be fully consistent with the Constitution and, in particular, with the authority of Congress to admit new states to the Union and to shape the physical boundaries of the federal district. I am aware that there are those who believe a constitutional amendment would be necessary to achieve statehood for the District, but they are wrong. As you know, Mr. Chairman, Article IV, Section 3, Clause 1 of the Constitution gives Congress full authority over statehood. Historical precedent gives us numerous examples of territories becoming full states, including the most recent example of Hawaii. The New Columbia Admission Act relies on that enumerated power of Congress and, as a result, does not require a constitutional amendment. The bill also preserves a federal district with all the principal monuments and significant federal buildings that will serve as the seat of the national government – thus preserving the constitutional requirement for a federal enclave within the capital city.

The District of Columbia is a growing city, home to proud and dedicated Americans; we pay billions in federal taxes and participate actively in the nation's political life. Justice, fairness and the core values that led to the formation of our nation compel the conclusion that the District must be a

state and our citizens must enjoy the full benefits of United States citizenship.

Mr. Chairman, thank you again for this opportunity to testify. I am happy to answer any questions that you or your colleagues have.

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**TESTIMONY OF CHAIRMAN PHIL MENDELSON**
**COUNCIL OF THE DISTRICT OF COLUMBIA**

**EQUALITY FOR THE DISTRICT OF COLUMBIA: DISCUSSING THE IMPLICATONS OF S. 132, THE NEW COLUMBIA ADMISSIONS ACT OF 2013**

UNITED STATES SENATE HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS COMMITTEE

SEPTEMBER 15, 2014

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Thank you Chairman Carper, Ranking Member Coburn, and members of the Committee. I am Phil Mendelson, Chairman of the Council of the District of Columbia. I am pleased to testify today in support of S. 132, the New Columbia Admissions Act of 2013. Full and fair representation for the over 646,000 citizens residing in the District of Columbia is only possible through achieving statehood, and so I urge this Committee, and this Congress, to move expeditiously on this measure.

I want to thank this Committee for its ongoing support for the District of Columbia. In particular, I want to thank Chairman Carper for introducing statehood legislation, and I want to thank Subcommittee Chairman Begich for introducing important legislative and budget autonomy legislation, S. 2245, the District of Columbia Paperwork Reduction Act of 2014, and S. 2246, the District of Columbia Budget Accountability Act of 2014. While our ultimate goal of statehood would accomplish the autonomy provided in these measures, until that happens, these bills would empower the

District to more effectively and efficiently manage our government operations. The Senate Financial Services and General Government Appropriations Subcommittee has included provisions similar to these bills in its recommendations for fiscal year 2015, and I urge support by all Members as this legislation comes before the full Senate.

I also want to thank this Committee for working with the District and our Congresswoman Eleanor Holmes Norton to update our Chief Financial Officer's compensation and make improvements to the Height Act.

While these measures are important to achieving the overarching goal of full rights of citizenship, each is an incremental approach. So that District residents can achieve full participation in our democracy, Congress must adopt the New Columbia Admissions Act.

**THE DISTRICT OF COLUMBIA IS THRIVING**

Despite the many limitations imposed on the District due to our unique status, and despite the economic downturn caused by the Great Recession and the resulting reduction in federal funds available to local jurisdictions, the District of Columbia is thriving. We are strong financially. We are growing by over 1,000 new residents a month and businesses are flocking to the District. This is a far cry from the image of the District that lingers in many people's minds from decades past. I believe that other jurisdictions can learn from our many successes over the last decades.

Since Congress granted the District of Columbia limited home rule in 1973,[1] the District has had many successes, but also many challenges. Perhaps our greatest challenge was the imposition of a Control Board in 1995, essentially stripping our local government of full control over our budget and management. The Control Board era

[1] District of Columbia Home Rule Act, Pub. L. No. 93-198, 87 Stat. 774, D.C. OFFICIAL CODE § 1-201.01 *et seq.* (1973) [hereinafter Home Rule Act].

forced the District to confront its finances head-on, and to realign the relationship between the District and the federal government. By 2001, the District was back on solid financial footing and the Control Board was dissolved. Since that period the District has had a strong economic record.

For 17 consecutive years, the District has ended its fiscal year with a budgetary surplus. We have grown our fund balance even in the wake of the Great Recession and massive cuts in federal spending. Our balanced budgets have relied not on steep tax increases or deep spending cuts, but on responsible policies that have grown our economy while providing a broad safety net for District residents. As of last September 30th, the District had a General Fund balance of over $1.75 billion dollars.[2] Compared to the states, this would put us only behind Alaska and Texas in terms of real dollars.[3] Included within this General Fund balance are four reserve funds which, as of the beginning of the current fiscal year, totaled $791 million – close to the Government Finance Officers Association (GFOA) recommended amount of two-months' operating cash.

These factors have helped the District maintain the third highest possible bond rating with both Moody's and Fitch, and the fourth highest with S&P.[4] Our strong fiscal position allowed us to recently adopt a far-reaching income and business tax cut which will phase in over the next three to five years, beginning with fiscal year 2015. We continue to make capital investments in our infrastructure, while remaining below our locally-mandated 12% debt cap.[5] I am also pleased to say that our Fiscal Year 2015 budget[6] lays out a path for future capital investments relying less on financing and more on pay-as-you-go capital.

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[2] District of Columbia Chief Financial Officer, 2013 Comprehensive Annual Financial Report 31 (Jan. 30, 2014).
[3] National Association of State Budget Officers, The Fiscal Survey of States 13 (Fall 2013).
[4] District of Columbia Chief Financial Officer, 2013 Comprehensive Annual Financial Report 10 (Jan. 30, 2014).
[5] D.C. OFFICIAL CODE § 47-335.02(a) (2014). The congressionally adopted Home Rule Act allows for an 18% cap.
[6] *See* Government of the District of Columba, Fiscal Year 2015 Proposed Budget and Financial Plan (Aug. 7, 2014).

Other indicators of financial strength include funding for retirement accounts. Our Police, Fire, and Teachers retirement fund – a defined benefit plan – is second best in the nation, fully funded at over 100 percent. Our Other Post-Employment Benefits Fund is also second best in the nation, funded at over 80 percent and with a closed amortization period for the remaining unfunded liability.

Our city is growing, our tax base is growing, our financial reserves are healthy, our capital spending is disciplined, and our retirement funds are among the best. Few local governments, and even fewer states, can boast of such achievements, especially in the last decade.

How does this relate to statehood for the District? Residents of the District have long held that denying almost 650,000 citizens the right to full congressional representation and control over their local government is fundamentally unfair and not in keeping with the values and ideals of the United States of America. Instead, as you know, we cannot spend without congressional appropriation, and we cannot enact local laws without congressional review. We cannot fix inequities in criminal sentencing without the approval of the United States Attorney General, and we cannot update the limits on small claims or strengthen our Anti-SLAPP law because we cannot legislate judicial process.

The District's success, even in the face of administrative hurdles that no other jurisdiction must endure, demonstrates that, in addition to our being entitled to full and fair representation, the District government is fully capable of managing our affairs just like any state. To that end, we stand on our record of responsible government management.

**THE CASE FOR STATEHOOD**

In the 200 years since Congress rescinded voting rights from the last group of Washington residents who had previously voted in Maryland and Virginia, citizens residing in the District of Columbia have been denied the right of a vote in Congress. To add insult to injury, it is Congress that has plenary authority over all matters in the District, although no members of Congress are elected by District residents.[7]

In recent decades, numerous efforts have been made to correct this historical injustice. Some of these efforts were successful, and some were not. In 1960, the 23rd Amendment was adopted, granting the District the same number of presidential electors as the smallest state.[8] In 1970, the District of Columbia Delegate Act[9] was enacted to give the District a representative in the House of Representatives. But, as you know, that position is non-voting – the same status as U.S. territories. In 1973, Congress adopted the Home Rule Act, a major reform for District governance, but that act is silent as to congressional representation.[10] In 1978, the District's non-voting delegate in the House of Representatives, Walter Fauntroy, introduced a constitutional amendment that would have given the District two senators, a representative, and an unrestricted vote for President.[11] While Congress approved the amendment, three-quarters of the states did not ratify it.

More recently, this Committee, under the previous leadership of Senators Lieberman and Collins, reported bipartisan legislation[12] to add two additional seats in the House of Representatives, including a full voting Member for the District and one for Utah. This approach relied on Congress's authority to legislate on matters for the

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[7] District of Columbia Organic Act, 6th Congress, 2nd Sess., ch. 15, 2 Stat. 103.
[8] U.S. CONST. amend. XIII § 1.
[9] District of Columbia Delegate Act, Pub. L. No. 91-405, § 201, 84 Stat. 848 (1970).
[10] Home Rule Act *supra* note 1.
[11] H.R.J. Res 554, 95th Cong. (1978).
[12] District of Columbia House Voting Rights Act, S.1257, 110th Cong. (2007).

District, as well as the creation of congressional seats and adjustment in the number of representatives in the House of Representatives.[13] Unfortunately, a Senate vote to simply proceed to full debate on the measure fell short by three votes. That bill eventually passed the Senate in 2009, but with a poison pill amendment limiting the ability of the District to regulate guns within its own borders, so it was never considered in the House.

There have been other efforts aimed at restoring voting rights for District residents by retroceding all populated areas of the city back to the State of Maryland. The most recent iteration of this idea was introduced last year in the House.[14] Advocates of this method have argued that retroceding the District to Maryland is the most practical and constitutionally sound way to give District residents a vote in the Senate, and that it makes historical sense when compared to the previous retrocession of Arlington to Virginia.[15] This may be logical, but the proposal is unpopular with the residents of the District and Maryland – they don't want it. And so Congress can't force this on Maryland. Further, this approach would ignore the unique character of the District and its residents as a distinct jurisdiction.

There is another important element to statehood besides congressional representation, and most of these past attempts to secure voting rights for District residents would have left us deprived of that fundamental right: the right to self-governance. Independent governance reflecting the will of the people is fundamental to our system of democracy. Self-governance reflects community values and priorities. Self-governance is more sensitive to constituents. Self-governance is the essence of every town hall, city council, county board, and state legislature in the United States of America.

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[13] S. REP. NO. 110-123, at 3 (2007).
[14] District of Columbia-Maryland Reunion Act, H.R. 2681, 113th Cong. (2013).
[15] *See Legislative Hearing on H.R. 5388, the District of Columbia Fair and Equal House Voting Rights Act of 2006* (testimony for the record of Lawrence H. Mirel for the Committee for the Capital City) (Sept. 20, 2006).

The only option to gain full voting representation and full self-governance, as enjoyed by residents of the other 50 states, is statehood for the District.

The idea behind the New Columbia Admissions Act of 2013 was first proposed in 1971.[16] It would carve out the geographic federal core of the city to remain a federal enclave, while establishing the remainder of the city as the state of New Columbia. Full statehood is the most practical way to fully restore the rights of those who now live in the Nation's capital.

This approach is a well-tested method of gaining representation, having already been employed 37 times. Congress granted statehood to several territories that were in existence for less than ten years. On the other hand, the last three states admitted to the Union – Hawaii, Alaska, and Arizona – were territories for 61, 47, and 49 years, respectively, before being granted statehood. However, the District has been around for 214 years. We had these rights way back then. It's time we had them again.

While I staunchly advocate for District statehood, I recognize that there are hurdles standing in the way. Unfortunately, many of these hurdles are simply a matter of national politics and efforts by political parties jockeying for majorities in Congress. The hurdles are not confined to Capitol Hill. Many state legislatures don't see the advantage of a constitutional amendment that might affect their states' influence in the House or Senate, and many of their state legislatures also don't understand that the United States citizens of the District of Columbia raise their own taxes and pay for their own services but are not equal to the United States citizens in any of the 50 states.

Even during the 2007 effort to gain seats in the House of Representatives for the District and for Utah, then-Chairman Lieberman acknowledged that "frankly and directly [the legislation] overcome[s] concerns of the partisan impact of giving a House seat to the

[16] *City and State: D.C. State Bill*, Washington Post, July 7, 1971, at C4.

District because it tends to vote Democratic..."[17] Fundamental fairness and voting rights should trump politics – at least in this country.

It is also important that we acknowledge that education of the public is another hurdle standing in our way. According to a January 2005 poll paid for by D.C. Vote and conducted by an independent research firm, over 80 percent of American adults were not aware that the District does not have equal constitutional rights or representation in Congress. However, over 80 percent of respondents supported voting rights for the District.[18] The idea of tax-paying citizens without full representation in the United States Congress is a concept so foreign and against everything we are taught in school about the basic democratic values of our country, that many don't believe it, or are forced to square this injustice using misconceptions about the District.

The District of Columbia is unique in many ways, but no unique qualities should support disenfranchisement of its citizens.

While decidedly small, population is not, and should not, be a requirement for full participation in the Union. In any event, the District's population is greater than two existing states: Vermont and Wyoming. Furthermore, at the growth rate we have seen in recent years – 7.4 percent – I would expect the District to continue to move up the list.

Some have argued that large, current federal payments to the District are another disqualification for statehood. In truth, however, the vast majority of the federal dollars that the District receives consists of Medicaid and other federal program subsidies received by all the states. We used to receive a federal payment in addition to the standard federal program allocations, but that was eliminated over 15 years ago.

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[17] 153 Cong. Rec. S11626 (daily ed. Sept. 18, 2007) (statement of Senator Lieberman).
[18] DC Vote, U.S. Public Opinion on DC Voting Rights (Jan. 2005).

Some say that the vast amount of land owned or controlled by the federal government within the District is another disqualification for statehood. There is, to be sure, a substantial amount of federal land in the monumental core of the District – much of which the New Columbia Admissions Act would leave as a federal area. However, the sixty-plus other square miles of the District are not unlike other states. Currently, compared against the states, the District has the second lowest total actual number of acres under federal control and has the 13th lowest federal acres as a percentage of total land, ranking behind a few notable states including Alaska, Montana, Arizona, and Wyoming.[19] Under the provisions of the New Columbia Admissions Act, much of the federal acreage in our borders would be retained as a federal enclave, leaving New Columbia with even less land under federal control.

To address state revenue forgone due to non-taxable federal lands, the Department of the Interior administers a Payments in Lieu of Taxes (PILT) program to compensate for state services that may be provided on federal lands under the control of the Department of the Interior, such as fire protection. This program is applicable to all of the states. In Fiscal Year 2014, under the PILT formula, the District received only $18,159 of the $436,904,919 paid out nationally.[20] Compare this to $28 million for Alaska, $34 million for Arizona, $28 million to Montana, or $27 million for Wyoming. Many of our other non-taxable areas fall under the General Services Administration, other federal agencies, or are subject to State Department diplomatic tax exclusions.[21]

The federal government also makes non-PILT payments to states in which it owns substantial land. In 2013, 34 states received federal mineral royalties totaling $1.9 billion, with Wyoming receiving the most at $932 million, followed by New Mexico at

[19] Congressional Research Service, Federal Land Ownership: Overview and Data, 4-5 (Feb. 8, 2012).
[20] Department of the Interior, Payments in Lieu of Taxes by State, Fiscal Year 2014 (Sept. 2, 2014, 2:45 PM), http://www.doi.gov/pilt/state-payments.cfm?fiscal_yr=2014.
[21] Department of State, Diplomatic Note 06-01, 12-18 (Apr. 12, 2006).

$478 million.[22] While the federal government owns the land on which the minerals are produced, it disburses revenues to fulfill a variety of state needs including infrastructure improvements and schools that support state residents.

The federal government is generous to the states. The fact that the District receives federal dollars – including for Medicaid, federal highway, homeland security, etc. – is not unusual and should not be used against us in our quest for statehood.

**CONCLUSION**

Full statehood is the only practical way that our citizens can participate in a fully democratic government. It is the only way to ensure that our local government will never be subject to a shutdown because of quibbling over purely federal matters, and our local services not suspended because of partisan disagreements. It is the only way to give our residents locally elected representatives to enact purely local laws that would not be subject to national debates over divisive social issues. It is the only way to create a justice system that is representative of, and sensitive to, our community values. Statehood is the only way to give residents a full, guaranteed, and irrevocable voice in the Congress of the United States – the same voice enjoyed by our peers across the country.

Statehood is the most practical solution to right the historical wrong of denying voting rights to citizens of the District and to guarantee the right to local self-governance. The District of Columbia has a proven track record of prudent fiscal management spanning two decades. The State of New Columbia would enter the Union as a 51st state with an economy envied by other jurisdictions. Politics must be set aside and all of the excuses used to justify denial of our inalienable rights must be shelved. Our limited home-rule power delegated by Congress is appreciated, but too tenuous and too often a

[22] Office of Natural Resources Revenue, Statistical Information, Disbursements for Fiscal Year 2013 (Sept. 2, 2014, 2:45 PM), http://statistics.onrr.gov/ReportTool.aspx.

bargaining chip in political battles. Limited home-rule cannot make up for all of the other rights withheld by Congress that we could have only through statehood.

Statehood legislation was last seriously considered by Congress after the House Committee on the District of Columbia reported the bill to the full House for consideration. The accompanying committee report[23] contained dissenting views as to why statehood should not move forward, and included some of the same arguments opponents use today. In addition to the constitutional concerns raised then and now – which I believe can be overcome – the report stated the following with regard to the conditions necessary to grant statehood:

> "By precedent and tradition, three main requirements have been considered by the Congress in evaluating statehood admission petitions. The requirements, as restated by the Senate Interior Committee Report accompanying the Alaska admission act, are as follows:
>
> "(1) That the inhabitants of the proposed new State are imbued with and are sympathetic toward the principles of democracy as exemplified in the American form of government.
>
> "(2) That a majority of the electorate wish statehood.
>
> "(3) That the proposed new State has sufficient population and resources to support State government and to provide its share of the cost of the Federal government.
>
> "The third of these requirements is particularly important to our form of federalism as it demands that new States demonstrate that they can provide for their own self-government, independent of any other State as well as the federal government, and that the new State will provide its

[23] H.R. REP. NO. 102-99 (1992).

equitable share of the cost of the federal government at the time of admission and in the future."[24]

At the time, those who opposed statehood for the District argued that the large federal payment, federal pension contributions, declining population, and lack of economic diversity stood in the path to our satisfying the third criteria. However, the District has turned around on all of these fronts. For the reasons I outlined earlier in this testimony, we have satisfied the traditional three main requirements, and it is time for Congress to reconsider our demand for statehood.

One final point: throughout the world, there are very few national capitals – and none in the free world – where the citizens do not enjoy a vote in the national legislature. We, the District of Columbia, are unique in this regard. It is a distinction we do not want, and a stain on our federal system.

The Council appreciates the Committee's consideration of the New Columbia Admissions Act of 2013, and urges that it be brought before the Committee for markup and before the Senate and House for a vote. I also appreciate the Committee's past support for the District and look forward to continuing to work together in the future, I hope with a newly-elected Senator of our own on the Committee from the State of New Columbia.

[24] *Id* at Minority Views.

**PREPARED STATEMENT OF**

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**GEORGETOWN UNIVERSITY**

**Before the**

**COMMITTEE ON HOMELAND SECURITY**
**AND GOVERNMENTAL AFFAIRS**

**of the**

**UNITED STATES SENATE**

**On the**

***NEW COLUMBIA ADMISSION ACT***

I have been asked to advise on the constitutionality of S.132, the New Columbia Admission Act. The Act would reduce the District of Columbia to a smaller federal capital district encompassing the White House, Capitol, Supreme Court and the area containing the National Mall and Monuments. The rest of the current District of Columbia would become the state of New Columbia and be admitted as the 51st state. For the reasons amplified below, I think that courts would likely decline to adjudicate any constitutional challenge to the Act and, in all events, would likely hold that the Act is constitutional.

As an initial matter, the courts would likely avoid ruling on the merits of any constitutional challenge to the New Columbia Admission Act. In many ways, Congress' admission of new states is the paradigmatic political question. The Constitution commits the task exclusively to Congress. It is difficult to imagine judicially manageable standards for assessing the admission of New Columbia. And any decision would express disrespect for the political branches while risking the embarrassment and uncertainty of multiple branches' conflicting judgments on a state's existence. History is helpful here: When the 1846 retrocession of Arlington and Alexandria from the District to Virginia was challenged, the courts avoided ruling on the merits. It is likely that the courts would do the same if faced with a challenge to the admission of New Columbia.

In all events, courts reaching the merits would likely find the New Columbia Admission Act constitutional. Under the New States Clause, U.S. Const. art. IV, § 3, cl. 1, Congress has constitutional authority to accept new states through simple legislation. This is how states are constitutionally admitted: Aside from the original thirteen colonies, the thirty-seven remaining states were all admitted through simple legislation pursuant to Article IV. Alaska and Hawaii, most recently, were admitted through simple legislation with terms similar to those of the New Columbia Admission Act, including the provision of a republican form of government. And, quite analogous to the current situation, Congress formed Ohio with the Enabling Act of 1802 from the eastern portion of the Northwest Territory, which itself came from lands previously ceded to the federal government from other states.

Congressional authority under Article IV to admit new states is broad and subject to just three requirements within the Constitution. First, Congress must guarantee new states a republican form of government; second, new states formed from within or by combining existing states must receive state legislature approval; and third, new states must be admitted on an equal footing with existing states. The New Columbia Admission Act satisfies these three constitutional requirements. Citizens of New Columbia must adopt the 1987 constitution, which secures a republican form of government; New Columbia's territory would come entirely from the current District of Columbia, and so would not require the approval of any other state legislature; and the Act, by its terms, would admit New Columbia on an equal footing with existing states.

In addition to the constitutional requirements, Congress has traditionally imposed two additional prerequisites for statehood: First, the people of the proposed state must *want* to form a state; second, the proposed state must have sufficient population and resources to support itself and to contribute its share of the cost of maintaining the federal government. The Act meets these traditional requirements as well: The future residents of New Columbia must approve the admission of the state, and Congress' passage of the Act would signify its satisfaction that New Columbia is a viable state.

Adjudicating courts will not likely find any contravening constitutional provisions. The District Clause, U.S. Const. art. I, § 8, cl. 17, which contemplates an exclusively federal district,

is satisfied because the Act would preserve an exclusively federal district not larger than 10 miles square. The District Clause actually supports the Act because it grants Congress sweeping and exclusive authority over the federal district and thus affirms Congressional authority to alter its size or shape. In fact, history shows that Congress *can* alter the district: the First Congress altered the southern boundaries of the original District of Columbia, and in 1846 Congress retroceded Alexandria and Arlington to Virginia. Likewise, the Twenty-Third Amendment, which allows the District of Columbia to participate in the Electoral College, is not contravened just because the federal district is smaller. Although granting a shrunken federal district three electoral votes would be bad policy, the Constitution does not prohibit it. It would indeed be sound policy to repeal the Twenty-Third Amendment, concurrent with admission of New Columbia, but it is not a constitutional prerequisite.

Nor will courts likely require Maryland's consent, just because the land was part of Maryland before 1790. The Constitution requires a state's consent when a new state is created from within the existing state's jurisdiction. But the land that would form New Columbia is not within Maryland's jurisdiction. Maryland lost that authority as soon as the federal government accepted Maryland's absolute cession of the land. While the Act presents a handful of other concerns—e.g., New Columbia would have a uniquely federal character and influence, it would have an outsized influence in the Senate, and it would lack the sort of internal diversity of interests that most view as an ideal characteristic of statehood—those are policy issues for Congress' consideration. The mechanism is constitutional; it is for you, the people's representatives, to decide if it is wise.

## I. Background on New Columbia Admission Act

The New Columbia Admission Act would admit as the 51st state most of the land area and population within the current District of Columbia. *See* Act § 111(a). New Columbia would be admitted "into the Union on an equal footing with the other States in all respects whatever." *Id.* § 101(a). Thus, New Columbia would be entitled to at least one representative and two senators in Congress.

The Act would preserve a small enclave of federal territory as the District of Columbia. That remaining federal district would "include the principal Federal monuments, the White House, the Capitol Building, the United States Supreme Court Building, and the Federal executive, legislative, and judicial office buildings located adjacent to the Mall and the Capitol Building." *Id.* § 112(a); *see also id.* § 112(b) (setting forth metes and bounds of remaining District of Columbia); *id.* § 112(c) (setting forth exceptions to metes and bounds description, including certain military property). "After the admission of the State into the Union," the remaining federal district will be "the seat of the Government of the United States." *Id.* § 201.

The Act sets forth a specific process for admitting New Columbia into the Union. Following Congress' passage of the bill, the people of the District of Columbia would vote at a special election on whether to:

(1) admit New Columbia as a state, *id.* § 102(a)(1)(A);

(2) adopt the 1987 Constitution for the State of New Columbia approved by the Council of the District of Columbia, *id.* § 102(a)(1)(B);[1]
(3) approve the state's boundaries, *id.* § 102(a)(1)(C); and
(4) agree to the terms of the New Columbia Admission Act, *id.* § 102(a)(1)(D).

District of Columbia voters must approve all four items for New Columbia to be admitted as a state. *Id.* § 102(b)(1). If the provisions are approved, "the State Constitution shall be deemed ratified," *id.* § 102(b)(1)(A), and "the President shall issue a proclamation" within 90 days that admits New Columbia into the Union, *id.* §§ 102(b)(1)(B), 104. In addition, after passage of the Act, an election would be held to elect two senators and one representative, who will be entitled to "all the rights and privileges of Senators and Representatives of other States in the Congress of the United States," upon admission of New Columbia as a state. *Id.* § 103(c).

The New Columbia Admission Act also provides expedited procedures for repealing the Twenty-Third Amendment. "At any time after the date of the enactment of" the Act, "it shall be in order in either the House of Representatives or the Senate to offer a motion to proceed to the consideration of a joint resolution proposing an amendment ... repealing the 23rd article of amendment to the Constitution." *Id.* § 206(b)(1).[2] A motion proposed under this provision would be treated as "highly privileged and...not debatable." *Id.* § 206(b)(2)(A). The motion could not be amended; nor could the vote on the motion be reconsidered. *See id.* § 206(b)(2)(B). And any "motion to postpone shall be decided without debate." *Id.* § 206(b)(2)(C). But neither the Act's passage nor admission of New Columbia is conditioned on repeal of the Twenty-Third Amendment.

Finally, the New Columbia Admission Act guarantees a republican form of government and ensures continuity between the current District of Columbia and the state of New Columbia. The Act requires that the Constitution of New Columbia "shall always be republican in form and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence." *Id.* § 101(b). The bill also provides that the current Mayor and Council of the District of Columbia would become the Governor and House of Delegates of New Columbia. *Id.* § 103(d). And current District executive and judicial officials would automatically become New Columbia executive and judicial officials; pending cases would be transferred to the appropriate courts. *Id.* §§ 103(e), 123(a)(2).

## II. New Columbia's Admission Would Present A Nonjusticiable Political Question.

Whatever the constitutional merits of admitting New Columbia as the 51st state, it is unlikely that the courts would decide the question. The Supreme Court has held that a case presents a nonjusticiable political question when it involves:

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy

[1] District of Columbia voters approved a constitution in 1982, but the Council of the District of Columbia has since made substantive changes that would need to be ratified by voters.

[2] The Act also strikes provisions from the U.S. Code that implement the Twenty-Third Amendment. *See* Act § 205(a) (striking 3 U.S.C. § 21, which defines the District of Columbia as a "State" for purposes of presidential elections).

> determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Baker v. Carr*, 369 U.S. 186, 217 (1962). A constitutional challenge to admission of New Columbia would present a number of these problems.

The Constitution textually commits the question of whether to admit a new state to Congress. *See* U.S. Const. art. IV, § 3, cl. 1. Long ago, the Supreme Court held that "it rests with Congress to decide what government is the established one in a State" and whether that government is republican in form. *Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849). When Congress makes that decision it "is binding on every other department of the government, and could not be questioned in a judicial tribunal." *Id.* So too it would be with the congressional decision that New Columbia is fit for admission to the Union. Though the courts will review congressional attempts to attach lasting unconstitutional conditions on newly admitted states, *see, e.g.*, *Coyle v. Smith*, 221 U.S. 559, 567 (1911), that question is very different from whether the state is eligible for admission in the first instance. The latter is much closer to the question in *Luther*.

The constitutional debates surrounding New Columbia statehood confirm the absence of judicially manageable standards. Opponents' core arguments proceed from the Founders' intent, an implied conflict with the purpose of the Twenty-Third Amendment, and the niceties of Maryland's cession of land in the Eighteenth Century. But the constitutional provisions invoked do not expressly embody the claimed prohibitions. The courts are ill-equipped to impose free-floating notions of original intent, unrelated to the *interpretation* of any textual provisions. Even if such principles could be discovered and applied in a judicial fashion, striking down New Columbia's admission to the Union would express a grave disrespect for the political branches. This is not like reviewing run-of-the-mill legislation for adherence to the Constitution's express protections. And no doubt conflicting statements from the political and judicial branches on the validity of a state's admission would result in political embarrassment and uncertainty. Thus, the question raises the "unusual need for unquestioning adherence" to Congress' "political decision."[3]

These are among the reasons why the Supreme Court previously avoided ruling on the constitutionality of Congress' retrocession of Arlington and Alexandria. In *Phillips v. Payne*, at a time before the modern political question doctrine, the Court opened its analysis by stating: "In cases involving the action of the political departments of the government, the judiciary is bound by such action." 92 U.S. 130, 132 (1875) (citing *Luther*, among other cases). Then, after holding that "Virginia is *de facto* in possession of the territory," the Court noted that "serious consequences

[3] The Supreme Court has recently rebuffed overbroad applications of the political question doctrine. *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1425 (2012) (holding that the judiciary is "fully capable of determining" the constitutionality of a statute permitting Americans born in Jerusalem to list "Israel" as their place of birth on their passports); *id.* at 1427 ("In general, the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821))). But deciding the merits of whether congressional legislation infringes on the executive's foreign affairs powers is a vastly different question than whether to admit a state into the Union. Nothing in *Zivotofsky* suggests that the much more analogous decision in *Luther* was incorrect, or that the judiciary should itself wade into the business of recognizing foreign or domestic governments. *See id.* at 1428.

would follow" from a contrary holding. *Id.* at 133. Specifically, it would call into question scores of laws enacted, taxes collected, and judicial sentences and decrees entered over the decades between retrocession and the lawsuit in *Phillips*. *See id.* A constitutional challenge to New Columbia's admission presumably would occur immediately upon the Act's adoption and thus would not present the same retroactivity concerns. But the fear of disrupting the political organization of the Union would still probably dissuade judicial review.

## III. The New Columbia Admission Act Satisfies All Constitutional Requirements And Congressional Prerequisites For New States.

The Constitution authorizes Congress to admit new states through simple legislation. The New States Clause provides: "New States may be admitted by the Congress into this Union." U.S. Const. art. IV, § 3, cl. 1. This broad authorization "vests in Congress the essential and discretionary authority to admit new states into the Union by whatever means it considers appropriate as long as such means are framed within its vested powers." Luis R. Davila-Colon, *Equal Citizenship, Self-Determination, and the U.S. Statehood Process: A Constitutional and Historical Analysis*, 13 Case W. Res. J. Int'l L. 315, 317 (1981). The New Columbia Admission Act is a proper exercise of that broad authority, consistent with constitutional requirements and traditional legislative practice and procedures.

The Constitution contains only two textual limits and one structural limit on the admission of new states. First, Congress must guarantee that the new state will provide a republican form of government. *See* U.S. Const. art. IV, § 4. Second, no new state may be formed "within the Jurisdiction of any other State" or by combining two or more existing states, or parts of states, "without the Consent of the Legislatures of the States concerned." U.S. Const. art. IV, § 3, cl. 1. The Supreme Court has also interpreted the constitutional structure to require that new states be "admitted on an equal footing with the original states." *Coyle*, 221 U.S. at 567 (quotation marks omitted). Though Congress can condition admittance on a state satisfying certain requirements, Congress cannot place lasting limitations on a state's sovereignty—e.g., it cannot require that the state keep its capital in a specified city after admission. *See id.* at 567-68; *see also Pollard v. Hagan*, 44 U.S. (3 How.) 212, 223 (1845) ("[T]he United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a state or elsewhere, except in the cases in which it is expressly granted.").

Traditionally, Congress has also imposed two other prerequisites for statehood. First, Congress has required proof that the residents of the proposed state actually *want* to form a new state. *See* J. Otis Cochran, *District of Columbia Statehood*, 32 How. L.J. 413, 418 (1989). This requirement reflects the fundamental principle of self-governance that "[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*." *Texas v. White*, 74 U.S. (7 Wall.) 700, 721 (1868) (emphasis added). Second, Congress has considered whether "the proposed new state has sufficient population and resources to support state government and at the same time carry its share of the cost of the federal government." Cochran, 32 How. L.J. at 418. This prerequisite is a core exercise of Congress' plenary authority over the admission of new states. It is a means for the current states—through their representatives in Congress—to preserve the integrity and well-functioning of the Union by ensuring that new states will carry their load.

Congress has typically exercised its power to admit new states through a three-step process. First, Congress usually "passes an enabling act prescribing the process by which the people of a United States territory may draft and adopt a state constitution" and express their desire to form a new state. David F. Forte, *New States Clause*, The Heritage Guide to the Constitution.[4] Second, the proposed state "then submits its proposed constitution to Congress, which either accepts it or requires changes." *Id.* Third, "[u]pon approval of the new state constitution, Congress may direct the President to issue a proclamation certifying the entry of the new state into the United States." *Id.*[5]

The New Columbia Admission Act satisfies these requirements and procedures. New Columbia's admission to the Union satisfies the Constitution's requirements. The Act expressly requires that the "State Constitution shall always be republican in form," Act § 101(b), and admission is conditioned on ratification of the 1987 Constitution adopted by the D.C. Council, *id.* §§ 102(a)(1)(B), 102(b), which is in fact republican in form. Moreover, the Supreme Court long ago held that "it rests with Congress to decide" whether a state provides a "republican form of government." *Luther*, at 48 U.S. at 42. Thus, so long as Congress assures itself that the 1987 Constitution secures to New Columbia a proper form of government, the courts will not second-guess that judgment. Part IV of this memorandum explains why Maryland's consent is not required for the creation of New Columbia. In short, the new state is not "within the Jurisdiction" of Maryland because Maryland divested itself of authority over the land when it ceded the territory to the United States in 1791. New Columbia would not be created by combining existing states. And the Act provides that the new state will be "admitted into the Union on an equal footing with the other States in all respects whatever." Act § 101(a).

Congress' traditional prerequisites are present here as well. The Act ensures that New Columbia's residents want to create the new state. Section 102 requires that the question be put to vote in a special election and provides that the Act's provisions "shall cease to be effective" if the voters reject statehood. *See* Act § 102(b)(2).

Congress alone decides whether New Columbia can support itself and the Union as a new state. This is a practical analysis that the existing states' representatives must undertake according to the political and economic concerns of their constituents. Thus, there is not much room for constitutional analysis on this point—other than to say that Congress' judgment will likely not be questioned by the courts. To be sure, there has been considerable debate over whether New Columbia would be a viable state. *See, e.g.*, U.S. Dep't of Justice, Office of Legal Policy, *Report to the Attorney General: The Question of Statehood for the District of Columbia* 59-68 (1987) ("OLP Report") ("[T]he District of Columbia simply lacks the resources both to support a state government and to provide its fair share of the cost of the federal government."). This is a concern that warrants Congress' careful consideration. But if Congress is satisfied that it poses no political problem to the Union, then that conclusion is controlling.

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[4] Available at: http://www.heritage.org/constitution#!/articles/4/essays/125/new-states-clause.

[5] Some states have pursued an alternative path, known as the "Tennessee Plan," by which they adopted a state constitution then petitioned Congress for admission. *See* R. Hewitt Pate, *D.C. Statehood: Not Without a Constitutional Amendment*, The Heritage Lectures 3 (1993), http://thf_media.s3.amazonaws.com/1993/pdf/hl461.pdf. D.C. Statehood proponents initially pursued this route, but the most recent New Columbia constitution has not yet been ratified. Thus, the New Columbia Admission Act is best viewed as a traditional enabling act that requires adoption of a pre-existing, un-ratified state constitution.

The New Columbia Admission Act follows the typical procedure for admission of new states. The Act functions like "enabling legislation" that provides for admission so long as certain criteria are met. Key among those criteria is that New Columbia's residents ratify an acceptable constitution, and the Act specifies that the 1987 Constitution is acceptable. Thus, once New Columbia's residents approve admission, ratify the 1987 Constitution, and accept the boundaries and other provisions set forth in the Act, the President will issue a proclamation accepting New Columbia as the 51st state. *See* Act §§ 102(b)(1), 104.

The Act thus complies with all constitutional and congressional requirements. If New Columbia were being created out of any other territory, its admission likely would face little or no constitutional attack. But the unique nature of the District of Columbia raises some unique constitutional concerns. This memorandum will next address those concerns.

## IV. The New Columbia Admission Act Does Not Violate Any Other Constitutional Provisions.

Three core concerns have been raised with the constitutionality of admitting New Columbia as a state. First, the Constitution's District Clause contemplates a federal city like the current District of Columbia and thus shrinking the District to a small federal enclave violates the Founders' intent. Second, the Twenty-Third Amendment prohibits the creation of New Columbia because it contemplates the continued existence of the current federal district. Third, admittance of New Columbia requires Maryland's consent because its land originally belonged to Maryland and was ceded to the federal government solely to create the District of Columbia. I address each in turn.

### *A. The Act does not violate the District Clause.*

The broadest challenge to admitting New Columbia as a state is rooted in the Constitution's District Clause. This clause grants Congress 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." U.S. Const. art. I, § 8, cl. 17. This provision, so goes the objection, requires the District of Columbia to remain fixed in size and character: "a federal enclave was created to ensure the independence of the new government, to avoid, in George Mason's words, 'a provincial tincture to ye Natl. deliberations.'" OLP Report 55 (quoting James Madison, *Notes of Debates in the Federal Convention of 1787* 378 (A. Koch ed., 1966)). The concerns are that the federal government "cannot be dependent upon any one of the states to ensure its smooth operation," nor is any state "entitled to a greater voice in the national councils than any other." *See id.*

Instead of imposing constitutional limits, the District Clause grants Congress authority over the federal district that "may" be created as the federal seat of government. Though it contemplates that a federal district will exist, the District Clause does not mandate that the district be any minimum size or specific shape. In fact, it conspicuously avoids placing a lower limit on the district's geographic area, while placing an absolute *upper* limit on its size. Had the Framers wished to mandate a lower bound for the size of the federal district, they knew how. But they did not. Thus, the text of the Constitution does not prohibit Congress from reducing the size of the District of Columbia, as contemplated in the New Columbia Admission Act. *See generally* Peter Raven-Hansen, *The Constitutionality of D.C. Statehood*, 60 Geo. Wash. L. Rev. 160, 166-77 (1991) (refuting the "fixed form" argument).

If anything, the District Clause affirmatively supports the constitutionality of the New Columbia Admission Act. The District Clause grants Congress plenary and exclusive power over the District of Columbia, and the courts have granted Congress wide latitude in its exercise of that authority. In *District of Columbia v. John R. Thompson Co.*, the Supreme Court explained that "[t]he power of Congress over the District of Columbia relates not only to national power but to all the powers of legislation which may be exercised by a state in dealing with its affairs." 346 U.S. 100, 108 (1953) (quotation marks omitted); *see also Neild v. District of Columbia*, 110 F.2d 246, 249 (D.C. Cir. 1940) (Congress' District Clause authority "is sweeping and inclusive in character"). Just as a state may consent to the creation of a new state from within its borders, so too should Congress be permitted to carve a state from the District of Columbia, over which it enjoys sovereign control. *See Equal Representation in Congress: Providing Voting Rights to the District of Columbia: Hearing Before the S. Comm. on Homeland Security and Governmental Affairs*, 110th Cong. (2007) (statement of Viet D. Dinh) ("D.C. Voting Rights Testimony") ("In few, if any, other areas does the Constitution grant any broader authority to Congress to legislate.").

History, too, supports this view. The original District of Columbia was much larger than the current District because it included land in Virginia that is now Arlington County and Alexandria City. In 1846, Congress retroceded that land to Virginia, thus reducing the District's area by one third. *See* An Act to Retrocede the County of Alexandria, in the District of Columbia, to the State of Virginia, ch. 35, 9 Stat. 35 (1846); *see also* Raven-Hansen, 60 Geo. Wash. L. Rev. at 169. Faced with similar arguments that the District Clause prohibited Congress from reducing the boundaries of the once-set federal district, the House Committee on the District of Columbia at that time concluded:

> The true construction of [the District Clause] would seem to be that Congress may retain and exercise exclusive jurisdiction over a district not exceeding ten miles square; and whether those limits may enlarge or diminish that district, or change the site, upon considerations relating to the seat of government, and connected with the wants for that purpose, the limitation upon their power in this respect is, that they shall not hold more than ten miles square for this purpose; and the end is, to attain what is desirable in relation to the seat of government.

Retrocession of Alexandria to Virginia, House Comm. on the District of Columbia, H.R. Rep. No. 29-325, at 3-4 (1846). Only half a century removed from its acceptance of lands to create the District, Congress was convinced that there was no restriction on its ability to alienate large portions of that land.[6] Even earlier, in 1791, the First Congress altered the southern boundaries of the District to capture portions of what are now Alexandria and Anacostia. *See* Raven-Hansen, 60 Geo. Wash. L. Rev. at 169-70. Thirteen of the Constitution's Framers, including James Madison, voted in favor of this amendment, *see id.*, which "'is contemporaneous and weighty evidence'" that the District Clause does not prevent Congress from altering the District's boundaries, *Marsh*

[6] The Virginia retrocession was challenged decades later by citizen attempting to avoid taxation by Virginia, but the Supreme Court declined to rule on the question, holding that "[i]n cases involving the action of the political departments of the government, the judiciary is bound by such action," and "[t]he State of Virginia is *de facto* in possession of the territory in question." *Phillips v. Payne*, 92 U.S. 130, 132-33 (1875). As explained above, the Court's avoidance of the question in *Payne* is strong evidence that courts likely would not rule on admittance of New Columbia.

*v. Chambers*, 463 U.S. 783, 790 (1983) (quoting *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888)).

Contrary historical arguments, which focus on the Founders' statements regarding the need for a federal district, do not prove otherwise. For instance, James Madison wrote that "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 (James Madison). A large federal city like the current District of Columbia, so goes the argument, is necessary so that Congress can "ultimately control the basic services needed by the national government." OLP Report at 57. Indeed, "[e]very Justice Department that has addressed the question, from the Kennedy Administration to the Bush Administration, has concluded that the Constitution does not allow for legislative alteration of the District's status." R. Hewitt Pate, *D.C. Statehood: Not Without a Constitutional Amendment*, The Heritage Lectures 6 (1993).

The need for independence from state control or dependence undoubtedly influenced the Constitution's provision for a federal district, and it should inform Congress' policy judgment on the admission of New Columbia. But it is just that: a policy concern. The Act preserves a federal district that is outside the control of any state and is less than ten miles square. That is all the Constitution requires. The statements of individual Framers cannot convert a constitutional clause that *grants* Congress broad authority into a clause strictly *limiting* Congress' authority.

At bottom, neither the District Clause nor the policy concerns that led to its enactment present a constitutional obstacle to the New Columbia Admission Act. The Act preserves a federal district to serve as the "Seat of the Government of the United States." Congress has plenary power over the District, and it has previously exercised that power by reducing the District's size. Arguments concerning the independence and vitality of a shrunken District are serious and should be seriously considered. But they pose no *constitutional* limit. They are within Congress' sound discretion to legislate on this sensitive political matter.

In this regard, it is worth noting that the concerns that motivated the Framers may be attenuated when the surrounding state (New Columbia) is relatively small and poses no particular risk of usurpation, especially when the federal enclave has been independent and autonomous for over two centuries. And any rational policy debate would weigh the benefit (protecting the federal seat from state usurpation) against the cost (disenfranchisement of residents who pose no threat and have no particular connection to the federal seat). It strikes me that it is harder to justify why someone living far from the federal seat—say, in Anacostia or upper Northwest--should be disenfranchised than it is to explain how having those neighborhoods under direct federal control is necessary to protect the federal government. Again, these are policy questions and not matters of constitutional law, but the presence of an upper, not lower, limit on the geographical size of the District in the Constitution at least suggests that the Framers were, if anything, more concerned with the latter.

*B. The Act does not violate the Twenty-Third Amendment.*

It is urged that admitting New Columbia would be inconsistent with the voting rights provided to District residents in the Twenty-Third Amendment. Because the Twenty-Third Amendment provides District residents with three votes in the Electoral College, the few remaining residents of the Act's shrunken federal district could claim an outsized influence on

presidential elections. Opponents argue that this electoral anomaly would violate the Twenty-Third Amendment's intent. *See generally* Adam H. Kurland, *Partisan Rhetoric, Constitutional Reality, and Political Responsibility: The Troubling Constitutional Consequences of Achieving D.C. Statehood by Simple Legislation*, 60 Geo. Wash. L. Rev. 475 (1992). Moreover, they argue, the amendment is premised on the existence of a large populated District, which confirms that the Constitution prohibits Congress from reducing the District's size. *See, e.g.*, OLP Report at 21-23. But these arguments are policy inferences not mandated by the constitutional text. A constitutional provision is not violated anytime the factual premise behind its enactment changes. While the Twenty-Third Amendment will pose grave policy concerns if the New Columbia Admission Act is adopted, the amendment does not *prohibit* the Act.

Section I of the Twenty-Third Amendment 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; 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.

U.S. Const. amend. XXIII, § 1. As a practical matter, the amendment enables District of Columbia residents to cast three electoral votes in presidential elections because the smallest state will virtually always have one representative and two senators in Congress.

Nothing in the Twenty-Third Amendment prohibits the admission of New Columbia. Because the New Columbia Admission Act will preserve a federal "District constituting the seat of Government of the United States," the Twenty-Third Amendment plainly can still operate according to its terms. The amendment, like the District Clause, says nothing about minimal geographic or population limits on the federal district. Nor does it matter if the population within the federal district changes. That was always going to be true to some extent: The District of Columbia's population is ever increasing or decreasing; yet the Twenty-Third Amendment's provision of electoral votes does not shift with those population fluctuations. Similarly, it would not violate the Constitution if the least populous state in the Union divided itself in two states, one of which contained very few residents, and Congress admitted the new state into the Union. This might be bad policy, but it would be constitutional.

That is because, in general, the Constitution is not violated anytime the factual assumptions underlying a provision change. For example, the increased number and economic influence of District residents does not mean that the Constitution changes to mandate their enfranchisement. *See Adams v. Clinton*, 90 F. Supp. 2d 35, 50 (D.D.C. 2000) (per curiam). Thus, changing a factual premise of the Twenty-Third Amendment does not violate its prior grant of electoral rights. The full electoral rights of New Columbia residents could logically and practically co-exist with the Twenty-Third Amendment rights for the shrunken district's residents. There is no inherent conflict and thus no constitutional problem.

Objections to New Columbia based on the Twenty-Third Amendment ignore the difference between a statute that alters the premise for a constitutional amendment and legislation that violates a constitutional prohibition included in an amendment. By way of analogy, a statute repealing the income tax is not unconstitutional beeause it renders superfluous the Sixteenth

Amendment, which authorizes a federal income tax. Of course, the Twenty-Third Amendment was passed against the factual backdrop of a District that included a substantial number of residents disenfranchised from presidential elections. But that does not mean that Congress lacks the power to alter that factual premise through legislation rather than constitutional amendment. Consider, as illustration, whether Congress had authority to adopt the New Columbia Admission Act before the Twenty-Third Amendment. Absolutely nothing in the Twenty-Third Amendment purports to limit congressional power, so if Congress had the power to admit New Columbia prior to the Twenty-Third Amendment, the amendment did not take that power away. All of this is to say that the Twenty-Third Amendment by itself adds little to the analysis of congressional power to admit New Columbia.

To be sure, it makes little policy sense to grant the smaller district's residents outsized influence on the presidential election. (Given that the President and First Family will be among those few residents, it would pose a particularly pernicious advantage to presidential incumbents.) Thus, if New Columbia is admitted, I think the Twenty-Third Amendment *should* be repealed. The Act provides for expedited consideration of a constitutional amendment for repeal, and one would expect Congress and the states to quickly ratify the repeal amendment to protect their electoral votes from dilution. In fact, the better policy would be to make repeal of the Twenty-Third Amendment a prerequisite to New Columbia's admittance. But that is a political judgment for Congress to make, not a constitutional limit on New Columbia's admittance to the Union.

In all events, the New Columbia Admission Act seeks to avoid the problem of granting three electoral votes to the reduced federal district. The Act repeals 3 U.S.C. § 21, which currently provides for the District of Columbia's participation as a state in presidential elections, thus leaving the District without any legislatively-provided presidential electors. *See* Act § 205. This provision builds on Professor Schrag's theory that the Twenty-Third Amendment is not self-executing and thus Congress can simply decline to provide electors for the federal district. *See* Philip G. Schrag, *The Future of District of Columbia Home Rule*, 39 Cath. U. L. Rev. 311, 348-49 (1990). Congress is granted some authority to control the appointment of the District's electors: The District "shall appoint" those electors "in such manner as the Congress may direct," and the Amendment grants Congress the "power to enforce this article by appropriate legislation." U.S. Const. amend. XXIII. But it is unlikely that the "power to *enforce*" the Twenty-Third Amendment includes the power to nullify it. And the Twenty-Third Amendment speaks in mandatory terms: "The District constituting the seat of Government of the United States *shall* appoint" electors for President and Vice President. *Id.* (emphasis added). But the constitutionality of New Columbia's admittance does not rise or fall with this provision. Whatever the legality and effect of Section 205, it is severable from the rest of the Act, and the admission of New Columbia remains constitutional.

*C. Admission of New Columbia does not require Maryland's consent.*

Some also argue that the Constitution requires Maryland's consent before New Columbia can be carved out of the existing District of Columbia. The New States Clause prohibits the creation of any new state from "within the Jurisdiction of any other State" without the existing state's consent. U.S. Const. art. IV, § 3, cl. 1. Statehood opponents argue that Maryland ceded its land to the federal government solely for use as the federal capital district and thus Maryland retains an interest in the land that would trigger the New States Clause's consent requirement if Congress attempts to alienate the land. *See, e.g.*, OLP Report at 58; *see also generally* Raven-Hansen, 60 Geo. Wash. L. Rev. at 177-83.

The premise of this argument is false. The land that would create New Columbia is not "within the Jurisdiction" of Maryland, and Maryland has no residual authority over the land. On the contrary, Maryland relinquished all sovereign authority over the land when it ceded the territory and the federal government accepted it. The express terms of the cession state that the land is "*for ever* ceded and relinquished to the congress and government of the United States, in *full and absolute right*, and *exclusive jurisdiction* ...." 2 Laws of Maryland 1791, ch. 45, § 2 (Kilty 1800), *quoted in* Raven-Hansen, 60 Geo. Wash. L. Rev. at 179 (emphasis added). The terms could not be more clear. Maryland retained no authority over the land because, "the cession had ended residents'] political link with" Maryland. D.C. Voting Rights Testimony (citing *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)). Thus, by its terms, the consent provision in the New States Clause does not apply. In this vein, the New Columbia Admission Act follows the precedent of the Enabling Act of 1802, which did not require consent from Connecticut even though the Act formed Ohio partially from territory Connecticut ceded to the United States in 1786. The Enabling Act of 1802, 2 Stat. 173 (1802); 5 *The Territorial Papers of the United States* 22-24 (Clarence Edwin Carter ed., 1934).

*D. Other policy concerns do not raise constitutional problems.*

Statehood opponents also raise a number of other practical concerns that do not raise any constitutional problems. For instance, even setting the Twenty-Third Amendment aside, the state of New Columbia would have an outsized influence in the Senate, given its exceptionally small geographic size and relatively low population. New Columbia would also undoubtedly retain the culture of a "national city" and would likely enjoy the advantages of geographic proximity to the federal government. And New Columbia would hardly present the sort of economic, cultural, and geographic diversity of the traditional Madisonian democracy. It would add a diverse counterweight to large, sparsely populated states, but New Columbia would consist *entirely* of one city, whose existence and prosperity are tied to the federal government. These are all significant concerns that counsel against admitting New Columbia as a state. But the Constitution does not speak directly to any of these problems and thus they are for Congress to resolve in its political judgment.

* * *

At its core, the admission of New Columbia is a political decision for Congress. The New Columbia Admission Act satisfies the minimal constitutional requirements and traditional prerequisites for the admission of new states, and courts will likely find other constitutional attacks to be meritless. Virtually all of the objections actually amount to disputes over political policy—that is, whether New Columbia would structurally fit within the existing Union. But the Constitution commits that judgment to Congress, which has the power to admit new states and possesses plenary power over the District of Columbia. There is little cause for the courts to second-guess that decision.

"Why Statehood for the District of Columbia Makes Sense Now"

Testimony of Alice M. Rivlin*

The Brookings Institution and Georgetown University

Before the Committee on Homeland Security and Government Affairs

The United States Senate

Monday, September 15, 2014

Chairman Carper, Ranking Member Coburn and members of the Committee:

I am delighted that you are holding this hearing on statehood for the District of Columbia and happy to share my views. I hope this hearing will focus national attention on the outrageous situation of citizens of the United State who happen to live in the District of Columbia. We are not in fact full citizens of this great democracy. We do not have the same rights and responsibilities of self-government enjoyed by citizens of the 50 states, and we cannot participate equally in governing the Nation. This situation is both an anomaly and an anachronism. I hope this hearing will start a process leading to statehood for the District of Columbia.

A bizarre anomaly. It is hard to explain to anyone why a nation that sees itself as a beacon of democracy keeps the more than a half million inhabitants of its capitol city from normal participation in the governance of the country. Americans are proud of our Constitution and our nearly two and a half centuries of evolving democracy. We preach self-government around the globe, often in cultures without our strong democratic tradition. We send our finest young people to risk their lives in far-away places in the name of protecting the rights of other countries' citizens to self-determination. Our television networks proudly show pictures of voters in Iraq or Afghanistan standing in long lines to cast their ballots in their national elections. But those same networks rarely mention that citizens of the District of Columbia are denied the right of full self- government. DC citizens pay our taxes, serve in the armed forces, and if necessary make the ultimate sacrifice to defend democracy around the world. But here at home we cannot vote for full representation in the Congress of the United States. This is an inconvenient truth about America, which should be changed forthwith.

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*The views expressed in this statement do not necessarily reflect those of staff members, officers, or trustees of The Brookings Institution or of Georgetown University.

A strange anachronism. Over two centuries ago when the District of Columbia was created and the national government moved to this site on the Potomac, it would have been hard to imagine a thriving metropolis in this ten mile square. The new nation's capital was mostly open land with small settlements and muddy streets. The census of 1800 counted only about 8 thousand people living in the District of Columbia and only about 15 thousand by 1810. The new nation proclaimed itself committed to representative government, but the concept of voting rights was limited. Most of the adults living in the District would not have been eligible to vote by the standards of the day, because they were female, African American (both slave and free) or didn't own property. The few voices protesting exclusion of the District from representation in the new Congress were easily ignored.

Between then and now two revolutions have totally changed the picture. American democracy evolved from idea to reality. After great struggle, the Nation abolished slavery and gradually committed to voting rights for adult citizens of all races and genders. Over the same period the District of Columbia grew from a village to a vibrant city. Its growing population numbers about 646 thousand-- larger than Vermont and Wyoming—and its vibrant urban economy has a bigger gross domestic product than 16 states. It is past time to bring the rights and responsibilities of DC citizens up to date. Statehood would do exactly that.

The fiscal viability of the District of Columbia. Twenty years ago, one could have raised legitimate doubts about the fiscal wisdom of statehood for the District. Washington, like many central cities, had lost population over several decades. Much of the middle class, both black and white, had moved to the suburbs, leaving behind abandoned houses, boarded up stores, and distressed neighborhoods. A deteriorating tax base and fiscal mismanagement brought the city close to bankruptcy. The situation was not a serious as that facing Detroit at present, but it warranted federal intervention. The Clinton Administration, working with DC Delegate Eleanor Holmes Norton and a Republican-led Congress put in place a "control board" charged with restoring the city to fiscal health. The same legislation created an independent Office of the Chief Financial Officer (OCFO) for in the District. The OCFO has had able leadership and has been effective in strengthening the District's finances.

The combination of fiscal reform and a recovering economy led to rapid improvement in the District's financial situation. The federally appointed "control board," which I chaired for its final three years, was able to declare victory and go out of business at the end of fiscal year 2001. Since then, both the city's economy and its fiscal health have continued to improve remarkably. The long decline in population finally turned around. Last year DC population grew faster than that of any state except North Dakota. The city weathered the Great Recession far better than most cities. It has balanced its budget every year for 17 years, made substantial investments in improving its schools and other services, built up a substantial balance in the general fund, and enjoyed high bond ratings. There is no longer any reason to worry that the District would not be a fiscally viable state.

Other steps toward autonomy and national representation for the District. I strongly favor statehood for the District of Columbia, but it may not happen quickly. In the meantime, Congress should take at least two steps that partially remedy the anomalous and anachronistic situation of DC citizens. The District should have budget autonomy. It should be able to spend its locally raised revenues to meet the needs of its citizens without delay or interference from Congress. The District's able representative in the House of Representatives should have full voting rights like other members of Congress.

In sum, Mr. Chairman, I commend the Committee for holding this hearing and urge Congress to enact statehood for the District of Columbia.

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**STATEMENT OF**
**WADE HENDERSON, PRESIDENT & CEO,**
**THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS**

**HEARING ON S. 132, THE "NEW COLUMBIA ADMISSION ACT"**

**UNITED STATES SENATE**
**COMMITTEE ON HOMELAND SECURITY & GOVERNMENTAL AFFAIRS**

**SEPTEMBER 15, 2014**

Chairman Carper, Ranking Member Coburn, and members of the Committee, I am Wade Henderson, President and CEO of The Leadership Conference on Civil and Human Rights. I appreciate the opportunity to speak before you today regarding The Leadership Conference's strong support for providing voting rights and self-governance to the residents of the District of Columbia, in general, and for S. 132, the "New Columbia Admission Act," in particular.

The Leadership Conference on Civil and Human Rights 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. The Leadership Conference consists of more than 200 national organizations representing persons of color, women, children, organized labor, persons with disabilities, older Americans, the LGBT community, 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 individual witnesses, 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 in both capacities. 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 the rights of my fellow Americans. As many of you on this Committee who I've had the pleasure of working with know,

I have strived to do so on a nonpartisan basis. And throughout the course of my career, I have been fortunate to see 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, 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 represent me 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 have long understood 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, can overrule how local tax revenues will be spent, and has even tried to micromanage the appropriate penalties for minor, nonviolent legal offenses. Adding insult to injury, we have even been barred from casting a single vote when Congress has decided, in past years, to prevent our elected city officials from using our own tax dollars to advocate for a more meaningful voice in our democracy.

Taxation without representation 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. When it comes to our nation, the rule

is very simple: if you don't vote, you don't count – and that is true both at the ballot box and in the halls of Congress. Without the right to vote, 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, including a unanimous vote in the Senate and only token resistance in the House, 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.

The 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] The UN Committee on the Elimination of Racial Discrimination in its Concluding observations issued on 29 August 2014 following its review of the United States called for "the full voting rights of residents of Washington, D.C.

Extending representation to DC residents is one of the highest legislative priorities for The Leadership Conference on Civil and Human Rights, and for me on a personal level as a DC resident myself, and it will remain so until it is achieved.

**Why this Approach?**

Mr. Chairman, before turning to a discussion of S. 132, I must say that I come before this committee today with a great deal of frustration. For decades, DC residents like me have urged

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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).

Congress to provide us with the same rights in these halls that all other Americans enjoy. Indeed, this is my fourth time testifying on the issue since 2004 – and when I appeared before this Committee in 2007, I was especially honored to sit at this table with the late Secretary Jack Kemp who, as always, spoke eloquently and thoughtfully about the need for Congress to correct "this unique historical injustice."

Yet despite our best efforts, nothing has changed. The last time Congress took up the issue, in the 111th Congress, some advocates even went so far as to accept an amendment by then-Senator John Ensign (R-NV) that repealed most of DC's firearm laws, in order to secure Senate passage of a bill to provide DC with a voting House member – even though it undermined the very principles that lay at the heart of the bill. But rather than allow that compromise to pass the House, opponents snatched defeat from the jaws of our victory by proposing drastic last-minute changes to the gun amendment that they knew the city could not possibly accept. Four years later, over 600,000 District residents are still left without any meaningful voice.

That said, I am very grateful to you, Mr. Chairman, and to your colleagues who have joined you in bringing the attention of Congress back to this issue. As our nation continues our efforts to promote our values abroad, we must always be mindful of the fact that democracy begins at home. I believe the enactment of S. 132, the "New Columbia Admission Act," would finally resolve this glaring inconsistency in our system of government, and it would bolster our moral authority around the world at a time when it is so profoundly important.

S. 132 would establish a process for the current District of Columbia to be admitted as our nation's 51st state. It would begin by requiring DC voters to agree to statehood, something they have already expressed support for in the past, and it would lay the groundwork for the election of a Representative and two Senators to Congress. Pursuant to Article I, Section 8 of our Constitution, S. 132 would define a separate and distinct seat for our federal government, by carving out a small area of the current District that includes the White House, the Capitol, the Supreme Court, and many other federal buildings. The United States would retain title to federal buildings and properties that lie outside of this new district. S. 132 also provides for the transfer of legal proceedings from the current District to the state of New Columbia, where appropriate, and defines the legal relationships between the new District and the new State. Because some current DC residents would still reside within the new District, S. 132 would allow them to vote in and be represented by the state of their most recent domicile. Finally, it would set in motion a process to repeal the 23rd Amendment.

Mr. Chairman, I know that Professor Viet Dinh and former OMB Director Alice Rivlin will discuss some of the constitutional and financial issues, respectively, surrounding the creation of New Columbia, and I am happy to defer to their expertise. But because the issue of repealing the 23rd Amendment was such a significant part of the discussion in 1993, when Congress last considered a proposal to create the state of New Columbia, I would like to briefly chime in on that point here. In short, opponents of DC statehood have argued that New Columbia cannot properly be created through the legislative process alone.

While I believe that nothing in the Constitution precludes Congress from creating a state out of the existing District of Columbia, the existence of the 23rd Amendment – which now provides DC residents with three electoral votes in presidential elections – does indeed create an important practical consideration. Because a very small number of voters would still reside in the new District of Columbia, leaving the 23rd Amendment intact would create an absurdity in which those voters would retain a disproportionately large influence in presidential elections under its provisions. These three electoral votes, of course, would he in addition to those the state of New Columbia would be entitled to following its creation.

I certainly agree that the 23rd Amendment would need to be repealed upon the creation of New Columbia, and that this of course would have to be done through the regular process by which we amend our Constitution. But to opponents of statehood who have relied on this as an argument in the past,[3] I have to ask: so what? I do not see this repeal as a particularly difficult proposition for lawmakers. In fact, I find it nearly impossible to fathom that any lawmakers in their right minds, either in Congress or in the states, would stand in the way of repealing the 23rd Amendment if the question were put before them, as the failure to repeal it would only dilute their own states' electoral votes in presidential elections, to the benefit of a tiny handful of voters who remained in the federal enclave.

I realize that there will be a number of other constitutional and practical questions that will be discussed today about the creation of New Columbia and a separate federal district. As we undertake that discussion, I would urge the Committee to consider this: given the principles on which the bloody struggle for our nation's independence was based, I think it is more likely than not that our Founding Fathers would have wanted Congress to have extensive leeway to prevent the evil of "taxation without representation" from ever being imposed on American citizens again. In fact, given the current size combined with the second-class political status of the DC population today, I believe they most likely would be horrified that Congress had not addressed the situation a long time ago.

Ultimately, I believe that the creation of a new state, as proposed in S. 132, is the approach to this issue that moves us closest to the ideals for which our Founders fought. It extends to citizens not only full representation in Congress, but unlike some other proposals that have been considered in the past, it also extends the dignity of self-governance to which all human beings are entitled. I am grateful that you have brought it up for discussion today, and I look forward to working with you to make it a reality.

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

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[3] See, e.g., Pate, R. Hewitt, *D.C. Statehood: Not Without a Constitutional Amendment*, Lecture #461 on Political Thought, Heritage Foundation (Aug. 27, 1993), available at http://www.heritage.org/research/lecture/dc-statehood-not-without-a-constitutional-amendment

**STATEMENT**

**of**

**Roger Pilon, Ph.D., J.D.**
**Vice President for Legal Affairs**
**B. Kenneth Simon Chair in Constitutional Studies**
**Director, Center for Constitutional Studies**
**Cato Institute**

**before the**

**Committee on Homeland Security and Governmental Affairs**
**United States Senate**

**September 15, 2014**

**Re: S. 132, the New Columbia Admission Act of 2013**

Mr. Chairman and members of the committee:

My name is Roger Pilon. I am vice president for legal affairs at the Cato Institute and director of Cato's Center for Constitutional Studies. I want to thank you Mr. Chairman for inviting me to testify today; and I want to thank Senator Coburn in particular for inviting me to offer a discordant note on S. 132, the New Columbia Admission Act of 2013, which proposes the admission of a new, 51st state, "New Columbia," created from the present District of Columbia, leaving in place as "the District" a tiny federal enclave constituted by the National Mall and the land and certain buildings that immediately surround it, which I shall call "New Washington."

Let me begin on two practical notes. First, at this point in the 113th Congress, with mid-term elections only weeks away, I think it safe to say, especially given the history of legislation on this subject, that this bill has little chance of reaching the president's desk. Accordingly, in deference to the committee's time and mine, I will keep my comments short and to the point.

Second, given that history, and the much longer history during which the District of Columbia has existed in its present form for over 200 years, save for the small Virginia portion retroceded in 1847, there must at this point in time be a strong presumption *against* the kind of radical changes envisioned by this bill. In a word, it strains credulity to believe that the Framers, when they drafted the Enclave Clause, imagined anything like the arrangements contemplated by this bill.

Let me turn, then, to substantive issues, starting with that clause, after which I will raise three constitutional objections to this bill, followed by a few practical objections.

**Constitutional Objections to S. 132**

**1. The textual objection.** The Enclave Clause of Article I, Section 8, reads in relevant part as follows:

> 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 ....

Clearly, the Framers did not set a *minimum* size for the seat of the new government. Proponents of this bill have seized upon that point by way of claiming that a constitutional amendment is not required for the bill to pass constitutional muster.

To be sure, the Framers did not set a minimum size for the District. But their mention of "ten Miles square," together with Congress's nearly contemporaneous creation of the District in 1790 from ten square miles of land ceded to the federal government by Maryland and Virginia, is strong evidence of what they intended—and evidence against the tiny enclave envisioned by this bill's proponents. Moreover, notice that Congress was granted exclusive authority not simply over the *seat* of the government but over the *district* in which the government is seated, which for over 200 years has been far larger than the small area in which the government literally sits. Yet this bill would strip Congress of that authority, leaving it with authority over only that tiny area in which the government literally sits.

A further textual objection is rooted in nothing less than the very foundation of the Constitution, the doctrine of enumerated powers,[1] which holds that Congress has only those powers that have been delegated to it by the people as enumerated in the document—and Congress has no power to do what this bill contemplates it doing. The point was well stated in 1963 by then Attorney General Robert F. Kennedy, commenting on a bill that would have retroceded the District to Maryland:

> While Congress' power to legislate for the District is a *continuing* power, its power to create the District by acceptance of cession contemplates *a single act*. The Constitution makes no provision for revocation of the act of acceptance, or for retrocession. In this respect the provisions of Art. I, Sec. 3, cl. 17 are comparable to the provisions of Art. IV, Sec. 3 which empower Congress to admit new states but make no provision for the secession or expulsion of a state. (emphasis added)[2]

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[1] For my Senate testimony on the doctrine of enumerated powers, see Roger Pilon, The United States Constitution: From Limited Government to Leviathan, Economic Education Bulletin, American Institute for Economic Research (Dec. 2005), available at http://object.cato.org/sites/cato.org/files/articles/CT05.pdf.

[2] Letter and Memorandum from Attorney General Robert F. Kennedy to Hon. Basil Whitener, House Committee on the District of Columbia (Dec. 13, 1963), *reprinted in Home Rule, Hearings on H.R. 141 Before Subcommittee No.6 of the House Committee on the District of Columbia,* 88th Cong., 1st Sess. 341, 345 (1964).

Regarding the 1846 retrocession of the small Virginia portion of the original District, that offers no real support for this measure since the Supreme Court, when finally asked to rule on the question nearly 30 years later in a private taxpayer suit, declined to declare the retrocession unconstitutional because so ruling would have resulted in dire consequences given all that had transpired over those years.[3]

I would add only that every Justice Department from the Kennedy administration on that has addressed the D.C. statehood question has concluded that Congress has no authority to alter the status of the District legislatively—although Attorney General Eric Holder, after receiving a similar opinion in 2009 from the department's Office of Legal Counsel regarding a D.C. voting rights bill then pending in Congress, "rejected the advice and sought the opinion of the solicitor general's office, where lawyers told him that they could defend the legislation if it were challenged after its enactment."[4]

**2. The consent of Maryland is likely necessary for the creation of New Columbia.** As the Enclave Clause contemplates, the District was created through the consent of both Congress and the states that ceded land for its creation. And the *purpose* of the cession was made clear in the initial act that gave the Maryland delegation in the House of Representatives authority "to cede to the congress of the United States, any district in this state, not exceeding ten miles square, which the congress may fix upon and accept for the seat of government of the United States."[5] Here again we have a single act, for a single purpose. Maryland did not cede the land for the purpose of creating a new state on its border.

Were Congress to put that land to a different purpose, therefore, the terms of the original cession would be violated. Indeed, that would be crystal clear were it to have happened initially rather than more than 200 years later. It would be sheer political mischief if Congress and Maryland had agreed to the cession for the purpose of creating the District and then Congress turned right around and created a state from that grant. Congress cannot do in two steps, simply from the passage of time, what it cannot do in one fell swoop initially, a conclusion that is further buttressed by Article IV, Section 3, which provides that no new state may be created out of the territory of an existing state without that state's consent. Although the Supreme Court has not ruled on a case quite like this, its 8-1 "rails-to-trails" decision just this year rejected a similar effort to make an end run around the terms of an original grant.[6]

Whether Maryland would consent to the creation of "New Columbia" is an open question, of course. There are numerous practical objections that would arise, a few of which I will address below. Suffice it to say here that past efforts in this direction have received little support from the free state.

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[3] Phillips v. Payne, 92 U.S. 130 (1875).
[4] Carrie Johnson, Some in Justice Department See D.C. Vote in House as Unconstitutional, Wash. Post, April 1, 2009, at A1, available at http://www.washingtonpost.com/wpdyn/content/article/2009/03/31/AR2009033104426_pf.html#.
[5] An Act to Cede to Congress a District of Ten Miles Square in this State for the Seat of Government of the United States, 2 Kilty Laws of Md., Ch. 46 (1788).
[6] Marvin Brandt Revocable Trust v. United States, 572 U.S. ___ (2014).

**3. The 23rd Amendment would need to be repealed.** The 23rd Amendment, ratified in 1961, provides that:

> The *District* constituting the seat of government 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; ... (emphasis added)

Plainly, those who wrote and ratified the 23rd Amendment envisioned a district of a certain size. In fact, the amendment speaks of the District as "if it were a State," granting it the number of presidential electors it would be entitled to "if it were a State." But remember, under this bill the "District" we're talking about is the tiny enclave I've called "New Washington," where will live perhaps a handful of voters—including the presidential family—who would be empowered to select the three electors presently allotted consistent with the amendment's provisions. The votes of such people, vastly more weighty than those of their fellow citizens, cannot be taken away. They are guaranteed by the Constitution. To be sure, Section 205 of S. 132 purports to strike the amendment's implementing legislation; but no mere statute can extinguish those *constitutional* rights. The 23rd Amendment authorizes Congress to direct the *manner* in which the District appoints electors; it does not allow Congress to *eliminate* the District's constitutional power to appoint those electors.

## Practical Objections to S. 132

James Madison, the principal author of the Constitution, explained in *Federalist* No. 43 why we needed a "federal district," separate and apart from the territory and authority of any one of the states, where Congress would exercise "exclusive" jurisdiction:

> The indispensable necessity of complete authority at the seat of government, carries its own evidence with it. It is a power exercised by every legislature of the Union, I might say of the world, by virtue of its general supremacy. Without it, not only the public authority might be insulted and its proceedings 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.

Independency runs through that explanation: It was imperative that the federal government not be dependent on any one of the states, and equally important that no state be either dependent on the federal government or disproportionately influential on that government.

Neither of those objectives would be met under this bill. Today, Congress has authority over the entire District of Columbia, albeit delegated in large measure to the District government. That authority would cease under this bill.[7] Congress would have exclusive authority over only

[7] *See* Coyle v. Smith, 221 U.S. 559 (1911).

the tiny sliver of land outlined in the bill—essentially the White House, the Capitol, the Supreme Court, and the area including and fairly close to the National Mall. That would make the federal government dependent on an independent state, New Columbia, for everything from electrical power to water, sewers, snow removal, police and fire protection, and so much else that today is part of an integrated jurisdiction under the ultimate authority of Congress. Nearly every foreign embassy would be beyond federal jurisdiction and dependent mainly on the services of this new and effectively untested state. Ambulances, police and fire equipment, diplomatic entourages, members of Congress, and ordinary citizens would be constantly moving over state boundaries in their daily affairs and in and out of jurisdictions, potentially increasing jurisdictional problems exponentially.

But neither would this state of New Columbia be independent of the federal government. In *Federalist* No. 51 Madison discussed the "multiplicity of interests" that define a proper state, with urban and rural parts and economic activity sufficient and sufficiently varied to be and to remain an independent entity. That hardly describes the District of Columbia. Washington is an entirely urban one-industry town, dependent on the federal government far in excess of any other state. And New Columbia would be no different. Moreover, as a state, no longer under the exclusive authority of the Congress that would now be dependent on it, as just outlined, New Columbia would be in a position to exert influence on the federal government far in excess of that of any other state. The potential for "dishonorable" influence, as Madison noted, is palpable. A district so compressed as "New Washington" would be under this bill would be unable to effectively control its place of business, rendering it susceptible to such influence.

Let me conclude, however, on a note on which I began. As we saw when an amendment to afford greater representation for the District was put before the nation in 1978, only 16 states had signed on by the time the allotted period for ratification had concluded in 1985. Outside the Beltway there is little support for even that kind of change. I submit that so radical a change as is contemplated by this bill—reducing the nation's capital to so tiny an enclave—would garner even less support if it were more widely proposed. Which brings me to this: With a national debt at seventeen trillion dollars and growing once inflation kicks in, with our entitlement programs facing insolvency under demographic pressures and unrealistic assumptions, with an internal revenue system fraught with both irrationality and scandal, and with international crises weighing upon us, why are we debating a bill with so little prospect of succeeding and with problems galore if it did? The Framers knew what they were doing when they provided for the seat of government that we have. It has served us well for over two centuries. There are more pressing issues before this chamber.

U.S. SENATOR PAUL STRAUSS
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Testimony of

Paul Strauss

United States Senator

District of Columbia (Shadow)

before the

United States Senate

Committee on Homeland Security & Governmental Affairs

Regarding

**"Equality for the District of Columbia: Discussing the Implications of S. 132, the New Columbia Admission Act of 2013"**

3:00pm - September 15, 2014

Dirksen Senate Office Building

Rm. 342

Chairman Carper, Ranking Member Coburn, and members of the Homeland Security and Governmental Affairs Committee, I am Paul Strauss, the third-term United States Senator elected by the voters of the District of Columbia, a position sometimes referred to as the Shadow Senator.

I want to thank the Committee for holding this hearing, and giving me a chance to speak on behalf of my constituents, many of whom are in this room with us today. Permitting me, and my colleague Senator Brown to address you today is indeed a historic occasion, but certainly not without precedent.

While Shadow Senators most recently have been associated with the District of Columbia's efforts for full equality and Statehood, they have been an integral part of U.S. Senate History. The term "shadow" originates from the common Parliamentary practice by an opposition party to form a cabinet in waiting, complete with shadow Ministers, etc. The first "Shadow" or "Senators in waiting" date back to the 4th Congress back in the late 18th Century. Following an unsuccessful attempt to secure admission to the union for the State of Franklin, the residents of the "Southwest Territory", decided to try a new strategy which ultimately resulted in the state of Tennessee.

In 1796, Tennessee elected the nation's first Shadow Senators. With lack of clear precedent on how to admit new states to the Union, Senator Blount and Senator Cocke were given seats on the Senate floor until Tennessee was accepted into the Union.[1]

[1] See generally, "Shadow Senators," Memorandum Report October 9, 1990, Jo Anne McCormick Quatannes, U.S. Senate Historical Office.

In 1835, Michigan's entry to the Union was stalled by opposition from Southern Senators due to its being a non-slave state. Shadow Senators or "Senators-elect" Lucius Lyon and John Norvell were sent to Washington to advance the cause of Michigan's Statehood. [2]

California, Minnesota, and Oregon also used Shadow Senators to gain admission to the Union. California's entry to the Union was, like Michigan, opposed by slave states reluctant to admit another non-slave state.

And most recently, the Territory of Alaska was represented in the Senate by Shadow Senator's Ernest Gruening and William A. Egan election to office in 1956. Alaska's Shadow Senators were also the first Shadow Senators elected directly by the people of their territory following the passage of the 17th Amendment.[3] This most recent admission gives me hope that a new state could be added to the Union at any time.

I had the privilege of succeeding Rev. Jesse Jackson, and Senator Brown follows Senator Florence Pendleton, the first 2 US Senators elected by DC's voters. As the 15th and 16th shadow United States Senators respectively, and with due appreciation to the historic

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[2] *Id.* In addition, although unlike Tennessee's Shadow Senator's they were not assigned seats on the floor. Michigan's admission into the Union was finally secured in 1837. The U.S. Senate did not require a re-election of those previously elected Senators-elect, and on the very day Michigan became a State in 1837, the two shadow Senators presented their Credentials and took the Oath of Office that same day, not withstanding the fact that their election by the Michigan legislature had taken place almost two years before Statehood.

[3] *Id.* Alaska was also the first Territory to elect a shadow US Representative, in addition to a Territorial delegate to round out their Congressional delegation. Prior to its admission to the Union, the Alaska Shadow Congressional delegation served as advocates for Alaska's Statehood. Senator Gruening is, I believe the only Shadow Senator to be recognized with a Statue in Statuary Hall. For his personal efforts at

nature of this hearing, we truly appreciate the opportunity to provide this statement on behalf of my constituents in the District of Columbia, in support of S. 132, the New Columbia Admissions Act of 2013.

It has long been recognized by many that the American citizens who reside in their nation's capital suffer from two great injustices. First, we are denied equal suffrage in the national legislature, and second we lack self- determination over our own affairs. Admitting the District of Columbia as a State solves both of these problems. In addition to providing equal rights to Americans who deserve them, it is a remedy which is fully constitutional, legally appropriate, and perhaps most important, morally right.

I am suspicious of those who claim to support equality for the District, but oppose this bill as a remedy, because of the argument that the District shouldn't be a state because historically, it was only meant to be the Seat of the Federal Government. Among the historical aspects of our constitution were enshrined the institution of slavery, lack of rights for women, and a host of other injustices, now corrected by Constitutional amendments, and more commonly appropriate interpretation by independent judicial review.

Since the original 13 colonies were formed, the process of obtaining statehood has been invoked 37 times. Statehood can be granted through a simple bill. A bill requires a simple Congressional majority and the President's signature. A constitutional amendment

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ending racial segregation in Alaska back in the 1940's, and securing full equality for his constituents through Statehood, Senator Gruening is a personal hero of mine.

requires a two-thirds vote of Congress and the support of three-quarters of state legislatures. A constitutional amendment can be repealed, but statehood cannot be repealed.

While the full payment of Federal income taxes is often and rightly highlighted as a special injustice imposed on the citizens of the District of Columbia, it must be remembered that all other obligations of citizenship are met by my constituents. From Military service, to civil service, to jury service, DC residents are full participants in American civic life.

It is unfortunate that equality for an estimated 646,449 US citizens generally receives too little attention from this body. To have this manifest injustice opposed by some on an overtly partisan basis without due regard to the fundamental rights of my constituents is an outrage. Although this issue has been reduced to a battle between differing parties, let us be clear. This is not a partisan issue. This is an issue of American democracy, and a representation of our federal government's respect for democratic values.

Those who oppose the Statehood bill argue redrawing the boundaries of the national Seat of Government conflicts with the historical intent of the Constitution's District Clause. However, the Seat of Government is brought into conformity with a vision that in reality more closely resembles the original intent of the framers. The Constitution states the upper size limits of the District, but it is silent as to the lower limits. History has shown

that the District can be shrunk by the fact that a portion of the District was retroceded to Virginia.

Anyone who spends a great deal of time in the District of Columbia is well aware that there is a distinct and separate "National Capital Service Area", where the Federal government maintains its own lands, protects itself with its own police forces and collects no DC sales taxes on transactions within its borders. While this bill addresses the need to resolve any ambiguity regarding the 23rd Amendment, few, if any, people reside within the borders of that federal enclave jurisdiction with the conspicuous exception of one prominent family who last time I checked actually voted in Illinois.

The misguided view that DC exists primarily as an area to house federal representatives of the United States is no longer sustainable. The District of Columbia has over 646,000 residents, and according to the 2013 US Census Bureau report the District of Columbia is the fifth fastest growing metropolitan area in the United States. From 2012 to 2013, the District grew by 87, 265 residents[4] and this trend shows no signs of abating.

At the same time DC's residential population continues to grow exponentially, the presence of the Federal government in Washington continues to decrease. We are no longer home to the Walter Reed Medical center, and Federal agencies have been making a steady exodus from the District of Columbia for the past thirty years. Even the FBI is soon re-locating out of the District of Columbia. If Congressional control is so important

[4] The 10 Metro Areas with Largest Numeric Increase: July 1, 2012 to July 1, 2013
http://www.census.gov/newsroom/releases/pdf/CB14-51_countymetropopest2013tables.pdf (Appendix)

to the Federal government's ability to protect its interests, why do so many of our sensitive institutions exist comfortably and without interference in so many fully sovereign states? Whatever issues we may have with the functioning of the Pentagon, CIA, NSA, no one seems to suggest that their placement in the Commonwealth of Virginia adversely impacts the important federal functions that they serve. Although the smaller Federal District will still have the majority of Federal buildings, the mere fact that some will be housed in the new State should be of no more concern than the existence of Federal buildings in all 50 states. Similarly, while many Embassies will also now be in the new State, most nations maintain diplomatic property such as Consular offices in other States around the nation. New York in particular is home to U.N. Embassies and international Consulates, and no one has suggested that the democratic rights of that State's citizens ever needed to be curtailed in the name of World diplomacy.

The idea that DC's economy is a product of the Federal presence is also a fallacy. Expanding investments in Information Technology and private sector investments continue to strengthen our ability to function as an independent economic entity regardless of the Federal public sector investment. If anything, the uncertainties of the cumbersome and poorly functioning Federal appropriation process often lead to greater harm to DC's budget. The almost total shut down of our local budget during the Federal shut-down was an ominous hardship which only underscored the importance of an autonomous budget process, something accomplished by this bill.

DC Statehood is fully constitutional. One of America's foremost constitutional scholars, Professor Jamin B. Raskin, addresses the historical and Constitutional legal concerns of DC's status in his pre-eminent law review article *Is This America? The District of Columbia and the Right to Vote*[5]. This comprehensive survey of the relevant legal precedents and constitutional issues is one of the pre-eminent scholarly works on the subject of District of Columbia equality, and I ask the Committee's consent to make it an exhibit in the record of this hearing.

The District has a growing population comparable to several other states and more residents than Wyoming and Vermont. The District of Columbia functions as the legal equivalent of a state for most of our nations laws; its residents also pay more per capita in federal taxes than other citizens, and sacrifice their lives through military service at elevated rates. Yet, since the passage of the Organic Act in 1801, when it comes to the basic rights of federal representation and legislative autonomy we are treated as separate and un-equal without the basic rights we deserve.

The struggle for statehood, representation, and autonomy has been ongoing since the creation of the District of Columbia. Over the past 200 years, obstacle after obstacle has been presented in opposition to granting District residents the same basic rights as their fellow Americans for no defensible reason. As we are all Americans, there is no defensible justification as to the reasoning behind why Congress continuously prevents the District's full participation in the democracy which Americans all over the nation

[5] Jamie Raskin, *Is this America? The District of Columbia and the Right to Vote*, Harvard Civil Rights-Civil Liberties Law Review, Vol. 34, No. 1, Winter (1999) (Appendix)

enjoy. Year after year our request for the same rights as our fellow countrymen is responded to with senseless arguments and justifications as to why the District should not have representation, or statehood, or equality. We are all Americans. We all deserve to participate in the democracy our nation's founders set before us. To deny basic rights to the citizens of the National Capital, makes a mockery of our attempts to act as a model of democracy for the rest of the world.

The United States positive influence on the world can be seen in how many countries model the systems we have developed and adopted the societal values we espouse. However, the United States has over time become subject to embarrassing scrutiny for not following its own democratic principles. As such, numerous reports from multilateral regional organizations have been released such as the Office of the United Nations High Commissioner for Human Rights report that the US government is subjecting residents of the District of Columbia to human rights violations due to the continuing denial by the Federal government of equal political rights to the residents of the District.[6] These reports are especially damaging to the credibility of the United States on the world stage. When diplomats, such as the ambassador from Belarus, or the ambassador from Germany express surprise at hearing that the District of Columbia, the capital of the world's champion of democracy, fails to extend democracy to its own residents and citizens, that

[6] *Continuing Violations of Equal Political Participation for the Residents of the District of Columbia*, Office of the United Nations High Commissioner for Human Rights (2007) ; *see also, Statehood Solidarity Committee v. United States,* Report N° 98/03, Case 11.204 (2003); *Violations of Equal Political Participation,* Office of the United Nations High Commissioner for Human Rights (2003);

is embarrassingly hypocritical.[7] This subjects the United States to criticism and acts as a model for those countries to justify their own egregious human rights abuses.

In its report, the U.N. Human Rights Committee, under the International Covenant on Civil and Political Rights, called on the United States to grant the residents of Washington, D.C. representation in Congress.[8] The Committee also recommended providing the citizens of the District of Columbia, at the least, representation in the House of Representatives. [9] Further, the Organization of American States, of which the United States was a founding member, issued a report in 2003 which specifically addressed Statehood's opponents' arguments that history and the Constitution support depriving U.S. citizens equal voting rights. [10]

In my time as a Senator for the District of Columbia, I have advocated for various solutions to rectify these injustices. For example, in 2002 I offered my testimony before this very committee on the more limited issue of Voting Representation in Congress for Citizens of the District of Columbia.[11] However, the bill that we have before us, the New Columbia Act of 2013, fully addresses the issues the District faces with its lack of

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[7] http://www.world-rights.org/us/dc_human_rights_time_line.htm (The Republic of Belarus ambassador expresses surprise at the status of the people of Washington , D.C. before the world body. The German ambassador unofficially queries the US OSCE ambassador about the status of Washingtonians.)
[8] *Continuing Violations of Equal Political Participation for the Residents of the District of Columbia*, Office of the United Nations High Commissioner for Human Rights (2007)
[9] *Id.*
[10] *Violations of Equal Political Participation*, Office of the United Nations High Commissioner for Human Rights (2003) (The OAS Report states, "Not only has the State failed to offer any present-day justification for the Petitioners' denial of effective representation in Congress, but modern developments within the United States and the Western Hemisphere more broadly indicate that the restrictions imposed by the State on the Petitioners' right to participate in government are no longer reasonably justified.)

autonomy, and preserves the District of Columbia as the Federal Seat of the United States Government by reducing the seat only to those areas which should be considered Federal land. This addresses the concerns of the District in having autonomy, statehood, and representation, while at the same time addresses the concerns of those who recognize the appropriateness of Federal control of the Seat of Government, while realistically addressing the actual boundaries of where the borders of the Federal District really are.

Therefore, the New Columbia Admissions Act of 2013 is the proper remedy to the disenfranchisement of the District of Columbia. I request that you move this bill to the floor for a vote and give the District the opportunity for equality it has deserved for 200 years.

Thank you again for giving this issue of national importance, and a lifelong passion of mine, your consideration.[12] It is my hope that our government represent the will of the people in granting my constituents that which has been long overdue, that which we have been entitled to for the past 200 years; the right to self-governance and representation for the tax paying residents of the District of Columbia.

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[11] S. Hrg. 107-555, Voting Representation in Congress for Citizens of the District of Columbia: Hearing before the Homeland Security and Governmental Affairs Committee, 107th Cong. 179-184, (2002) (statement by Paul Strauss, U.S. Senator, District of Columbia, (Shadow)) (Appendix)

[12] I would like to thank Mr. Omeed Tabiei, a member of my staff, for his help in researching and preparing this statement.

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

*Jamin B. Raskin*[*]

> Britain, with an army to enforce her tyranny, has declared, that she has a right (not only to tax) but "to bind us in all cases whatsoever," and if being bound in that manner is not slavery, then there is not such a thing as slavery upon earth. Even the expression is impious; for so unlimited a power can belong only to God.
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> —Thomas Paine[1]

> This District had been a part of the States of Maryland and Virginia. It had been subject to the Constitution, and was a part of the United States. The Constitution had attached to it irrevocably. There are steps which can never be taken backward. . . . The mere cession of the District of Columbia to the Federal government relinquished the authority of the states, but it did not take it out of the United States or from under the aegis of the Constitution.
>
> — Justice Sutherland, *O'Donoghue v. United States*[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. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.
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> — Justice Black, *Wesberry v. Sanders*[3]

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[*] Professor of Law, American University, Washington College of Law. A.B., Harvard College, 1983; J.D., Harvard Law School, 1987.

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

[1] THOMAS PAINE, THE AMERICAN CRISIS, NUMBER ONE (R. Carlile 1819).

[2] 289 U.S. 516, 541 (1933) (quoting Downes v. Bidwell, 182 U.S. 244, 260–61 (1901)).

[3] 376 U.S. 1, 17–18 (1964).

Do American citizens have a right to vote for representatives to Congress and their state and local legislative institutions? This question goes to the very character of our Constitution, but it is more than academic in the nation's capital. Today, more than 500,000 citizens living in the District of Columbia[4] have no voting representation in the United States Senate or the United States House of Representatives, and little prospect of achieving representation in either through political channels.[5]

Thus far, attempts to secure representation for District residents through litigation have failed. In *Loughborough v. Blake*,[6] the Supreme Court affirmed Congress' power to impose a direct federal tax on the District, refuting the principle of the American Revolution that called for "no taxation without representation" and rejecting the analogy between taxation of the disenfranchised colonists and taxation of disenfranchised Washingtonians.[7] Similarly, the courts have rejected claims that the es-

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[4] The 1990 Census counted close to 607,000 District of Columbia residents. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1997 at 47 tbl. 46 (1997).

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

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

[6] 18 U.S. (5 Wheat.) 317, 324 (1820).

[7] *See also* Heald v. District of Columbia, 259 U.S. 114, 124 (1922) (affirming the dis-

tablishment of an unelected local government in the District is unconstitutional because it constitutes discriminatory disenfranchisement in violation of the Fifteenth Amendment.[8] Still, despite the failure of previous constitutional challenges to congressional control, a strong equal protection argument is still available to District residents disenfranchised under the current regime.

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

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missal of a claim which challenged a local tax statute "because it subject[ed] residents of the District to taxation without representation"); Gibbons v. District of Columbia, 116 U.S. 404 (1886) (upholding the power of Congress, as local state legislature for the District, to tax different classes of property at different rates).

[8] *See* Hobson v. Tobriner, 255 F. Supp. 295 (D.D.C. 1966); *see also* Carliner v. Board of Comm'rs, 265 F. Supp. 736 (D.D.C. 1967).

[9] U.S. CONST. art. I, § 8, cl. 17.

[10] *See* discussion *infra* Part II.B.

[11] The residents of the 50 states are represented in their state legislatures and, through the workings of Article I, in Congress. Residents of Puerto Rico, Guam, American Samoa, and the Virgin Islands are denied voting representation in Congress, as well as participation in the election of the president and vice-president. *See* Amber L. Cottle, Comment, *Silent Citizens: United States Territorial Residents and the Right to Vote in Presidential Elections*, 1995 U. CHI. LEGAL F. 315, 315-17 (1995). However, they do have the right to vote for their own legislatures. Congress does not govern any of these territories directly, as it does the District, although it retains plenary power over them. *See id.* at 316. A further difference is that residents of these territories are not taxed by the federal government, while District residents are. *See* U.S. CONST., art. I, § 8, cl. 1 (requiring that federal taxes be "uniform throughout the United States," but not the territories).

[12] District residents presently have no voting representation in their four-year-old presidentially appointed local "control board," as it is popularly known, or in the Emergency Transitional Educational Board of Trustees. The control board was created by Congress in response to a series of intensifying fiscal and management crises in the District government. *See* District of Columbia Financial Responsibility and Management Assistance Act, Pub. L. No. 104-8, § 2(a), 109 Stat. 97, 98 (1995) (hereinafter DCFRA) (finding the District government in a "fiscal emergency," buffeted by "pervasive" mismanagement and unable to deliver "effective or efficient services" to residents). The National Capital Revitalization and Self-Government Improvement Act of 1997, Pub. L. No. 105-33, §§ 11000-11723, 111 Stat. 251, 712-87 (1997), strengthened the DCFRA by transferring most of the powers of the Mayor and Council of the District of Columbia to the control board. Together, these acts of Congress effectively ended just over two decades of limited home rule for the District of Columbia.

On November 15, 1996, the control board issued an order creating an Emergency

Thus, as the twentieth century draws to a close, the District remains isolated from the normal practices of representative democracy. It is the glaring "anomaly in our system of government, where the lawmakers are chosen by others than those for whom they make the laws," as President John Tyler put it long ago.[13] I have argued elsewhere that the American polity has been characterized by progressive waves of inclusion and representation, a trend countered by the declining suffrage fortunes of noncitizens.[14] But the trend of suffrage expansion has mostly bypassed citizens living in the District, who have lost much ground since the Republic began.[15]

In both a theoretical and practical sense, the effective disenfranchisement of the District is the paradigm case testing whether all American citizens actually enjoy a right to vote and to be represented on equal terms. This apparently marginal or parochial issue takes on central importance for the meaning of American constitutional democracy.[16]

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

[13] KEELEY, *supra* note 5, at 58.

[14] *See* Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional, and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1392–93 (1993).

[15] Before Maryland and Virginia ceded land to Congress to create the new District, its inhabitants voted as residents of those states. Even after the cession of the lands to Congress in 1791, residents continued to vote in Maryland or Virginia (depending on where they lived within the District) until 1800 when Congress took the reins of power and passed the first Organic Act. *See* Peter Raven-Hansen, *The Constitutionality of D.C. Statehood*, 60 GEO. WASH. L. REV. 160 (1991) [hereinafter Raven-Hansen, *D.C. Statehood*]. Thus, the original understanding was that District residents were part of what Gerald Neuman has called, in a different context, an "optional electorate." Gerald L. Neuman, *"We Are the People": Alien Suffrage in German and American Perspective*, 13 MICH. J. INT'L L. 259, 320 (1992). They could be allowed to vote in other states or, theoretically, their voting rights could be allowed to wither on the vine. In practice, by contrast, the District as a community has essentially gone two full centuries without having had a vote for members of Congress.

[16] The idea that the current regime is unconstitutional has recently caught on. On July 12, 1998, the District of Columbia Corporation Counsel, John Ferren, submitted a Petition for Redress of Grievances demanding full voting rights with the leadership of both the House of Representatives and the Senate. *See* Petition for Redress and Grievances from John M. Ferren, District of Columbia Corporation Counsel to Congress (July 12, 1998) (on file with the *Harvard Civil Rights-Civil Liberties Law Review*). The House reacted by attaching a restriction to the D.C. appropriations bill forbidding the Corporation Counsel to expend any funds advocating or litigating on behalf of the voting rights of its constituents. Pub. L. 105-277. Undaunted, the Corporation Counsel, assisted by the Washington, D.C. law firm of Covington and Burling and this author, filed suit in the U.S. District Court for

The regime of non-representation in the nation's capital depends on the pervasive assumption that disenfranchisement is structurally required or, at the very least, implied by the Constitution. This Article challenges that assumption, which misreads the terms and meanings of our Constitution. In fact, the political arrangements set by Congress for the District violate the essential norms of the Constitution, denying District residents an "equal part in political life" and an "equal stake in government."[17] If the Constitution was ever a political straitjacket that imposed inequality and domination on citizens, the modern Constitution is a freedom charter, the democratic social contract of, by, and for a sovereign people, including the people who live in the District of Columbia.

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

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

1. Denial of representation in Congress burdens the equal protection and due process rights of American citizens in the District to be popularly represented in Congress on the basis of one person–one vote without regard to geographic residence, a right established in *Wesberry v. Sanders*[18] and subsequent voting rights jurisprudence, as well as the correlative right to run for Congress;

2. Denial of representation in Congress burdens the right of American citizens living in the District to be represented in their own state legislature, which is Congress itself, on the basis of one person–one vote without regard to geographic residence, a right established in *Reynolds v. Sims*,[19] as well as their correlative right to run for state legislature;

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

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the District of Columbia on September 18, 1998, seeking injunctive relief against various officials in the executive and legislative branches of government and a declaration that Congress must immediately vindicate full voting rights in the District. The case is presently before Judge Louis F. Oberdorfer. *See* Alexander v. Daley, No. 98-2187 (D.D.C. filed Sept. 18, 1998).

[17] Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 FORDHAM L. REV. 1249, 1264 (1997).

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

*Id.*

[18] 376 U.S. 1 (1964).

[19] 377 U.S. 533 (1964).

belief in the unfitness of the population to participate equally in national life but creates the kind of "uncomfortable resemblance to political apartheid" that the Supreme Court condemned and invalidated in *Shaw v. Reno*.[20]

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

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

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

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

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

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[20] 509 U.S. 630, 647 (1993).

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

[22] *See, e.g.*, STEPHEN MARKMAN, STATEHOOD FOR THE DISTRICT OF COLUMBIA: IS IT CONSTITUTIONAL? IS IT WISE? IS IT NECESSARY? 65 (1988).

> [I]t appears that the sensible course is to accept the wisdom of the Founders and to maintain the status quo. While Washingtonians may not vote in Congressional

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

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

The Constitution's so-called District Clause grants Congress power "[t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States."[25] This Clause did not disinherit the people of their constitutional rights even when the Constitution's statement of those rights refers to people of "the states." The Supreme Court has consistently found that the Constitution, including the Bill of Rights, applies with undiminished force to citizens living in the District. The Court made this point emphatically in *Callan v. Wilson*,[26] in which it upheld, under Article III and the Fifth and Sixth Amendments, the right of criminal defendants in the District to a jury trial. Despite the fact that the relevant constitutional text focused exclusively on the "states," the Court found

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elections, they have in exchange for this right received the multifold benefits of living in the nation's capital . . . . In exchange for these benefits, District residents have adopted the entire Congress as their representatives.

*Id.*

[23] United States v. Cohen, 733 F.2d 128, 146 (D.C. Cir. 1984) (Mikva, J., concurring).

[24] 517 U.S. 620 (1996) (representing the proposition that government may not single out a certain class of citizens for selective or hostile treatment under the law). The case may provide solace to District residents resisting selective or discriminatory laws.

[25] U.S. CONST. art. I, § 8, cl. 17.

[26] 127 U.S. 540 (1888).

that "[t]here is nothing in the history of the constitution, or of the original amendments, to justify the assertion that the people of this District may be lawfully deprived of the benefit of any of the constitutional guarantees of life, liberty, and property . . . ."[27]

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

> The District was made up of portions of two of the original states of the Union, and was not taken out of the Union by cession. Prior thereto its inhabitants were entitled to all the rights, guaranties, and immunities of the Constitution . . . . We think it is not reasonable to assume that the cession stripped them of these rights.[28]

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

> The Constitution had attached to [the District] irrevocably. There are steps which can never be taken backward . . . . The mere cession of the District of Columbia to the Federal government relinquished the authority of the states, but it did not take it out of the United States or from under the aegis of the Constitution. Neither party had ever consented to that construction of the cession.[29]

The land of the "District" that is the "Seat of the Government of the United States" originated with the state of Maryland,[30] and the people who came to live, and come to live, in the District did not—and cannot—lose their status as equal American citizens.

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

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[27] *Id.* at 550. Here, the Court found the jury right to apply despite the fact that the Sixth Amendment provides that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . . ." U.S. CONST. amend. VI.

[28] O'Donoghue v. United States, 289 U.S. 516, 540 (1933) (finding that, unlike territorial courts, the local courts of the District of Columbia are Article III courts for constitutional purposes).

[29] *Id.* at 541 (quoting Downes v. Bidwell, 182 U.S. 244, 260–61 (1901)).

[30] The Virginia portions of the District, then known as the county and town of Alexandria, were retroceded in 1846. *See* Raven-Hansen, *D.C. Statehood*, *supra* note 15, at 169.

force there.[31] However, the Court has already determined that the Equal Protection Clause protects District residents against actions by Congress. That point was made powerfully in *Bolling v. Sharpe*,[32] the unsung companion case to *Brown v. Board of Education*,[33] in which the Court struck down racial segregation in District of Columbia public schools. Because Congress is not a state covered by the Fourteenth Amendment, *Brown* did not automatically invalidate race segregation in District schools. In *Bolling*, however, the Court adopted a reverse incorporation doctrine by which the most significant equal protection norms embodied in the Fourteenth Amendment come to apply in the District of Columbia through the Fifth Amendment Due Process Clause.[34] The Court, therefore, applied to the District its long-established "principle 'that the constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the general government, or by the states, against any citizen because of his race.'"[35] The Court has continued to assume that Fifth Amendment Due Process Clause assimilates fundamental equal protection principles for the protection of Washingtonians.[36]

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

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

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[31] The Fourteenth Amendment provides that "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

[32] 347 U.S. 497 (1954).

[33] 347 U.S. 483 (1954).

[34] While the Court noted that Fourteenth Amendment Equal Protection and Fifth Amendment Due Process Clauses are not identical in substantive coverage, they overlap in significant ways: although equal protection and due process are not "always interchangeable phrases . . . discrimination may be so unjustifiable as to be violative of due process." *Id.* at 499.

[35] *Id.* (quoting Gibson v. Mississippi, 162 U.S. 565, 591 (1896)).

[36] *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976); Shapiro v. Thompson, 394 U.S. 618 (1969).

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

[38] 4 JONATHAN ELLIOTT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 569 (photo. reprint 1987) (Jonathan Elliot ed., 1888) [hereinafter ELLIOT'S DEBATES].

opined in *McCulloch v. Maryland*: "The government of the union . . . is, emphatically, and truly, a government of the people . . . . Its powers are granted by them, and are to be exercised directly on them, and for their benefit."[39]

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

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

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

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[39] 17 U.S. (4 Wheat.) 316, 404-05 (1819).

[40] The theory of "compact" was advanced by the seceding states during the Civil War. They argued that the nation was nothing more than a confederation of "sovereign states" bound only by a pact from which each could withdraw at will. *See generally* GARY WILLS, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA (1992).

[41] *Id.* at 145 (quoting Abraham Lincoln's Gettysburg Address).

[42] *Id.*

[43] 60 U.S. (19 How.) 393 (1857).

[44] 505 U.S. 833, 901 (1992).

Because citizenship and its attendant liberties are a birthright under the Constitution,[45] because Congress can make neither slaves nor nobility here,[46] and because "the people" are the sovereign constituting authority, equality of voting rights among citizens is inherent, inalienable and indispensable.

The organizing theme of the following three doctrinal inquiries is that American citizens who live in the District belong to the constitutional community which ratified and, at least hypothetically, continues to renew its consent to our Constitution. Washingtonians have never surrendered their place as members of the constitutional community and must be considered equal members of it. The vast majority of Washingtonians are citizens of the United States,[47] members of the constitutional "people" whose voting rights are not optional but mandatory under the Constitution.[48] In the past, suffrage expansion has occurred following political and military struggle, both through constitutional amendments and as a result of active judicial intervention. Throughout the twentieth century, the Supreme Court has repeatedly removed barriers to enfranchisement, even when these barriers were thought for generations to be perfectly natural or necessary. The Court has invalidated grandfather clauses,[49] exclusionary white primaries,[50] state poll taxes,[51] restrictions on the voting rights of citizens serving in the armed services,[52] unnecessarily long residency requirements,[53] disenfranchisement of citizens living on federal enclaves,[54] prohibitively high candidate filing fees,[55] malapportioned leg-

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[45] *See* U.S. CONST. amend. XIV.

[46] The Thirteenth Amendment bans "slavery" and "involuntary servitude" in the United States. U.S. CONST. amend. XIII, § 1. Article I prevents both Congress and the states from granting "any title of Nobility." U.S. CONST. art. I, §§ 9–10.

[47] For a demographic breakdown of the District population, see BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1990 CENSUS OF POPULATION, SOCIAL AND ECONOMIC CHARACTERISTICS, DISTRICT OF COLUMBIA (1993).

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

[49] *See* Guinn v. United States, 238 U.S. 347 (1915).

[50] *See* Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927).

[51] *See* Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966).

[52] *See* Carrington v. Rash, 380 U.S. 89 (1965).

[53] *See* Dunn v. Blumstein, 405 U.S. 330 (1972).

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

[55] *See* Bullock v. Carter, 405 U.S. 134 (1972).

islative districts,[56] and gerrymandered districts with majority-minority populations.[57]

These cases are not random or scattershot. They reflect a trajectory of progressive political inclusion that has transformed the original republic of "Christian white men of property."[58] Alexis de Tocqueville saw and understood this dynamic of constant progress toward the ideal of one person–one vote and universal adult suffrage. He wrote that "[t]here is no more invariable rule in the history of society: The further electoral rights are extended, the greater is the need for extending them: for after each concession the strength of democracy increases, and its demands increase with its strength."[59]

However natural, fixed, or structurally determined we may think the regime imposed on the District to be, it is completely contrary to this constitutional dynamic. In the words of Kenneth Karst, "[t]he substantive core of the [fourteenth] amendment, and of the equal protection clause in particular, is a principle of equal citizenship, which presumptively guarantees to each individual the right to be treated by the organized society as a respected, responsible, and participating member."[60]

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

The one person–one vote principle is the heart of modern voting rights jurisprudence. The question is whether it extends to citizens living in the District. The original formulation of the doctrine in *Wesberry v. Sanders* in 1964 was that each citizen must have an equal voice in choosing members of the United States House of Representatives without respect to geographic residence.[61] The Court struck down a Georgia statute that malapportioned House districts to such an extent that certain urban districts had up to three times as many voters within them as rural districts and thus one-third of their rightful influence.[62] The logic of this ruling was that representation in Congress is a right that belongs to the people, not the states, and that government may not use political geogra-

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[56] *See* Reynolds v. Sims, 377 U.S. 533 (1964); Wesberry v. Sanders, 376 U.S. 1 (1964).

[57] *See* Miller v. Johnson, 515 U.S. 900 (1995); Shaw v. Reno, 509 U.S. 630 (1993).

[58] Christopher Collier, *The American People as Christian White Men of Property: Suffrage and Elections in Colonial and Early National America*, *in* VOTING AND THE SPIRIT OF AMERICAN DEMOCRACY 19 (Donald W. Rogers ed., 1992).

[59] 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 10 (Philips Bradley ed. & Henry Reeve trans., Knopf 1946) (1840).

[60] Kenneth L. Karst, *Foreword: Equal Citizenship: Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 4 (1977).

[61] *See Wesberry*, 376 U.S. at 7–8.

[62] *See id.* at 7.

phy or cartography to dilute the representation of the people, much less to rope off an entire community of Americans from the franchise.[63]

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

> To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected "by the People" . . . it was *population* which was to be the basis of the House of Representatives.[65]

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

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

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[63] *See id.* at 13–14.

[64] *See id.* at 14 ("The House of Representatives, the [Constitutional] Convention agreed, was to represent the people as individuals, and on the basis of complete equality for each voter.").

[65] *Id.* at 8–9 (emphasis added).

[66] *Id.* at 7–8.

[67] *Id.* at 10.

[68] 364 U.S. 339, 342 (1960) (quoting Lane v. Wilson, 307 U.S. 268, 275 (1939)).

effectively."[69] Such a violation can be shown by evidence of "effective denial to a minority of voters of a fair chance to influence the political process."[70]

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

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

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

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

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

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[69] 478 U.S. 109, 133 (1986).

[70] *Id.*

[71] The Supreme Court has found that Congress' power to admit new states is limited by the Equal Footing doctrine such that it cannot attach conditions on statehood admissions that would be unconstitutional as applied against any of the existing states. *See* Coyle v. Oklahoma, 221 U.S. 559 (1911) (invalidating a congressional effort to condition Oklahoma's admission to the Union on its acceptance of the city of Guthrie as its state capital).

[72] Other than Texas, which was an independent republic when it was admitted to the Union in 1846, and Vermont, Kentucky, Maine, and West Virginia, which were formed out of other existing states, every other state to join the Union has been a territory. *See* BREAKTHROUGH FROM COLONIALISM: AN INTERDISCIPLINARY STUDY OF STATEHOOD 1215-19

ping out the regime governing the territories, developed a "blueprint for a territorial system" that envisioned the Territories "as vast areas of land to be settled by rugged individualists into autonomous political communities with an ingrained democratic tradition."[73] This idea, embodied in the congressional ordinances of 1784, 1785 and 1787, was to encourage settlement, expand the Union, and proliferate the number of states so as to prevent anyone under the flag from being governed permanently as a subject of the national government instead of as an equal citizen:

> The Jeffersonians viewed the territorial system as a scheme of colonization that would *temporarily* operate in a given area *only until* it had reached a minimum population and after its inhabitants had experienced a brief tutelage in self-government. During this transitory status, Congress would organize the government through the passage of organic legislation. Once the citizens of that area had learned the ways of democracy, the territory would then be admitted as a full and equal member of the Union.[74]

Under the Jeffersonian conception, the territories are not a kind of imperial real estate acquisition but a national trust held by Congress in the name of the people of the territory who, in matter of course, will either leave the arrangement as the Philippines did or achieve "statehood as a matter of right." Their readiness for admission is to be evidenced by three simple factors: (1) achieving some minimum population threshold (it was set in the Northwest Ordinance of 1787 at 60,000 free male inhabitants); (2) a demonstration of successful experience with democratic self-government; and (3) a showing that a majority of voters in the area earnestly desire statehood.[75]

In the juridical context, the Supreme Court has linked the power to acquire new lands and territories with Congress' power to admit new states.[76] In *Dred Scott*, Chief Justice Taney proclaimed in the strongest of terms the temporary and transitional nature of colonial governments in the territories,[77] emphasizing the Jeffersonian concept of states-in-waiting:

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

[73] *Id.* at 1111.

[74] *Id.*

[75] *See id.* at 1115–17.

[76] *See* American Ins. Co. v. Canter, 26 U.S. (12 Wheat.) 511 (1828).

[77] Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

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

*Id.* at 446.

> The power to expand the territory of the United States by the admission of new States is plainly given; and in the construction of this power by all the departments of the Government, it has been held to authorize the acquisition of territory, not fit for admission at the time, but to be admitted as soon as its population and situation would entitle it to admission. *It is acquired to become a State, and not to be held as a colony and governed by Congress with absolute authority.*[78]

Unlike the territories, which are constitutionally designed as transitory entities, the District is structured as a permanent constitutional feature.[79] The District Clause vests all power in Congress over "[s]uch District (not exceeding ten miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of government of the United States."[80] The purpose of this District is to guarantee federal police power control over the capital city and to liberate the national government from a potentially crippling dependence on the states.[81]

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

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

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

[80] U.S. CONST. art. I, § 8, cl. 17.

[81] *See* discussion *infra* Part III.B.1.

nation's citizenry. In finding that Fifth Amendment due process of law applies to District but not territorial residents,[82] Justice Sutherland went to great pains to separate District residents from inhabitants of a territory, which he defined as "an inchoate state"[83] in a condition "'of pupilage at best'"[84] and a "'mere dependent[ ] of the United States.'"[85]

Justice Sutherland described the differences between territories and the District, stating that "[t]he District is not an 'ephemeral' subdivision of the 'outlying dominion of the United States,' but the capital—the very heart—of the Union itself, to be maintained as the 'permanent' abiding place of all its supreme departments."[86]

Because the seat of government is thus designed as a *permanent* and integral aspect of the constitutional structure, it cannot, in its entirety, become a state even if the three Jeffersonian conditions of population, democratic experience, and popular desire are met.[87]

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

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

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[82] *See* O'Donoghue v. United States, 289 U.S. 516 (1933).

[83] *Id.* at 538 (quoting *Ex parte* Morgan, 20 F. 298, 305 (W.D. Ark. 1883)).

[84] *Id.* (quoting Nelson v. United States, 30 F. 112, 113 (C.C.D. Or. 1887)).

[85] *Id.* (quoting Snow v. United States, 85 U.S. (18 Wall.) 317, 320 (1873)).

[86] *Id.* at 539.

[87] As statehood advocates argue, Congress could redraw the boundaries of the District and cede the excluded areas to the state of New Columbia. *See* Jamin B. Raskin, *Domination, Democracy, and the District: The Statehood Position*, 39 CATH. U. L. REV. 417, 423 (1990); Raven-Hansen, *D.C. Statehood*, *supra* note 15. However, the House of Representatives voted such a proposal down by a two to one margin in 1993 and the Senate never even considered it. The structural political obstacles to statehood for New Columbia seem insuperable today. One can imagine the disfavor with which conservative or agrarian states would consider the creation of the most liberal state in the Union—a 100% urban, majority African American state. Meanwhile, larger states would see no reason to dilute their fraction of legislative power any further for a small state; the western states would see nothing in it for them; and so on. In addition, many members of Congress, such as Congresswoman Constance A. Morella of Maryland, take the position that the Constitution effectively forbids creation of a new state out of the District, emphasizing that Washington, D.C., "does not belong to only a few of our residents, but to all of our citizens as the seat of our National Government." 139 CONG. REC. H10,568 (daily ed. Nov. 21, 1993) (statement of Rep. Morella). More to the point, even on a shrunken basis, the District would still have some people living within it, a point pressed hard for other reasons by statehood opponents like Adam Kurland. *See* Adam H. Kurland, *Partisan Rhetoric, Constitutional Reality, and Political Responsibility: The Troubling Constitutional Consequences of Achieving D.C. Statehood by Simple Legislation*, 60 GEO. WASH. L. REV. 475 (1992). Whether or not that fact refutes the argument for statehood, it still leaves the problem of disenfranchisement of District residents as a constitutional puzzle that needs to be solved on its own terms.

they pay federal taxes, indeed more per capita than most states.[88] Like state residents but unlike territorial residents, they vote for president and vice-president.[89] District residents are counted in the national census.[90] They are governed by the laws of the United States and were part of the original thirteen states. They fight wars, are drafted into the military, and have lost many men and women in foreign battles.[91] They are treated like residents of the states for federal diversity jurisdiction purposes.[92] The principle of one person–one vote applies within the District to the reapportionment of the District's Council.[93]

No right is more fundamental than the right to vote, which is the right "preservative of all rights"[94] and the right that establishes people as first-class citizens deserving of public respect and equal membership.[95] But intertwined with the right to vote is the right to run for office as a candidate and, at least theoretically, to serve as a representative. Indeed, the right to vote and the right to run imply one another since the "fundamental principle of our representative democracy" embodied in the Constitution is that "the people should choose whom they please to govern them."[96] A law that gave women or racial minorities the right to vote but denied them the right to run for office would violate both their right to participate fully and the right of the voters to choose them as representatives.

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

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[88] "Today, District residents pay over $3 billion annually in Federal taxes at the fourth highest per capita rate in the Nation without full democratic representation." 139 CONG. REC. H10,569 (daily ed. Nov. 21, 1993) (statement of Rep. Vento).

[89] *See* U.S. CONST. amend. XXIII.

[90] *See* 13 U.S.C. § 191 (1994).

[91] "The District of Columbia sustained more casualties during the Vietnam War than 10 States and more killed in action per capita than 47 States . . . more District residents per capita fought in the Persian Gulf War than 46 other States." 139 CONG. REC. H10,569 (daily ed. Nov. 21, 1993) (statement of Rep. Vento).

[92] *See* National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1948) (upholding federal court jurisdiction between citizens of states and citizens of the District of Columbia under the District Clause Federal Statute).

[93] *See* D.C. CODE ANN. § 1-1308(c) (1981).

[94] Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) ("[Voting] is regarded as a fundamental political right, because [it is] preservative of all rights.").

[95] Justice Blackmun observed:

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

Plyer v. Doe, 457 U.S. 202, 233 (1981) (Blackmun, J., concurring).

[96] Powell v. McCormack, 395 U.S. 486, 547 (1969) (quoting Alexander Hamilton, *in* 2 ELLIOT'S DEBATES, *supra* note 38, at 257).

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

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

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

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

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[97] 514 U.S. 779 (1995).
[98] *See id.* at 779.
[99] *Id.* at 819.
[100] *Id.* at 820, 821.
[101] *Id.* at 822.
[102] U.S. CONST. preamble.

states. Thus, just as it would be unconstitutional for states to strip citizens of their right to vote in congressional elections, it is unconstitutional for Congress to disenfranchise the citizens of Washington.

Because the guarantee of the Equal Protection Clause applies to citizens living in the District, they must receive equal benefit from "the principle solemnly embodied in the Great Compromise—equal representation in the House for equal numbers of people."[103] If the House is the people's body, constituted on the basis of population without regard to geographic residence, the population of American citizens living in the District must be included in its constituency. If it is true, as Justice Black wrote, that the principle "uppermost in the minds" of the Framers was that "no matter where he lived, each voter should have a voice equal to that of every other in electing members of Congress," then the current regime in the District plainly violates the one person–one vote right to "fair representation."[104]

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

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. *Our Constitution leaves no room for classification of people in a way that unnecessarily abridges that right.*[105]

### 2. *Popular Representation in the Senate*

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

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

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

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

*Id.* at 18 (quoting THE FEDERALIST No. 57 (James Madison)).

Seventeenth Amendment. Ratified in 1913, this amendment shifted the mode of selection of senators from designation by the state legislatures, the original method specified by Article I, Section 3, to election *by the people* of the states.[106] The purpose of this change was to remove the selection of senators from corrupt state legislatures and place it instead in the hands of the citizenry. The Seventeenth Amendment was directly patterned after the mode of popular election of House members provided for in Article I, Section 2. Thus, although senators are still selected statewide, the basis of selection has shifted to the people. As the Supreme Court put it in *U.S. Term Limits*:

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

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

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

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

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[106] *See* U.S. CONST. amend. XVII.

[107] 514 U.S. 779, 821 (1995).

[108] *See* discussion *infra* Part II.B.

[109] *See* Carl Strass, Note, *Federal Enclaves—Through the Looking Glass—Darkly*, 15 SYRACUSE L. REV. 754, 755 (1964) ("Under [the federal enclave] provision, the federal government has acquired more than 5,000 parcels over which it exercises exclusive jurisdiction. Over forty are bigger than Washington, D.C. Others are only as big as a single building . . . .").

In the watershed case of *Evans v. Cornman*,[110] the Supreme Court struck down Maryland's disenfranchisement of American citizens living on the grounds of the National Institutes of Health ("NIH"), a federal enclave in Montgomery County, which borders the District of Columbia. The NIH campus was built on land donated to Congress by Maryland in 1953.[111] Citizens living on the NIH grounds continued to vote "apparently without question, for another 15 years"[112] in Maryland, just as residents of the seat of government continued to vote after Maryland and Virginia's gift of land in 1790. What ended the practice was a decision holding that a resident of a federal enclave was not a "resident of the state" within the meaning of the state constitution.[113] That state case set the stage for NIH residents to make an equal protection challenge to the removal of their names from the voter rolls.[114]

In *Evans*, the Supreme Court considered Article I, Section 8, Clause 17, the provision that enabled Maryland to transfer to Congress both the land used for NIH and the land used for the District of Columbia. Just as this Clause gives Congress power to exercise legislation over the District, it grants "like Authority over all Places purchased by the consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings . . . ."[115] The Court agreed with Maryland that the NIH federal enclave, like the District of Columbia itself, "is one of the places subject to . . . congressional power."[116]

However, the Court did not agree that the federal character of the NIH enclave obviated Maryland's obligation to grant citizens living there the constitutional right to vote and be represented. On the contrary, by disenfranchising people living on NIH grounds, Maryland was breaking "the citizen's link to his laws and government," the connection that "is protective of all fundamental rights and privileges."[117] The Court thus applied strict scrutiny to determine whether the suffrage denial could be sustained.[118]

Maryland asserted that its compelling interest was "to insure that only those citizens . . . interested in or affected by electoral decisions have a voice in making them,"[119] a potentially valid interest. It argued that NIH

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[110] 398 U.S. 419 (1970).

[111] *See id.* at 421.

[112] *Id.*

[113] *See* Royer v. Board of Election Supervisors, 191 A.2d 446 (Md. 1963).

[114] In October 1968, the Permanent Board of Registry of Montgomery County announced publicly that persons living on NIH grounds failed to meet the state constitutional residency requirement and would be removed from the county's voter rolls. *See Evans*, 398 U.S. at 419–20.

[115] U.S. CONST. art. I, § 8, cl. 17.

[116] *Evans*, 398 U.S. at 420.

[117] *Id.* at 422.

[118] *See id.*

[119] *Id.*

residents were "substantially less interested in Maryland affairs than other residents of the State because the Constitution vests 'exclusive Legislation in all Cases whatsoever' over federal enclaves to Congress."[120] It cited several state supreme court cases that denied suffrage to federal enclave residents on the grounds of the preemptive priority of the "exclusive Legislation" Clause from Article I.[121] But the Supreme Court was not satisfied with this blanket textual appeal to the fact of federal control over the enclave because both the law of voting and the character of federal enclaves had changed over time. It found that "[w]hile it is true that federal enclaves are still subject to exclusive federal jurisdiction . . . , whether [NIH residents] are sufficiently disinterested in electoral decisions that they may be denied the vote depends on their actual interest today . . . ."[122]

The Court then canvassed the "numerous and vital ways in which NIH residents are affected by electoral decisions," including government policy concerning criminal justice, spending and tax decisions, state unemployment and workers' compensation laws, auto registration, family and probate matters, and public education.[123]

Meanwhile, for differences between NIH residents and state residents, Maryland could point only to the fact that NIH residents did not pay real property taxes that made up a large part of Maryland public school financing, would not have paid county personal taxes if there were any, were exempt from service in the state militia, and were exempt from the state's compulsory education law.[124] The Court considered these differences "far more theoretical than real,"[125] and found that they "do not come close to establishing that degree of disinterest in electoral decisions that might justify a total exclusion from the franchise."[126]

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

> In their day-to-day affairs, residents of the NIH grounds are just as interested in and connected with electoral decisions as they were prior to 1953 when the area came under federal jurisdiction and as are their neighbors who live off the enclave . . . .

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[120] *Id.* at 423.
[121] *See id.*
[122] *Id.* at 423–24.
[123] *See id.* at 424.
[124] *See id.* at 424–25, 425 n.5.
[125] *Id.* at 425.
[126] *Id.* at 426.

> They are entitled under the Fourteenth Amendment to protect that stake by exercising the equal right to vote.[127]

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

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

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

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

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

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[127] *Id.*

[128] *Id.* at 424.

[129] District residents, who have experienced both crime waves and unparalleled levels of incarceration, have a profound interest in congressional passage of both federal and state criminal laws. The District of Columbia has the highest incarceration rate in the country, four times the national average. The sentences are the longest in the country—three times the national average. *See* Vincent Schiraldi, *This Moral Code Should be Inviolate*, WASH. POST, Sept. 14, 1997, at C8. Given that District residents pay more than $2 billion a year in taxes and that both their federal and state budgets are passed by Congress, there is a deep interest in congressional spending and taxing decisions. Because Congress is the state legislature, and does not hesitate to legislate for the District, the people have a powerful interest in being represented when it comes to legislation that affects state unemployment and workers' compensation laws, auto registration, family and probate matters, and public education. Moreover, District residents have all of the federal interests that other American citizens have in congressional representation: interests in economic policy, social legislation, matters of war and peace, and urban policy.

munity of District residents has a *stronger* argument for regaining the right to vote than the nearby residents of NIH did in 1970. The fact that District residents live not within the political boundaries of a state but within the political boundaries of a federal district is immaterial. The whole trajectory of the one person–one vote cases is to insist that substantive political rights must trump the administrative consequences of governmental line-drawing and classification.

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

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

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

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

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

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[130] 286 U.S. 427 (1932).

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

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

*Id.* at 4.

gent that Congress admit the District's representatives. It is unsuitable to have every American citizen represented in the District's state legislature except American citizens who live there.[132]

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

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

Chief Justice Warren stated:

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

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

[133] 377 U.S. 533 (1964).

[134] *Id.* at 563.

[135] *Id.* at 567–68.

[136] *Id.* at 558 (quoting Gray v. Sanders, 372 U.S. 368, 379–81 (1963)).

The project of constitutional interpretation is to take words and ideas worked out in the past and to translate them to new contexts in ways that keep faith with the original and evolving meaning of the concepts.[137] Both *Wesberry* and *Reynolds* established principles of popular representation in federal and state government on the basis of one person–one vote regardless of a citizen's geographic residence. The rule of geographic nondiscrimination in voting renders congressional disenfranchisement of the District deeply suspect. The current regime works a double representational harm against a community of more than a half-million American citizens, leaving the people without effective representation in their national and state legislative bodies. Moreover, the right to run for, and serve in, one's state legislature is abolished under the current regime, leaving the residents of the District as the only citizens or subjects of the United States, including not just the states but the territories as well, unrepresented in their own state-level legislature.[138]

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

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

Which resembles "political apartheid" and "racial segregation"[143] more: an oddly drawn majority–African American congressional district

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[137] *See generally* Lawrence Lessig, *Fidelity as Translation*, 65 FORDHAM L. REV. 1365 (1997).

[138] The people of all 50 states, of course, have their own legislatures and the people of the four territories have territorial legislatures. The District population alone is without representation in its state-level legislature, Congress itself.

[139] 509 U.S. 630, 647 (1993).

[140] *Id.* at 641.

[141] *See* Brief for State Appellee, Shaw v. Reno, 509 U.S. 630 (1993), *available in* 1993 WL476425, at *23a.

[142] Holder v. Hall, 512 U.S. 874, 905 (1994) (Thomas, J., concurring).

[143] *See Shaw*, 509 U.S. at 630 (referring to redistricting legislation that is so extremely

where *everyone* has the right to vote and run for office or an oddly drawn majority-African American district where *no one* has the right to vote or run for office?

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

*Shaw* validates expressive harms as constitutionally cognizable.[146] O'Connor's opinion

> is laden with references to the social perceptions, the messages, and the governmental reinforcement of values that the Court believes North Carolina's districting scheme conveys. There is simply no way to make sense of these references, which give the opinion its character and are central to its holding, without rec-

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

[144] This Article is not the place to evaluate the merits of the *Shaw* line of authority; I have registered my elaborate objections elsewhere. *See* Jamin B. Raskin, *The Supreme Court's Racial Double Standard in Redistricting: Bizarre Jurisprudence, Bizarre Scholarship*, 14 U. VA. J.L. & POL. (1998); Jamin B. Raskin, *Supreme Court's Double Standard: Gerrymander Hypocrisy*, NATION, Feb. 6, 1995, at 167. For trenchant criticism of the *Shaw* doctrine, see James U. Blacksher, *Dred Scott's Unwon Freedom: The Redistricting Cases As Badges of Slavery*, 39 HOW. L.J. 633, 660–84 (1996); Frank R. Parker, *The Constitutionality of Racial Redistricting: A Critique of* Shaw v. Reno, 3 D.C. L. REV. 1 (1995).

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

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

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

Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 506–07 (1993).

> ognizing that the decision is grounded in concern for expressive harms.[147]

The anti-apartheid doctrine of "expressive harms" elaborated in *Shaw* provides a devastating angle of attack on disenfranchisement in the District, which is a system of far more thorough and ongoing symbolic *and* material injury than anything experienced by voters in the states where majority-minority districts have been struck down by the Court.[148]

Like the plans invalidated by the *Shaw* line of cases, the District's disenfranchisement bears an uncomfortable resemblance to political apartheid. The District population is more racially lopsided than any of the districts so far invalidated by the Court. According to the 1990 Census, the District population is 65.8% African American, 27.4% white, and 2.2% Hispanic.[149] Unlike citizens in majority-minority congressional districts in the states, all of whom enjoy the right to vote for representatives and senators and state and local officials, the District's population is categorically denied the right to vote for members of the U.S. House and Senate as well as their main local governing bodies.

The District's similarity to "political apartheid" in South Africa goes beyond the similarity exhibited by majority-minority districts in the other states. Actual disenfranchisement of the black majority was the central feature of "political apartheid" in pre-liberation South Africa, where 85% of the population was denied the right to vote for representatives to Parliament and the National Government. Like the twenty-one million blacks in South Africa previously denied representation in Parliament and on Provincial Councils, the majority-black population in the District of Columbia is without a vote in its national and "state" legislatures.[150]

The congruence with apartheid becomes even more disturbing when one looks at the District's disenfranchisement in national and local con-

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[147] *Id.* at 508–09.

[148] *See* Abrams v. Johnson, 521 U.S. 74 (1997) (holding that the Georgia legislature acted within its discretion in deciding that the creation of two majority black districts would be an impermissible racial gerrymander); Bush v. Vera, 517 U.S. 952 (1996) (holding that strict scrutiny was triggered in a Texas redistricting plan where the plan was "so extremely irregular on its face that it rationally can be viewed only as an effort to segregate races for the purposes of voting, without regard for traditional districting principles"); Johnson v. De Grandy, 512 U.S. 997 (1994) (finding no violation of the Voting Rights Act even though the Florida redistricting plan diluted Hispanic and black voting strength); *Shaw*, 509 U.S. 630 (casting doubt on North Carolina's redistricting plan as segregation for the purposes of voting).

[149] *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1990 CENSUS OF POPULATION AND HOUSING, POPULATION AND HOUSING UNIT COUNTS (1990).

[150] *See* A. Leon Higgonbotham et al., Shaw v. Reno: *A Mirage of Good Intentions With Devastating Racial Consequences*, 62 FORDHAM L. REV. 1593, 1622 (1994) ("'The twenty-one million black people enjoy no representation in the central Parliament. Nor are they represented in the Provincial Councils which have limited legislative powers over the provinces.'" (quoting JOHN DUGARD, HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER 6 (1978))).

texts. In a nation of fifty majority-white states, the majority-African American population of the District is the only community not represented in federal, state, and most recently, local government. In a familiar historical pattern, the majority-black District's affairs are controlled at almost every significant turn by representatives of majority-white districts from neighboring and other southern states.[153]

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

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

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

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

[153] *See* Lisa Greenman, *Turning Back the Clock: Why Close A School Where the Races Mix?*, WASH. POST, Apr. 13, 1997, at C1. By contrast, before school desegregation took place as a result of *Bolling v. Sharpe*, 347 U.S. 497 (1954), white students constituted about 50% of the public schools. *See* Joseph M. Sellers et al., *Public Education Legal Service Project: A Private Sector Initiative in the Area of Public Education*, 27 HOW. L.J. 1471, 1473 (1984) (describing the racial demographics of the school system when *Bolling* was decided).

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

[155] *See* Jamin B. Raskin, *Imprisoning 'the Last, the Least, and the Lost,'* LEGAL TIMES, Nov. 28, 1994, at 27. Of every 100,000 persons, the United States imprisons 426 people, Louisiana imprisons 478, and the District imprisons an astounding 1651. Apartheid South Africa incarcerated 333 per 100,000. As part of the recent legislation reclaiming power from the home rule government, Congress passed criminal justice provisions that are expected to substantially *lengthen* criminal sentences in the District. *See* HOBBLING A GENERATION, *supra* note 154, at 8 (discussing recent congressional creation of a federal "Truth-in-Sentencing" Commission whose mandate is to see to it that felons serve at least 85% of their sentences). Prisoners in D.C. in 1994 served 67% of their sentences, which is already higher than the national average of 46% for violent offenders. *See id.*

protection claims.[156] It would be similarly irrelevant to allege that disenfranchisement in the District disproportionately harms African Americans (although such an allegation would be easy to make given the demographics of the District).

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

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

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

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

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[156] *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976) (requiring black plaintiffs challenging a police candidate testing system as violative of the Equal Protection Clause to prove a discriminatory purpose).

[157] *See, e.g.*, Mobile v. Bolden, 446 U.S. 55, 65 (1980) (stating that the Fifteenth Amendment "prohibits only purposefully discriminatory denial or abridgement by government of the freedom to vote 'on account of race, color, or previous condition of servitude'" (quoting U.S. CONST. amend. XIV)).

[158] *See* KEELEY, *supra* note 5, at 121.

[159] *Id.* at 121–22.

[160] *Id.* at 123.

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

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

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[161] *See* 471 U.S. 222 (1985).

[162] *Id.* at 232.

[163] *E.g.*, The Civil Rights Cases, 109 U.S. 3 (1883).

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

## III. Strict Scrutiny

The Court must apply "strict review of statutes distributing the franchise" because they "'constitute the foundation of our representative society.'"[165] Thus, the question raised by the equal protection claims is whether Congress possesses a compelling interest in disenfranchising the District population. Three general categories of interest present themselves: (1) interests that relate to some characteristics of the District population that are allegedly disqualifying; (2) an interest in complying with the structural provisions of the Constitution that allegedly require disenfranchisement and do not permit Congress to extend the vote in congressional elections to District residents; (3) an interest in maintaining federal control over the seat of government and vindicating specific federal interests in the capital city. In this section, I conclude that the first kind of interest is categorically impermissible; that the second is specious; and that the third is real and arguably compelling with respect to voting in local elections if narrowly tailored, but wholly unconvincing as a reason for disenfranchisement from Congress.

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

The first type of interest offered to justify disenfranchisement in the District relates to some allegedly disqualifying characteristic of the population. The offending characteristic may be dressed up in sophisticated terms, but in 1970, Senator Edward Kennedy plainly observed that "opposition to congressional representation for the District [is] based on the conviction that it is 'too liberal, too urban, too black, or too Democratic.'"[166] Of course, the first and fourth adjectives represent nakedly political and ideologically biased efforts to "fence[e] out" a "sector of the population because of the way they may vote," a kind of political discrimination condemned by the Supreme Court.[167] The "too urban" argument has no justification in the Constitution and seems to cut directly against the Court's statement that "[l]egislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests."[168] The idea that the District population is "too black" to be represented is the very antithesis of everything the Fourteenth and Fifteenth Amendments are designed to accomplish.

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[165] Dunn v. Blumstein, 405 U.S. 330, 337 (1972) (quoting Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 627 (1969)).

[166] Kurland, *supra* note 87, at 476 n.2 (citing Arlen J. Large, *Full Representation for D.C.?*, WALL ST. J., Aug. 30, 1978, at 14 (quoting Sen. Edward Kennedy)). Senator Kennedy repeated those opposition arguments in 1991. *See id.*

[167] Carrington v. Rash, 380 U.S. 89, 94 (1965) (striking down Texas' disenfranchisement of members of the armed forces).

[168] Reynolds v. Simms, 377 U.S. 533, 562 (1964).

There are, however, slightly elevated forms of this kind of argument. It has been suggested that the District population is too politically and economically dependent on the federal government,[169] or that it lacks sufficient political diversity. It is worth briefly parsing these arguments.

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

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

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

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[169] *See* JUDITH BEST, NATIONAL REPRESENTATION FOR THE DISTRICT OF COLUMBIA 3-4 (1984), *cited in* Neuman, *supra* note 21, at n.133 ("The District is ineligible for statehood because its populace is too closely associated with the interests of the federal government.")

[170] As of December 31, 1994, approximately 2,903,000 civilian federal employees lived and worked in the United States, but only 204,000, or roughly seven percent, worked in the District. *See* BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1997, at 350 tbl. 539 (1997).

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

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

[173] *See* BARONE & UJIFUSA, *supra* note 5, at 450-62.

cratic.[174] The complaint that the District lacks sufficient political diversity is a camouflaged reformulation of the impermissibly viewpoint-specific complaint that it is too Democratic or too liberal.

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

The assumption that the Constitution compels congressional disenfranchisement of District residents has long permeated legal and popular consciousness.[175] Even many proponents of statehood and greater home rule accept on face value the ubiquitous claim that the non-voting regime flows necessarily from the architecture of the Constitution. But the relevant structural provisions of the Constitution—Article I, Section 8, Clause 17; Article I, Section 2, Clause 1; the Seventeenth Amendment; and the Twenty-third Amendment—contain nothing explicitly or implicitly compelling disenfranchisement.

#### *1. The District Clause Fallacy*

Article I vests in Congress the power to "exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may . . . become the Seat of the Government of the United States."[176] It is often argued that this Clause requires disenfranchisement of the population of the District in congressional elections. According to this conception, because Congress is the governmental authority for the District, residents cannot constitutionally be given the right to vote for members of Congress who share in actual Article I powers. However, this interpretation is not supported by the text, structure, history, or purposes of the District Clause, much less the conception of political sovereignty that underlies the Constitution as a whole.

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

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[174] *See id.* at 684–720.

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

[176] U.S. CONST. art. I, § 8, cl. 17.

that Congress' authority over the District is "for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings . . . ."[177]

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

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

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

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

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

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[177] *Id.*

[178] *See* discussion *supra* Part II.B.

[179] The "very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

[180] *See supra* note 28 and accompanying text, *discussing* O'Donoghue v. United States, 289 U.S. 516 (1933).

[181] *See supra* note 29 and accompanying text, *discussing O'Donoghue*, 289 U.S. at 541 (quoting Downes v. Bidwell, 182 U.S. 244, 260-61 (1901)).

[182] As a lesser concern, the Framers also thought that carving out a separate jurisdiction for the national government would dampen the intense sectional rivalries that had been unleashed by the peripatetic Congress' search for a permanent home in the 18th century. *See* 3 ELLIOT'S DEBATES, *supra* note 38, at 432-33. For expressions of this sectionalism, see *id.* at 430-31, 433 (statement of Mr. Grayson) and see *id.* at 440 (statement of Mr. Pendleton). This additional motivation, however, in no way conflicts with the constitutional imperative of voting by capital residents.

A major reason the Framers consistently argued for giving members of Congress control over the city in which they met was "to preserve the police of the place and their own personal independence, that they may not be overawed or insulted, and of course to preserve them in opposition to any attempt by the state where it shall be."[181] The critical event giving impetus to this pervasive rationale was a rowdy public demonstration at the Pennsylvania State House building in Philadelphia on June 21, 1783, while the United States Congress was meeting there.[184] According to historian Kenneth Bowling, thirty former Revolutionary War soldiers, mostly from Pennsylvania, prepared to mount an assault on the building.[185] The target of their wrath was not Congress, which had recessed over the weekend, but Pennsylvania's Executive Council, which was in session on the second floor of the building. The soldiers had come to the State House to demand their overdue pay from the Executive Council.[186]

As the demonstration grew larger and rowdier, the congressmen appealed to the Executive Council to summon the Pennsylvania militia.[187] The Council refused, arguing that absent an authentic emergency the militia would never take up arms against the men who had fought for American independence.[188] The Executive Council finally agreed to accept the soldiers' petition and meet with a group of officers, but not before the soldiers and gathered crowd had insulted and intimidated the congressmen in the building.[189]

According to Bowling, Alexander Hamilton and his Federalist allies exploited the flare-up over wages precisely to win support in their effort to constitutionalize their vision of a magnificent federal capital directly under congressional control. In addition, Bowling suggests that "Hamilton and his centralist allies deemed it inappropriate that continental soldiers be allowed to settle their claims against Congress with a state government."[190] In an emergency session held the night of the demonstration, Congress passed several secret resolutions, mainly written by Hamilton, protesting the insult experienced by members of Congress, authorizing Hamilton to seek assurances from Pennsylvania that it would in the future ensure the "dignity of the federal government," and ordering George Washington to march a group of loyal federal soldiers to Philadelphia to

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[183] *Id.* at 439–40 (statements of Mr. Pendleton); *cf. id.* at 89 (statement of Mr. Madison) (warning that a state with legislative power over the seat of government could threaten and control Congress).

[184] *See* KENNETH R. BOWLING, THE CREATION OF WASHINGTON, D.C.: THE IDEA AND LOCATION OF THE AMERICAN CAPITAL 30–34 (1991) (providing an authoritative and detailed account of these events and their political meanings).

[185] *See id.* at 30.

[186] *See id.*

[187] *See id.* at 32.

[188] *See id.*

[189] *See id.* at 32–33.

[190] *Id.* at 31. Centralists sought stability for the new country, and most wanted the federal government to be supreme over the states. *See id.* at 24.

quell the gathering insurrection.[191] Congress also passed, and soon acted upon, a clandestine measure authorizing the President of Congress to reconvene Congress in New Jersey "in order that further and more effectual measures may be taken for suppressing the present revolt, and maintaining the dignity and authority of the United States."[192]

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

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

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

Other state ratification debates reveal the same conception of the purposes behind "exclusive legislation." In the North Carolina Conven-

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[191] *Id.* at 33.
[192] *Id.* at 33–34.
[193] *Id.* at 34.
[194] Whit Cobb, *Democracy in Search of Utopia: The History, Law, and Politics of Relocating the National Capital*, 99 DICK. L. REV. 527, 530–31 (1995).
[195] Raven-Hansen, *Congressional Representation*, *supra* note 175, at 171.
[196] 3 ELLIOTT'S DEBATES, *supra* note 38, at 434 (statements of Mr. Grayson).
[197] *Id.* at 89.
[198] *Id.* at 433.
[199] *Id.*

tion, Delegate Iredell asked about the "consequence" of locating the capital "in the power of any one particular state . . . ."[200] "Would not this be most unsafe and humiliating? Do we not all remember that, in the year 1783, a band of soldiers went and insulted Congress?"[201]

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

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

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

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[200] 4 ELLIOT'S DEBATES, *supra* note 38, at 219.

[201] *Id.* at 219–20.

[202] For example, Thomas Tredwell, a delegate to the New York ratifying convention, argued that "subjecting the inhabitants of that district to the exclusive legislation of Congress . . . is laying a foundation on which may be erected as complete a tyranny as can be found in the Eastern world." 2 ELLIOT'S DEBATES, *supra* note 38, at 402. Still, it is hard to infer from such statements that the purpose of the District Clause was disenfranchisement. First, Tredwell was speaking about a District Clause without any accompanying Bill of Rights to inform it. Second, as a critic of central power, Tredwell was making a prediction about what Congress would actually do with respect to local voting rights rather than what it *had* to do as a matter of constitutional law.

> never contemplated that Congress would be permitted to use cession to strip away the rights accorded to all *state* citizens by the Constitution, rights that "attached to [District residents] irrevocably" when the District was a part of the ceding states. [citation omitted] . . . . As state citizens prior to cession, D.C. residents were entitled to participate in the election of the President via the electoral college under Article II, § 1 . . . [and] to elect representatives to the House of Representatives, Article I § 2 cl.1.[203]

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

Raven-Hansen has attributed the Framers' inattention to the voting issue to several factors.[205] First, because the Framers' focus was on assuring federal independence from states and control over its local meeting place, the problem of suffrage was not on anyone's mind. The geographic site for the District had not yet been located, and thus the Framers were dealing with a complete future abstraction. It was perfectly conceivable that the District would be located on virtually empty land, and indeed when it was sited on the Potomac and the federal government finally opened up shop in 1800, it had fewer than 15,000 year-round residents, much less than the target population of 50,000 that Congress had set for the admission of new states in the Northwest Ordinance of 1787.[206] Second, "it was widely assumed that the land-donating states would make appropriate provision in their acts of cession to protect the residents of the ceded land."[207] On this theory, voting was not a matter of

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

[204] National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 587 (1949).

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

[206] *See id.* at 177.

[207] *Id.* at 172 (citing 3 ELLIOTT'S DEBATES, *supra* note 38, at 433 (statements of James Madison)).

constitutional concern—recall that at the time there was *no* federal constitutional protection of the right to vote—because the ceding states would work the matter out politically with Congress during cession negotiations. Delegate Iredell in the North Carolina ratification debate pointed out that a ceding state "may stipulate the conditions of the cession. Will not such state take care of the liberties of its own people?"[208]

Finally, Raven-Hansen argued that representation of District residents was not an issue because "it was assumed that the residents of the District would have acquiesced in the cession to federal authority."[209] The most explicit statement by one of the Framers on this point was Madison's observation that:

> the [ceding] State will no doubt provide in the compact for the rights, and the consent of the citizens inhabiting it . . . as they will have had their voice in the election of the government which is to exercise authority over them; as a municipal legislature for local purposes, derived from their own suffrages, will of course be allowed them . . . .[210]

Madison's statement that District residents "will have had their voice" in the election of Congress is, of course, studiously ambiguous. It might simply mean, as Raven-Hansen seems to believe, that Madison recognized that District residents, as former residents of states, will have had their chance at some point in the past to cast votes for representatives to Congress, now their exclusive legislator. Alternatively, it might mean that Madison anticipated the arrangement that actually prevailed for the first decade after cession by Maryland and Virginia in which District residents continued to vote for members of Congress from their states of former domicile. At any rate, it is hard to read Madison's language as manifesting anything like an intention to permanently disenfranchise the capital population. On the contrary, his words evince a most democratic spirit, antithetical to the idea of constitutionally engineered disenfranchisement, and a specific commitment to a "municipal legislature . . . derived from their own suffrages."[211]

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[208] 4 ELLIOTT'S DEBATES, *supra* note 38, at 219.

[209] Raven-Hansen, *Congressional Representation*, *supra* note 175, at 172.

[210] THE FEDERALIST NO. 43, at 280 (James Madison) (Earle ed. 1937). However, Raven-Hansen considered Madison's words "doubtful authority" for the proposition that Madison anticipated direct District representation in Congress. He especially objected to a misreading of Madison's statement by proponents of District representation in which the future perfect tense is altered to read "they will have their voice in the election of the government." *See* Raven-Hansen, *supra* note 175, at 172-73 n.24, (citing *Hearings on H.J. Res. 396 Before the House Comm. on the Judiciary*, 90th Cong. 43 (1967) (statement of Citizens' Joint Committee on National Representation)).

[211] THE FEDERALIST NO. 43, *supra* note 210, at 280.

*2. The "People of the States" Fallacy*

The argument that the Constitution itself disenfranchises the District also relies on language describing senators as "chosen . . . by the People of the several States"[212] and as coming "from each State."[213] The theory is that the constitutional vernacular of "states" reflects an intention to exclude District residents categorically from representation in Congress. This claim is not simply that the District community, as a distinct political entity, is barred from sending representatives directly to the House and Senate, but that District residents themselves are constitutionally *forbidden* to vote for representatives to Congress, even if from other states.

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

The history bears out this interpretation in the most vivid way. During the first Congress, it was clearly understood that the Constitution did *not* disenfranchise citizens living in the District. When Congress took possession from Maryland and Virginia in 1790, residents of the land ceded to Congress continued to vote in federal elections in Maryland and Virginia for the first decade after cession. Although the local population was brought under the "Exclusive Legislation" of Congress "in all cases whatsoever" in 1790, Congress set the first Monday in December of 1800 as the official day for removing the federal government to the District, and so provided that District residents could continue to vote in Maryland and Virginia for members of Congress and that Maryland and Virginia law would continue to operate within the District until further notice.[214] There is no recorded challenge to this practice, and indeed the first

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[212] U.S. CONST. art. I, § 2.

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

[214] Raven-Hansen seems to embrace the idea that exclusive legislative authority vested in Congress in 1800. *See* Raven-Hansen, *Congressional Representation*, *supra* note 175, at 174 (citing United States v. Hammond, 26 F. Cas. 96 (C.C.D.C. 1801) (No. 15,293)). But I would argue that the event of constitutional dimension took place in 1791 when Congress accepted the lands from Maryland and Virginia. The Constitution requires Congress to "exercise exclusive Legislation in all Cases whatsoever over such *District* . . . as may, by cession of particular States, and the Acceptance of Congress, become the Seat of Government of the United States . . . ." U.S. CONST. art. I, § 8, cl. 17 (emphasis added). Thus, the cession, the acceptance, and the creation of the District all took place in 1791 despite the fact that Congress chose not to occupy the District or govern it directly until 1800. Congress' decision to continue Maryland and Virginia jurisdiction during the interval period was wholly within its discretion, and it could just as well have appointed commissioners or

Congress itself must have thought it perfectly unobjectionable, a fact pregnant with constitutional meaning.[215]

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

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

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

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

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allowed some other states to supervise the District.

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

[216] Raven-Hansen, *supra* note 175, at 175 (quoting 10 ANNALS OF CONG. 869 (1800) (statements of Rep. Nicholas)).

[217] *Id.* at 176.

[218] *See* WASHINGTON PAST AND PRESENT: A HISTORY (John Clagett Proctor ed., 1930).

[219] *See* BIOGRAPHICAL DIRECTORY OF THE AMERICAN CONGRESS 1774-1927, H.R. DOC. NO. 81-607, at 92 (1950).

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

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

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

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[220] U.S. CONST., art. I, § 1.

[221] Michel v. Anderson, 14 F.3d 623, 630 (D.C. Cir. 1994).

committees. Most significantly, however, delegates enjoy the right to vote in committee and in subcommittee,[222] and for a brief period even voted in the Committee of the Whole on the floor of the House.[223]

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

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

A second practice suggesting that the *statelessness* of District residents does not compel them to be perpetually unrepresented is Congress' decision to enfranchise citizens who have moved abroad temporarily or permanently. Through the Uniformed and Overseas Citizens Absentee Voting Act, first enacted in 1986, Congress requires that each state "permit absent uniformed services voters and overseas voters to use absentee registration procedures and to vote by absentee ballot in general, special, primary, and runoff elections for Federal office."[224] With this Act, Con-

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[222] The Rules of the House of Representatives provide that the delegates shall "serve on standing committees in the same manner as Members of the House and shall possess in such committees the same powers and privileges as the other Members." ROBIN H. CARLE, U.S. HOUSE OF REPRESENTATIVES, RULES OF THE HOUSE OF REPRESENTATIVES 18 rule XII (1998).

[223] This was the subject of the litigation in *Michel v. Anderson*. On January 5, 1993, the House gave the five delegates the right to vote in deliberations of the Committee of the Whole. The entire Republican membership of the House brought suit alleging that this practice violated Article I's command that the House "shall be composed of Members chosen every second year by the People of the several States." Because the court thought that the "ancient practice of delegates serving on standing committees of the House" was beyond challenge, it found that the enlargement of the Delegates' voting privileges had no "constitutional significance." *See Michel*, 14 F.3d at 632.

[224] 42 U.S.C. § 1973ff-1 (1994).

gress also compels the states to accept and process, with respect to any Federal election, any *otherwise valid* voter registration application from an absent uniformed services voter or overseas voter, if the application is received not less than thirty days before the election.[225]

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

### 3. *The Twenty-Third Amendment Fallacy*

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

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

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[225] *See id.*

[226] *See* U.S. CONST. amend. XXIII, § 1 (stating that the District "shall appoint . . . electors of President and Vice President . . . in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State . . .").

[227] *See id.*

create the office of delegate from the District of Columbia a decade later.[228]

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

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

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[228] *See* 2 U.S.C. § 25(a) (1994).

[229] *See, e.g.*, 108 CONG. REC. 17,660 (1962) (statement of Rep. Lindsay of New York) ("Mr. Speaker, if we are going to amend the Constitution, the amendment ought to be meaningful . . . such an amendment should abolish impediments to voting in local elections as well as state elections. It should not be confined to Members of Congress.").

[230] 383 U.S. 663 (1966).

[231] *Id.* at 677 (Black, J., dissenting).

[232] *Id.* at 684 (Harlan, J., dissenting).

[233] *Id.* at 669 (emphasis in original).

that culminated in the Court's landmark decision in *United States v. Virginia*.[234]

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

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

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

## IV. The Justiciability of the District's Disenfranchisement

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

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[234] 518 U.S. 515 (1996) (holding that Virginia violated equal protection in maintaining a male-only admissions policy at the Virginia Military Institute); *see also* J.E.B. v. Alabama, 511 U.S. 127 (1994) (forbidding preemptory challenges to potential jurors based on gender); Kirchberg v. Feenstra, 450 U.S. 455 (1981) (declaring that a Louisiana law which allowed a husband to dispose of property held jointly with his wife without her consent violated equal protection); Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980) (holding that gender-based distinctions in Missouri's workers' compensation law violated equal protection); Frontiero v. Richardson, 411 U.S. 677 (1973) (holding that disparate treatment of servicemen and servicewomen in allocating benefits was a violation of the Equal Protection Clause).

[235] *See Closed Streets, Open Issue*, WASH. POST, May 24, 1995, at A24; Stephen C. Fehr & Hamil R. Harris, *U.S. Says It Will Pay for Closing the Avenue; Officials Irked D.C. Was Not Consulted Before Action*, WASH. POST, May 24, 1995, at D5.

[236] U.S. CONST. art. III, § 2.

"several doctrines" have grown up "to elaborate that requirement;"[237] two of them are crucial in testing the justiciability of the claims outlined above: the political question doctrine and standing. This Part argues first that a federal suit addressing the representational rights of District residents would present no "political question" outside the competence of the judiciary. The District's disenfranchisement is a perfectly redressable violation of voting rights like the ones dealt with in one person–one vote or majority-minority district cases. Second, several hundred thousand people who are concretely and palpably injured by this regime have standing to challenge their disenfranchisement.

### *A. Is This a Political Question?*

These claims will confront, before anything else, the assertion that they raise a non-justiciable political question. A political question is one "where there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.'"[238] These are the two principal factors for analysis.

First, the question of voting rights in the District is not textually committed to the political arena. The text of the Constitution mentions neither congressional representation of District residents nor the specific nature of their voting rights. The District Clause provides that Congress shall "exercise exclusive Legislation" over the District,[239] but this is the same kind of power that states exercise over cities and towns, a kind of power that does not include authority to disenfranchise citizens in federal elections.

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

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[237] 468 U.S. 737, 750 (1984).

[238] Nixon v. United States, 506 U.S. 224, 224 (1993) (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).

[239] U.S. CONST. art. I, § 8, cl. 17.

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

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

The Court has accordingly found justiciable attacks on practices that are alleged to dilute or cancel out votes, such as malapportioned legislative districts[248] and gerrymandered districts with majority-minority populations.[249] The fact that the Supreme Court, ultimately, would be reviewing actions of Congress rather than the states does not change the analysis. In *Powell v. McCormack*,[250] the Court found justiciable the seating of a

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[240] U.S. CONST. art. I, § 5.

[241] 395 U.S. 486 (1969).

[242] *See* U.S. CONST. art. I, § 2.

[243] *See* Powell v. McCormack, 395 U.S. 486 (1969).

[244] It might be said that the Qualifications Clause itself implies disenfranchisement of the District since a District resident cannot be an inhabitant of a state. But District residents can be, and frequently are, treated as residents of states for both constitutional and statutory purposes.

[245] Congress has passed a statute requiring that Members of Congress who live year-round in the District of Columbia be treated like inhabitants of states for the constitutional and statutory purposes of taxation. By implicit analogy, this treatment must extend to voting and candidacy. *See* 4 U.S.C. § 113 (1994); 26 U.S.C. § 162 (1994).

[246] 369 U.S. 186 (1962).

[247] *Id.* at 217.

[248] *See* Reynolds v. Sims, 377 U.S. 533 (1964); Wesberry v. Sanders, 376 U.S. 1 (1963).

[249] *See* Miller v. Johnson, 515 U.S. 900 (1995); Shaw v. Reno, 509 U.S. 630 (1993).

[250] 395 U.S. 486 (1969)

Congressman allegedly denied his rightful seat in the House. In *United States Department of Commerce v. Montana*,[251] a case closely analogous to the District's, the Court considered the question of whether Congress' preferred method of apportioning House districts among the states (the so-called "method of equal proportions") violated the principle of one person–one vote developed in *Wesberry v. Sanders*.[252] The Court rejected the United States' argument that the case presented a nonjusticiable political question.

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

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

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

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

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[251] 503 U.S. 442 (1992).
[252] *Id.* at 446.
[253] *Id.* at 458.
[254] *Id.*
[255] *Id.* at 459.
[256] 14 F.3d 623 (D.C. Cir. 1994) (upholding the voting policy).

to prevail on the merits, but as a threshold matter, the allegation that Congress is denying fundamental voting rights must be heard.

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

### *B. Is There Standing?*

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

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

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

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

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[257] JOHN HART ELY, DEMOCRACY AND DISTRUST 117 (1980).
[258] *See* Allen v. Wright, 468 U.S. 737, 751 (1984).
[259] 509 U.S. 630 (1993).
[260] 515 U.S. 900 (1995).
[261] Warth v. Seldin, 422 U.S. 490, 501 (1975).

sentation, have a lesser *opportunity to compete* for federal resources in Congress. We know this point from *Regents of the University of California v. Bakke*[262] and *Associated General Contractors of America v. Jacksonville*,[263] in which standing to challenge affirmative action policies did not require proof that the challengers would have received the benefits had the policies not been in place. It was sufficient to allege as injury that applicants were denied a fair chance to compete.[264]

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

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

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

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

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[262] 438 U.S. 265 (1978).

[263] 508 U.S. 656 (1993).

[264] *See Bakke*, 438 U.S. at 280 n.14; *Associated*, 508 U.S. at 666 ("The 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of [a barrier that makes it more difficult for members of a group to obtain a benefit], not the ultimate inability to obtain the benefit.").

[265] Allen v. Wright, 468 U.S. 737, 751 (1984) (citing Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41 (1975)).

[266] *See* discussion *supra* Part II.

[267] 347 U.S. 497 (1954).

[268] Hobson v. Hansen, 269 F. Supp. 401, 408 n.1 (D.D.C. 1967) (emphasis added) (citing Carr v. Corning, 182 F.2d 14, 17–19 (D.C. Cir. 1950)).

according to the principle of one person–one vote and respect the other constitutional rights currently being abridged.

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

*1. Direct Statutory Enfranchisement*

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

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

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

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

[271] There are 537 federal statutes that treat the District of Columbia as though it were a State for programmatic, governmental and constitutional purposes. *See, e.g.*, 2 U.S.C. § 431 (1994) (Federal Election Campaign Act); 15 U.S.C. § 1692a (1994) (Fair Debt Collection Act of 1977); 17 U.S.C. § 101 (1994) (subject matter and scope of copyright); 18 U.S.C. § 1961 (1994) (Racketeer Influenced and Corrupt Organizations); 23 U.S.C. § 101 (1994) (federal-aid highways); 42 U.S.C. § 1973ee-6 (1994) (voting accessibility for the elderly and handicapped); 42 U.S.C. § 1973ff-6 (1994) (Uniformed and Overseas Citizens Absentee Voting Act of 1986); 42 U.S.C. § 1973gg-1 (1994) (National Voter Registration Act of 1993). *See also D.C. Representation in Congress: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 95th Cong. 7–12 (1978) (testimony of Senator Edward M. Kennedy).

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

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

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

Third, the Court in *District of Columbia v. Carter*[278] more generally "recognized nominal statehood as a commonplace of constitutional construction."[279] Justice Brennan wrote for the Court: "Whether the District of Columbia constitutes a 'State or Territory' within the meaning of any particular statutory or constitutional provision depends upon the character and aim of the special provision involved."[280]

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

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[272] *See* Raven-Hansen, *Congressional Representation*, *supra* note 175, at 179–84. Raven-Hansen here introduces and elaborates the "theory of nominal statehood" which he argues can and should be used to make political representation available to District residents.

[273] 18 U.S. (5 Wheat.) 317 (1820).

[274] *Id.* at 319.

[275] Raven-Hansen, *Congressional Representation*, *supra* note 175, at 179–81.

[276] 337 U.S. 582 (1949).

[277] *See* Raven-Hansen, *Congressional Representation*, *supra* note 175, at 183. This holding, however, can be only one element of an argument for the treatment of the District as a state. As Raven-Hansen noted, "*Tidewater* effectively recognized the District's nominal statehood only for purposes of constraing the federal judicial power, and not for the purposes of representation." *Id.*

[278] 409 U.S. 418 (1973).

[279] Raven-Hansen, *Congressional Representation*, *supra* note 175, at 184.

[280] *Carter*, 409 U.S. at 420.

such a statute "would correct the historical accident by which D.C. residents lost the shelter of state representation without gaining separate participation in the national legislature."[281]

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

*2. Treating District Residents Like Citizens Living Abroad*

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

*3. A Structural Revision: Statehood*

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

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[281] Raven-Hansen, *Congressional Representation*, *supra* note 175, at 185.

[282] *See* Lawrence M. Frankel, *National Representation for the District of Columbia: A Legislative Solution*, 139 U. PA. L. REV. 1659 (1991) (updating and, in certain constitutional respects, expanding on Raven-Hansen's original argument).

[283] *See, e.g.*, Raven-Hansen, *Congressional Representation*, *supra* note 169, at 179–84.

[284] 42 U.S.C. § 1973ff-6 (1994).

could live up to the command of equal protection for citizens now caught in the undemocratic arrangements in the District.[285]

*4. Another Structural Revision: Reunion with Maryland*

Just as Congress returned Alexandria and Arlington to Virginia in 1846, it could return most of the present District to Maryland, thus giving Washingtonians their political rights presently being denied. Maryland would have to consent to this retrocession of its former lands since Article IV, Section 3 provides that "no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress."[286] It does not presently appear that the political will exists in Maryland or in Congress to make this happen, but it remains a theoretical possibility.

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

## V. Conclusion

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

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[285] *See* Raskin, *supra* note 87, at 423; Raven-Hansen, *D.C. Statehood*, *supra* note 15.

[286] U.S. CONST. art. IV, § 3.

[287] 5 U.S. (1 Cranch) 137 (1803).

[288] *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 6, 272 (1988).

[289] *See* Shapiro v. Thompson, 394 U.S. 618 (1969); Bolling v. Sharpe, 347 U.S. 497

time has come for another case; this one to test whether equal protection for District citizens extends to the right to vote and to be represented in Congress.

A resilient truth about equal protection jurisprudence is that historical practice is no guarantee of present-day constitutionality, for "[n]otions of what constitutes equal treatment for the purposes of the Equal Protection Clause *do* change."[290] Radical reversals of obsolescent arrangements are to be expected because "the Equal Protection Clause is not shackled to the political theory of a particular era."[291] The equal protection principle will destabilize every settled form of political inequality and force the managers of exclusionary regimes to justify themselves.

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

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

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

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

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

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(1954).

[290] Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 669 (1966).

[291] *Id.*

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

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

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

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

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[292] 17 U.S. (4 Wheat.) 316, 404–05 (1819).

# Testimony of

Michael D. Brown
United States Senator
District of Columbia
Before
The United States Senate
Committee on Homeland Security
and Government Affairs

September 15, 2014

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I would like to thank the Chairman and members of the committee for this opportunity to testify. Senator Carper, the first time I talked to you about DC Statehood. You said, "push and keep pushing. Your cause is just and you will prevail." So, I have come here to push. My constituents have been denied their basic rights of citizenship and this is unacceptable. In spite of this, they have never shirked a single responsibility of democracy. They have always been exemplary citizens: paying taxes, serving in our military, taking on every obligation and receiving only partial compensation in return. I know there are several proud veterans on this Committee who know what it means to risk life and limb in defense of our freedom, but imagine what it was like to serve in a World War knowing that you did not even have the right to vote for President. I am proud to represent people with this kind of character. Proud to call myself a Washingtonian knowing that DC residents have always cared more about America than their own self-interest. Our founding fathers established this great nation through a sacred covenant with the people based on freedom, liberty and mutual obligation. Although we have faithfully fulfilled our end of the bargain, our government has consistently failed in its responsibility to reciprocate and has defaulted on the solemn pledge of citizenship that forms the basis of all legitimate governance. One nation indivisible; not separate but equal; that's the promise of democracy and for 200 years we have been denied. Once the contract has been breached, all that flows from it is tainted and the covenant that binds us is diminished. We're tired of hearing irrelevant excuses: too small; never meant to be; a violation of the Constitution; and insults, like move if you don't like it; stop whining; go back from where you came that only perpetuate the

misconception that we expect to be given something rather than reclaiming that which is already ours. The framers may have given the power to Congress but the right was given to us by God. I am here to say enough. We have earned our citizenship; paid for with our sacrifices, our money, and our service to America. The time has come to right this wrong which violates every principle Americans holds dear. You heard testimony today using words like budget autonomy, legal autonomy, and voting rights. Make no mistake; only Statehood makes us whole. Any other solution glosses over the inherent inequity in our subjugation and perpetuates our second class citizenship. Only statehood makes us equal. Only statehood resolves the injustice that has resulted in us becoming colonists rather than citizens. You ask what are the implications of S. 132? They are simple; fulfillment of an indenture as old as America itself; the final righting of a wrong that has perpetuated a political anachronism that outlived its usefulness a hundred years ago. On this date in 1814 a member of the DC militia, Lieutenant Francis Scott Key, wrote a poem that became our National Anthem. This morning a group of veterans and citizens presented each member of this committee a flag with 51 stars and the inscription, *" in recognition of the 200,000 who have served during wartime and our special connection to the American flag."* This was done to remind members that we ask for nothing more than the restoration of our rights. We ask for no favors, no special treatment, and no dispensation; only the justice of equality that democracy demands. You were right Senator. Our cause is just and we will prevail. The President said I'm for it; Senator Reid said, "we deserve it"; and 80% of Americans in a nationwide poll said we support it. As a child I stood up every morning, put my hand over my heart, and said "with liberty and justice for all". I believed it then; I believe it now; and I call upon the members of this committee and in both Houses to make it true showing the same courage that the residents of the District have always exemplified. Not asking what's in this for me but rather what's in this for our democracy. Dr. King said injustice anywhere is a threat to justice everywhere and this injustice can no longer stand on its own. Our democracy can no longer tolerate it, our government can no longer support it, and the way to abolish it is statehood. The partisan politics that characterize this struggle must end. We must rise above the rancor and divisiveness, act selflessly to pass this legislation, and continue to form a more perfect union. I close by answering the question my

fellow Washingtonian asked 200 years ago. Yes, Lieutenant that star spangled banner yet waves and it's time to add another star so that finally it waves for all of us.

# STATEHOOD
# for the
# DISTRICT OF COLUMBIA

**and**

# H. R. 4718
# NEW COLUMBIA ADMISSION ACT

SOURCE BOOK AND FACT SHEET
First Edition

prepared by the Minority Staff, Committee on the District of Columbia
March 1992

Minority Views on H. R. 4718

The Delegate for the District of Columbia Eleanor Holmes Norton gave voice to the feelings of many statehood proponents when she said, "It is time to leave behind the empty apologias and false legalisms and erase the stain on American democracy." (November 14, 1991.) Such protestations notwithstanding, the issue of D .C. statehood and the provisions of the proposed statehood legislation, H. R. 4718, are complicated and are not resolved by the quick-fix solutions offered by this legislation.

Article I, Section 8, Clause 17 (the District clause) of the Constitution states that the Congress shall have the power "[t]o exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States[.]" Proponents of H. R. 4718 claim that this provision is outdated, does not prohibit Congress from doing what it wants with the District (including a grant of statehood), and was never intended to create a densely populated city. Substantial evidence exists which refutes each of these claims.

In addition, there are serious questions concerning the status of the 23rd Amendment to the Constitution under D. C. statehood and whether the District, an Article I territory of the United States, can be treated like the Article IV territories which have been admitted as states. These matters cannot be dismissed as irrelevant because there is substantial evidence to the contrary. The worst possible outcome would be to enact unconstitutional legislation and have the courts overturn it and in the process declare invalid the laws and actions of the putative new state *after* statehood was granted.

That the constitutional doubts concerning D.C. statehood are substantial have been recognized for decades. As Attorney General Robert F. Kennedy stated in testimony before the House Committee on the District of Columbia in 1963:

> [T]he constitutional questions presented [by D.C. statehood proposals] are substantial,... the uncertainties which they create could probably not be resolved without several years of litigation, and...that these uncertainties could affect not only the validity of the proposed [legislation] and of governmental actions affecting the...area, but also the electoral system...and the outcome of a presidential election (Kennedy, p. 352).

Indeed, Attorneys General and Assistant Attorneys General from the Kennedy, Johnson, Carter, and Reagan Administrations have all agreed that the District problem requires a constitutional solution. The leading legal advocate for statehood without a constitutional amendment himself confesses that:

> No one who has troubled to explore the issues with an open mind could claim in good faith that the answer to the constitutional conundrum of D. C. statehood is clear and unequivocal (Raven-Hansen p. 107).

Even if the Constitutional issues did not exist, there are a large number of problems in the legislation itself which must be addressed. H. R. 4718 is a poorly drafted bill that would create a State of New Columbia unequal to the other states, infringe on the sovereignty both of its neighboring states and the Federal government, and produce absurdities both in law and in logic.

Statehood proponents have invented novel constitutional theories and have rewritten history to defend admission for the District through simple legislation. Congress should not indulge in *those* false legalisms. The essence of the statehood argument is that under the District clause, Congress may do anything it wishes with the seat of government including giving it away. But the power to legislate "exclusively" for the nation's capital should not be confused with absolute or unrestricted power and certainly does not include the power to destroy it. The permanent seat of government was created by the Constitution, not by Congress. Congress's responsibility for the Nation's capital cannot be turned over to *any* state, current or future, absent an amendment to the constitution. Moreover, the power of Congress to legislate for the District, though "plenary," is not unlimited. Other constitutional provisions guarantee individual rights and place restraints on the Congress that cannot be taken away by a simple legislative majority.

In sum, H. R. 4718 is fatally flawed legislation. Admitting the District as a state by simple legislation would violate the constitution and, given the poorly crafted nature of H. R. 4718, its passage will result in years of congressional and judicial action to correct the legal and practical absurdities the bill would create. At a minimum, the other 50 states should not be required to pay the District to become a state with favored status as this bill requires.

## II. HISTORY OF THE "DISTRICT CLAUSE": THE CONSTITUTION CREATES AN INDEPENDENT SEAT OF GOVERNMENT

Many Americans do not realize what a revolutionary and controversial document the Constitution of the United States was when it emerged from the Constitutional Convention in 1787. The proposal was a radical departure both from historical models and from the form of government provided under the Articles of Confederation. A critical purpose of the new constitution was to enhance the power of a very weak central government which had been dependent upon the cooperation and goodwill of the several states. In order to ensure the independence of the new central government from undue state influence or control, the new constitution included a provision to set up a 100 square mile district outside of any state and under the exclusive control of the Congress as the seat of the new central government.

In many ways, the creation of a Federal city to serve as the seat of government was an integral part, if not essential to, the new form of government created in the Constitution. To properly understand why this was so it is helpful to take a brief look at the events leading up to the Constitutional convention.

When the American Colonies declared independence from Great Britain on July 4, 1776 they did so as thirteen separate and fully sovereign states. These newly declared nations cooperated closely with each other and attempted to act in concert as much as possible amidst a strong desire to and much discussion of forming an actual union. It was not until after the conclusion of the war for independence that such a union was created by the ratification of the Articles of Confederation in 1781. Even under the Articles, however, virtually all governmental power was reserved to the states. As historian Kenneth Bowling has described them:

> The Articles of Confederation ... established a loose union of independent states and delegated to Congress little power other than to make war and peace, manage foreign affairs, and resolve interstate disputes. Congress had no source of revenue except for unenforceable requisitions on the states, no supremacy, no control over commerce and *certainly no power to establish a jurisdictionally independent residence for itself.* (emphasis added)(Bowling p. 23-24).

### 1. First Congress Debates Federal Enclave

Naturally enough, since Congress had little power over the states, there was less reason to attempt to insulate Congress from overreaching by the states and less need to provide Congress with a capital city. Even so, the First Congress under the Articles took up the question of creating a Federal enclave by purchasing land on which to erect buildings.

> Soon after reaching Princeton in 1783, Congress had appointed a committee [including James Madison] to recommend the degree of jurisdiction it should exercise over its seat.....The issue facing them involved two questions. What should be the line between the authority of Congress and that of a locality or state

> over the seat of federal government? And what should be the relationship between the federal government and the residents of its seat?
>
> ...The jurisdiction committee reported in September 1783 that Congress should have *exclusive jurisdiction over a district not...less than 3 miles square (nine square miles)* (emphasis added)(Bowling p. 77-79).

There was considerable debate, however, over whether, under the Articles, Congress had the power to make such a purchase of land and exercise such jurisdiction. As noted above, the Articles did not expressly grant such power to Congress. Madison himself found the question of whether the Congress had the power to take such action sufficiently "puzzling" to seek advice from the Virginia delegation. (Bowling, p. 79) In response, Thomas Jefferson drafted resolutions for the Congress "rejecting both ownership of the land by the United States and the idea of exclusive jurisdiction for Congress." (*Id.*) Instead, Jefferson proposed that "Congress rely on the honor and affection of the states to guarantee the privileges and immunities of congressmen and foreign ministers." (*Id.*)

2. Madison Plans for Independent Seat of Government

As is well known, the Articles of Confederation led to much jockeying for position, strategic alliance building and vote-trading and, failure. Throughout the early and mid-1780's there was mounting frustration at the inability of Congress to act under the Articles. James Madison and others called for a Constitutional Convention to repair defects in the Articles of Confederation.

Madison clearly saw the "vices of the political system of the United States" under the Articles. He traveled to Philadelphia prepared to do battle for the future spirit and moral balance of the young American nation. In what became known as the "Virginia Plan" Madison laid out an entirely new scheme of government where power would be shifted from the states to the central authority. In a letter to George Washington prior to the Convention, Madison explained the basic outline of his ideas:

> Conceiving that an individual independence of the States is utterly irreconcilable with their aggregate sovereignty, and that a consolidation of the whole into one simple republic would be as inexpedient as it is unattainable, I have sought for some middle ground, which may at once support a due supremacy of the national authority, and not exclude the local authorities wherever they can be subordinately useful (Meyers p. 66).

Importantly, the proposal of Madison *included a constitutional provision for a completely independent seat of a newly supreme federal government set apart from any state.* Madison well remembered the difficulties, abuses, and humiliations suffered by the national legislature while residing in Philadelphia. He also well understood the temptations to the local government in seeking the favors offered by the presence of the national government. Madison understood that,

given the new powers his plan (and eventually the ratified constitution) would vest in Congress, such reliance upon any state would ultimately compromise the ability of the new central government to exercise true sovereign powers.

Madison's Virginia Plan to govern the new nation, with some significant modifications, was hammered into a document by lengthy and spirited debate throughout the summer of 1787 as the Convention worked its will. With respect to those provisions that would become the District clause of Article I of the Constitution, the Convention in fact strengthened Madison's suggestion for the powers of Congress over the Federal city.

> James Madison offer[ed to the convention] the proposition that became Article I, [Section] 8, Paragraph 17 of the Constitution of the United States. He proposed that Congress have 'exclusive legislation' -- a less politically sensitive phrase than "exclusive jurisdiction," but no different in meaning -- over a stationary seat of government and a district surrounding it. Decentralists George Mason and Elbridge Gerry questioned the necessity but lacked the support to prevent it. *The committee which worked on Madison's proposal strengthened the 'exclusive legislation' provision, eliminated the explicit distinction between the seat of government and the district surrounding it, and determined the size of the district.* (emphasis added)(Bowling p. 79-80).

As the states debated ratification of the Constitution, the District clause came to symbolize for the Antifederalists all that they feared from a central government with expanded powers. Again, to cite historian Bowling:

> [Opponents of the new constitution] publicly attacked what they saw as the inexorable result of a one hundred square mile district under the exclusive jurisdiction of Congress.....Both the lessons of history and their fears for republicanism provided a dangerous scenario which they did not consider exaggerated. Indeed, their attack on [the District clause] of the Constitution can be seen as a microcosm for many of their concerns about the document ... Antifederalists envisioned a city larger and potentially more corrupt than Philadelphia or even London. Indeed, they, not the Federalists, gave currency to the new term, "federal city." One hundred square miles was an enormous area to an agrarian people whose largest city, thirty-six square mile Philadelphia, had a settled area of less than two square miles, and whose second largest city, New York, lay more than a mile south of Greenwich Village
>
> Antifederalists projected a population at the federal city of perhaps two or even four million people, either directly attendant on the federal government as employees or lobbyists, or indirectly dependent on it as family members of the attendants ... The federal city would become the cultural, social and fashion-setting seat of the United States. To it would flock those Americans who adulated people of fortune and power, and it would soon be home to the great and

mighty of the earth ...

> ...Federalists such as James Wilson, Alexander Hamilton and particularly James Madison attempted to counter major Antifederalist charges in the press and in several ratification conventions. Federalists, however,...did not deny the Antifederal claim that the ten mile square might become the focus of American politics, wealth and society (Bowling p. 81-83).

Just as the Antifederalists feared the creation of a strong central government, proponents of the new constitution knew that the preservation of such a government would require the creation of a Federal city. James Madison expressed considerable fear that if the seat of the federal government were placed in a state then it could be subject to both entanglement in local politics and could be held in thrall by that state for goods and services that were vital to the functioning of the government. Writing in *Federalist, No. 43*, Madison explained the necessity for a seat of the new federal government independent of *any* state:

> The indispensable necessity of complete authority at the seat of government, carries its own evidence with it ... Without it, not only the public authority might be insulted and its proceedings interrupted with impunity; *but a dependence of the members of the general government on the State comprehending the seat of 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*. This consideration has the more weight, as the gradual accumulation of public improvements at the stationary residence of the government would be both too great a public pledge to be left in the hands of a single State, and would create so many obstacles to a removal of the government, *as still further to abridge its necessary independence* (emphasis added)(Madison p. 279).

Clearly, the record indicates that the founders intended to create a capital city which, if anything, would be even more densely populated and play an even larger role in the cultural and economic role in the life of the nation than it in fact plays today. The question which statehood proponents must answer convincingly is whether the need for a seat of government over which the Congress is truly and fully sovereign -- and in which the seat of government is independent from state governments and free from their undue influence or control -- has disappeared with the passage of time.

## III. CREATING A STATE OUT OF THE DISTRICT OF COLUMBIA

Even for those favoring D. C. statehood, a number of significant issues concerning H. R. 4718 must be addressed and resolved. Serious questions exist concerning the method by which New Columbia could be created and admitted to the union. The proponents of H. R. 4718 contend that Congress' power to admit states under Article IV, Section 3 of the Constitution is unlimited and, therefore, D. C. statehood may be achieved by only a simple legislative act. Considerable evidence exists, however, that part of the District of Columbia could only be admitted as a state by constitutional amendment and that simple legislation such as H. R. 4718 would be invalid.

A second set of questions exist concerning the provisions of H. R. 4718 itself, such as whether it, in fact, creates a state co-equal with the other 50 states and which meets the traditional and historical criteria used by Congress in admitting new states. H. R. 4718 contains many ambiguous or otherwise poorly drafted provisions which could give rise to extensive litigation and serious questions about the legal status of both New Columbia and the residual District of Columbia. As a result, New Columbia would be admitted under a cloud which could render it unable to effectively conduct its affairs while Congress, to the extent it retained the power to do so, would spend years correcting the manifold problems created by H.R. 2482.

These two sets of questions are of paramount importance to the debate and ultimate fate of H. R. 4718. Even one who supports statehood for the proposed New Columbia should recoil from a bill which may very well be found to be unconstitutional or which may engender years of legal disputes about the new state's powers and jurisdictions. The result of passage of H. R. 4718 could well be worse than the present situation by several orders of magnitude with no one knowing the status of New Columbia or the residual District of Columbia and the resultant uncertainty such confusion would engender.

Each of the questions addressed below must be dealt with or answered in the affirmative before *anyone* can lend support to H. R. 4718. Until substantial changes and clarifications in both the method of enactment and technical provisions of H. R. 4718 are incorporated this bill will remain fatally flawed.

## IV. CONSTITUTIONAL ISSUES

H. R. 4718 would create the state of New Columbia, reserving a small sliver of land roughly extending east from the Kennedy Center to the Supreme Court building and south along the waterfront to encompass Bolling Air Force Base as the nation's capital (the National Capital Service Area). Simply put, serious question exists whether it may be permissible under the Constitution to convert most of the District of Columbia into the State of New Columbia. Even if that hurdle is cleared, however, an equally serious question exists whether it is permissible to reduce the nation's capital to a mere sliver of land downtown and along the waterfront. Further, granting statehood to the District under H. R. 4718 will result in giving a few hundred residents near the Mall and on Bolling Air Force base three votes in the Electoral College.

When the framers of the Constitution authorized the states to cede, and the Congress to accept, up to 100 square miles of land to become the nation's capital, they intended the development of a sizable city that would be free and independent of control or undue influence of any state. As James Madison wrote in *Federalist* 43, an "indispensable necessity" exists for the Federal government to have "complete authority at the seat of government," otherwise the Congress would be "dependent" on the State within which it was located and become subject to "an imputation of awe or influence, equally dishonorable to the government and dissatisfactory to the other [states]" (Madison, p. 279).

It was in light of this intent of the framers of the Constitution that the House Judiciary Committee, in its report on what eventually became the Twenty-third Amendment to the Constitution (providing the "District constituting the seat of government" with 3 votes in the electoral college) concluded that *"any attempted divestiture by the Congress of its exclusive authority over the District of Columbia by invocation of its powers to create new States would do violence to the basic constitutional principle which was adopted by the framers of the Constitution in 1787 when they made provision for carving out the 'seat of government' from the States and set it aside as a* permanent *Federal district"*(Committee on the Judiciary, p. 2).

### 1. From Kennedy to Reagan: Department of Justice Testifies that a Constitutional Amendment is Necessary

Further, the Department of Justice, in an memorandum commissioned by Attorney General Robert Kennedy, concluded that the "view of the framers, that establishment of a Federal district as the permanent seat of the government, which would be entirely free from control by any State, was an 'indispensable necessity' to the effective functioning of the Federal Government lends strong support to the position that the District of Columbia, once created, could not thereafter be abolished" (Kennedy, p. 346). The concerns expressed by the Kennedy-Johnson Administration Justice Department have been reiterated by the Justice Department in

both the Carter and Reagan Administrations.[1]

In 1978 the House passed a proposed Constitutional Amendment to grant Congressional representation to the District of Columbia (H. J. Res. 554). The Judiciary Committee Report (H. Rpt. 95-886) on the legislation stated "*[t]he Committee is of the opinion that the District should not be transformed into a State* ..."(p. 4). Rep. Edwards of California, Chairman of the Subcommittee on Civil and Constitutional Rights and Floor Manager of H. J. Res. 554, stated "*[t]he constitutional experts pointed out that the alternatives of statehood and full or partial retrocession - alternatives whose proponents suggest are more likely to succeed since they require statutory action and not a constitutional amendment - may raise a host of constitutional and practical problems* ...(emphasis added)"(Congressional Record. March 1, 1978 p. H1617).

However, even if Congress has the authority to "abolish" the District of Columbia by making it a state, it may lack the authority to reduce the nation's capital to such a small sliver of land that it is no longer independent and free from the undue influence or control of surrounding states. The framers envisioned a capital city of sufficient size and economic strength that it would not be dominated by surrounding states. Here again, the Kennedy memorandum is illuminating:

> [T]he Federal district was intended to be a permanent feature of our Constitution, and that...district was intended to be large enough to serve as the location of a

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[1] Testifying on behalf of the Carter Administration Justice Department, Assistant Attorney General (now Judge) Patricia Wald stated: "We believe, however, that any attempt to make the District a state without an amendment to the Constitution would present both practical and legal difficulties." House Judiciary October 6, 1977. Wald continued: "I think a reasonable interpretation even in light of the present-day circumstances which indeed have changed is that there may still be reasons to maintain a Federal city here and that if we are going to change what appears to me to be the plain meaning of the original Founders to set that up in the Constitution we can do it, but I believe only by constitutional means." Wald p. 144.

In testimony before the District of Columbia Committee on H. R. 51 in 1978, Assistant Attorney General Stephen Markman stated:

> The Founders settled upon the device of a Federal district as the means by which the Federal Government might remain independent of the States....Because it would be the State providing the essential services needed by the national government, however, the State of New Columbia would be in a position to exercise far more influence over the Federal Government than any of its sister States. It would be a first among equals....The retention of Federal authority over a truncated Federal service area would not solve this constitutional problem (Markman p. 342-3).

> capital city having a substantial population....The "seat of government" contemplated by the framers included extensive residential areas ... L'Enfant's plan, as originally drawn, was designed for a city of 800,000, the size of Paris at the time [and 200,000 more than currently reside in the District of Columbia] ... In 1800, the district's population was approximately 15,000 and it was assumed by Madison, Jefferson, Monroe, and others that the District would continue to have a sizable and increasing population (Kennedy, p. 343, 347)

Indeed, during the debates on ratification, opponents of the constitution pointed to the District clause as providing for a federal city "larger and potentially more corrupt than Philadelphia or even London" that would eventually dominate the rest of the country economically and culturally as well as politically. Proponents of the constitution, while dismissing such fears as exaggerated, nevertheless "did not deny the ... claim that ... [the new capital] might become the focus of American politics, wealth and society" (Bowling, pp. 81-83).

Based upon that historical record, the Kennedy memorandum concluded that "[t]he inadequacy, of the small area proposed to be retained...to meet the objectives of the framers and the inherent needs of our Federal system, is apparent." (Kennedy, p. 348) The provisions of H. R. 4718 would make the nation's capital a tiny canton of the state of New Columbia; one that would be radically dependent on the new state for everything from water and electricity to police and fire protection, and one that perfectly matches Kennedy's description of an improper capital based only on "the small area proposed to be retained."

2. 23rd Amendment Presents Obstacle to Statehood

It should also be noted that, should H. R. 4718 be enacted, not only would the nation's capital be reduced, in essence, to an adjunct of the State of New Columbia, but the Twenty-third Amendment would remain in effect, giving the few current residents of the National Capital Service Area three votes in the Electoral College. This is true whether it seems to be an absurd result or not by the plain language of that Amendment "[t]he District constituting the seat of Government of the United States shall appoint...[3] electors of President and Vice President...."(23rd Amend.) "The District would still be entitled to three electors,...regardless of population," according to Kennedy (p. 349).

Furthermore, Attorney General Kennedy asserted,

> ...it appears reasonable to construe the action of that Congress [86th] in proposing, and the States in ratifying, the 23rd amendment as a considered choice among three alternative means of affording electoral votes to the residents of the District of Columbia: (1) separate statehood, (2) retrocession to Maryland, and (3) the grant of electoral votes to the District of Columbia. Congress and the States embodied this choice in the form of a constitutional amendment. Hence it is arguable that the choice can now be reconsidered only by means of another constitutional amendment.

> This is not to imply that the existing boundaries of the District of Columbia are immutable....[but] the basic concept of a Federal district, at the seat of government, comprising an area substantially larger than that occupied by the Federal buildings, having a population comparable in size to that of a State, and entitled to cast three or more votes for presidential electors, can be said to have been adopted by the 23rd amendment as a part of our Constitution, so that a constitutional amendment repealing the 23rd amendment would be required to abolish that district (Kennedy, p. 350-1).

### 3. Consent of Maryland is Necessary

Additionally, even if the foregoing constitutional problems did not exist, a serious question would remain whether Congress can grant statehood to the District without first receiving the consent of the state of Maryland. Article IV, section 3 states that "no new State shall be formed or erected within the jurisdiction of any other State ... without the consent of the legislatures of the States concerned, as well as of the Congress." When Maryland ceded the territory that today forms the District of Columbia, it was well understood that the land was to be used to house the seat of the Federal government and for no other purpose. While a variety of technical arguments can be constructed to skirt the requirements of Article IV, the only way to eliminate doubt as to the constitutional status of a Congressional grant of statehood to the District under Article IV would be to receive the consent of Maryland -- something that statehood proponents declare presents no obstacle and yet they have failed to seek such action.

There are then four substantial constitutional obstacles to admitting New Columbia by a simple statute:

1. There is serious question as to whether Congress, having created a federal district to serve as the nation's capital can dissolve that district by making it a state -- just as, in the parallel case, once Congress grants statehood to a territory there is no provision for then revoking statehood. As Attorney General Kennedy wrote: "The Constitution makes no provision for revocation of the act of acceptance ... In this respect the provisions of article I, section 8, clause 17, are comparable to the provisions of articles IV, section 3, which empower Congress to admit new States but make no provision for the secession or expulsion of a State."

2. Even if Congress has the power to reduce the size of the District of Columbia, as statehood proponents assert, a substantial question exists whether it may reduce the size of the nation's capital to a mere canton of the new state, radically dependent on that state for everything from water and electricity to fire and police protection.

3. Even if the prior two obstacles are ignored, granting statehood to

the District of Columbia will produce the absurd result of giving three votes in the Electoral College to the few residents of the National Capital Service Area (extending roughly from the Kennedy Center to the Supreme Court building and south along the waterfront to include Bolling Air Force base).

4. Assuming all of the prior obstacles are somehow overcome, a legislative grant of statehood for the District would be under a cloud absent the prior consent of the state of Maryland.

**4. A Critique of the Constitutional Arguments For Statehood**

Over the past decade, statehood proponents have constructed a series of arguments which they contend allows Congress to admit New Columbia into the Union absent means of a constitutional amendment. While we believe the plain language of the U. S. Constitution directs us to the opposite conclusion, it is useful to examine the arguments of the proponents' theories and to reply directly to them.

Even by their own admission, the constitutional issues are not nearly as easily resolved as statehood proponents pretend them to be: "No one who has troubled to explore the issues with an open mind could claim in good faith that the answer to the constitutional conundrum of D. C. statehood is clear and unequivocal" (Raven-Hansen, GWU Law Review, p. 107).

The starting point for the constitutional case for statehood is the District clause of Article I. The District clause gives Congress the right "to exercise exclusive legislation in all cases whatsoever" for the nation's capital. Statehood proponents contend that "the grant of jurisdiction over the District is so absolute and unconditional as to empower Congress to erect out of the District any form of government, even a State government," (Perry, p. 16). The statehood legal scholars have invented this new interpretation of Article I section 8, clause 17, "to exercise exclusive legislation in all cases whatsoever" to contend that Congress can do anything it wishes with the District:

> Well, what does exclusive legislation mean if, in fact, they do not have the authority to do with it what they want? The plain language of the Constitution makes it clear that, in fact, Congress can take the District and make it into a State (Newman, p. 382)

Statehood advocates have seized upon this theory to obfuscate any clause 17 protections against statehood and even imply that the Constitution indeed gives permission to create the new state:

> It may be argued that the exclusive power over the District, pursuant to Article I, Section 8, Clause 17 of the Constitution, is so absolute and unconditional as to empower Congress to create out of the District any form of government it chooses, even a state government (If You Favor Freedom, p. 589).

However, not even the most fervent statehood advocate can truly believe that clause 17 allows Congress to literally do anything it wishes with the District. This interpretation of exclusive legislation is not only historically wrong, it is nonsense which requires the proponents to defend infinite absurd and mischievous conclusions. Can Congress repeal the 23rd amendment by statute? No. Can it repeal any of the other amendments which protect civil liberties in the District of Columbia by statute? No. Can it grant the District a representative in the House and two Senators with full privileges by statute? No. This misinterpretation and the idea that statehood can be granted because the Constitution does not expressly prohibit statehood for the District are simply exploded by the historical understanding of the U. S. Constitution.

A more traditionally accepted and recognized understanding of "exclusive legislation", which statehood proponents apparently have abandoned, was forwarded by very proponents of Home Rule during the 1960s-1970s. Representative Henry Reuss explained the meaning of this constitutional phrase:

> It is entirely clear that the word "exclusive" was used only for one purpose: namely to make sure that none of the ceding States would exercise legislative power within the District. This was the view entertained during the debates on the Constitution (3 Elliot's "Debates in the Several States on the Adoption of the Federal Constitution" (2d ed. 1876) ...(Reuss, p. 439).
>
> The courts have uniformly held the same view. In 1880 the highest court in the District of Columbia stated 'the term "exclusive" has reference to the States, and simply imports their exclusion from legislative control of the District ...(Reuss, p. 439).
>
> The Supreme Court specifically ruled that 'it is clear from the history of the provision that the word "exclusive" was employed to eliminate any possibility that the legislative power of Congress over the District was to be concurrent with that of the ceding States (Reuss, p. 439).

Thus, despite whatever new theories statehood proponents claim exclusive legislation means, it is clear that it does not mean that Congress may abdicate its own ultimate power demanded by the Constitution.

A more subtle version of the Newman argument was advanced before the House Committee on the District of Columbia last November:

> The District Clause is immediately followed, in the same paragraph, by a grant permitting 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." This authority has been construed consistently to allow Congress to convey, as well as to acquire, such places. Congress does not exhaust its

> authority by using it to acquire these places. If it can thus change the form of such federal places, then it has "like authority" to do the same to the District itself ... In the former case, the United States is sometimes said to act solely in a proprietary capacity; in the latter, in a purely governmental one. But this seems a distinction without a difference (Raven-Hansen, p. 112).

In fact, the distinction between the authority of Congress to acquire property for proprietary purposes, and its authority to accept territory ceded by a sovereign state is of the utmost importance and substantially different. The proper parallel is that, just as Congress has the power to purchase and dispose of property within a state, so too it has the power to purchase and dispose of property within the District of Columbia. It is in that sense which Congress has "like authority" over its proprietary interests in both the District and the fifty states -- at least insofar as the question of disposition is concerned.

The power of Congress to undo a cession of land which it received in a sovereign capacity is a different matter. The Justice Department, both during the Kennedy-Johnson and Reagan Administrations, concluded that "once the cession was made and this 'district' became the seat of government, the authority of Congress over its size and location seems to have been exhausted" (Markman, p. 20).[7] But even if Congress can dispose of the territory of the District of Columbia, the question remains whether it may do so by granting it statehood.

The first obstacle to statehood is whether the consent of the State of Maryland is required. Article IV, section 3 of the Constitution states in pertinent part:

> New States may be admitted by the Congress into this Union, but no new State shall be formed or erected within the jurisdiction of any other state.

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[7] Some statehood advocates argue that the only restriction of the District clause on the Congress is that it cannot enlarge the territory of the District:

> "The only restriction, again, under the plain language, is that it is not to exceed 10 miles" (Newman, D. C. Statehood p. 382).

> "First, the language is clear that there is a ceiling but not a floor on the size of the District of Columbia." (Letter to Rep. Romano Mazzoli as reprinted in D. C. Statehood, p. 270.)

The "ceiling/floor" argument is not historically correct. The Framers indeed considered confining the "seat of government" within a much smaller geographical boundary than ultimately provided for under the U. S. Constitution. Proposals to limit the federal district to a three mile square region and a six mile square region were considered and rejected. Also rejected was a proposal to limit exclusive jurisdiction. The ten mile square was ultimately adopted. Thus, at the very least, there is strong reason to view the floor as being greater than 9 square miles.

Statehood proponents treat the question of whether Maryland's consent is required as dependent upon whether a grant of statehood would cause the original cession of land from Maryland to the federal government to fail and the land to thus revert to Maryland.

> The consent argument treats use of the ceded land for the district as a condition subsequent to the cession and assumes that the condition would be defeated by any other use of the ceded lands. The cession would therefore itself fail, and the ceded land would presumably revert to Maryland (Raven-Hansen, p. 119).

Although the language by which the Maryland legislature ratified the cession of land to the federal government clearly anticipates that such land would be used solely as the seat of the government, it does not contain an express reverter clause.[3] According to proponents, Maryland "yielded all the political jurisdiction [it] possessed over this territory to the United States and the United States accepted this unconditional grant of sovereignty without qualification" (Perry, p. 17). Further, statehood proponents argue that, under Maryland common law, a reversion cannot be implied from the Maryland act ratifying cession (Raven-Hansen, p. 121).

In arguing that a reversion may not be implied, statehood proponents rely upon the modern Maryland caselaw of deeds and wills (Raven-Hansen, pp. 121-122). Reliance on those cases fails on two grounds: 1) twentieth-century caselaw does not govern an 18th century transaction; and, 2) the rules for construing deeds and wills are not the same as the rules for construing statutes. The most basic rule of statutory construction is that the intent of the legislator governs. Here it is clear that even though the Maryland legislature "for ever ceded and relinquished to the congress and government of the United States, in full and absolute right" the territory that is now the District of Columbia, it did so "pursuant to the tenor and effect of the eighth section of the first article of the constitution of the government of the United States." In other words, there is not the slightest hint in the ratifying act that, had Maryland been asked it would have agreed to cede land to the United States for the purpose of creating a new state (rather than, or in addition to, the seat of government).

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[3] The operative language of the Maryland act of ratification follows:

> That all that part of the said territory, called Columbia, which lies within the limits of this state, shall be and the same is hereby acknowledged to be for ever ceded and relinquished to the congress and government of the United States, in full and absolute right, and exclusive jurisdiction, as well of soil as of persons residing, or to reside, thereon, pursuant to the tenor and effect of the eighth section of the first article of the constitution of the government of the United States[.]

2 Laws of Maryland 1791, ch. 45, sec. 2 (Kilty 1800).

But even if statehood proponents are correct and a reverter cannot be implied in the Maryland act ratifying cession, it would not necessarily overcome the Article IV requirement that no state may be formed from the territory of another state without the consent of the state wherein the property is located. Quite simply, the current District of Columbia was created from Maryland counties. The fact that those counties have undergone a period as the District of Columbia does not necessarily by itself negate the constitutional command that they may not become a state without the consent of their "mother" state, Maryland.

Historical precedent supports that contention. There have been four States created directly from existing states:

| New State | Mother State |
|---|---|
| Kentucky | Virginia |
| Vermont | New York |
| Maine | Massachusetts |
| West Virginia | Virginia |

In each of these cases, the "mother" state gave its permission to create a new state prior to admission through an act of the respective state legislature. A question can be raised in the case of West Virginia, which was admitted during the Civil War. At that time, there were two legislatures of the Commonwealth of Virginia, one located in Wheeling professing loyalty to the Union and the other located in Richmond professing loyalty to the Confederacy. The unique circumstances of the Civil War, however, make this a very weak precedent for D.C. statehood proponents to rely upon.[4]

There have also been three states created from land ceded by an existing state to the federal government for the purpose of creating new states. These are:

| Mother State | Year Ceded to the Federal Government | New State |
|---|---|---|
| North Carolina | 1790 | Tennessee |
| Georgia | 1787 | Alabama |
| Georgia | 1802 | Mississippi |

In addition, five states were created out of the Northwest Territory which itself was made

[4] For one thing, any argument that West Virginia was admitted to the Union without the consent of the Virginia legislature must rest on the proposition that Virginia had a right to secede from the Union, that the confederate legislature in Richmond was therefore the "legitimate" legislature, and that the legislature in Wheeling, professing loyalty to the Union, was illegitimate.

up out of lands claimed and then ceded by several of the original 13 states prior to adoption of the U. S. Constitution. While these states did not receive individual consent from their original grantors, the land was ceded to the federal government for the express purpose of creating new states. Following these precedences, Maryland would be required to consent in some manner before Congress could change the use of the District from the seat of the federal government.

Perhaps the most difficult problem for statehood proponents is the universally recognized intent of the framers to establish a federal city independent from the control or undue influence of the states or any individual states. Granting statehood to all but a small sliver of the District would hardly seem to conform to that intent. While recognizing that such arguments against statehood are "firmly rooted in the history and intent of the District Clause" and present "a serious challenge to the constitutionality of D.C. statehood," proponents respond that:

> The federal city has long since ceased to be self-sustaining in any practical sense of the word; it is inextricably part of a regional metropolis which transcends District boundaries. (Raven-Hansen, p. 115)

This is a curious argument for statehood proponents to make since, if true, it would support a proposal to enlarge the District of Columbia, not reduce it as does H. R. 4718. Further, it states only half of what is clearly the case: that the Nation's capital is the hub around which metropolitan suburbs revolve. It would be more accurate to say that the regional suburbs are dependent upon the federal city than the reverse.

While admitting that "reasonable people can differ" about such issues, proponents point to this very uncertainty as relegating such concerns out of the realm of constitutional judgement and into the realm of "political judgement." (Raven-Hansen, p. 116). Indeed, even within the circle of statehood advocates, there are differences. Professor Perry, for one, concluded that the consent of Maryland indeed was necessary prior to statehood. At best, this argument amounts to a claim that the constitutionality of D. C. statehood is non-justiciable. The doctrine of non-justiciability, however, is intended to limit the power of federal courts -- not to enlarge the power of the Congress.

The final bar to statehood is the twenty-third amendment to the Constitution which provides that the "District constituting the seat of the Government of the United States shall appoint in such manner as the Congress may direct" three electors to the Electoral College. It would appear, then, that granting statehood to New Columbia while reducing the District to the National Capital Service Area would have the effect of giving the First Family and a few residents of the new District three votes in the Electoral College. Statehood proponents argue that such an absurd result can be avoided short of repeal of the twenty-third amendment.

First, proponents argue that the twenty-third amendment can be rendered a dead letter by granting statehood to the District and at the same time "defining [the residents of the National Capital Service Area] as residents of New Columbia for voting purposes." (Raven-Hansen, p. 125). First, H. R. 4718 does not make residents of the National Capital Service Area residents

of the new state for voting purposes. So, on its face, H. R. 4718 fails to render the twenty-third amendment moot. Further, this too is a curious argument for statehood proponents to make since it conceivably could apply to residents of the District of Columbia who, presumably, could be made residents of Maryland for voting purposes. Thus, in large measure, statehood would be rendered moot.

A second argument is that the twenty-third amendment is not self-executing. Instead, it requires implementing legislation from Congress (Schrag, Cath. U. L. Rev. 311, p. 348-349). The twenty-third amendment, however, is mandatory in its language: the District "shall appoint" electors. What discretion Congress has in the matter is solely in how, not whether, those electors shall be appointed.

Finally, statehood proponents also argue, whether or not the twenty-third amendment must be repealed, "who would care? Or, more accurately, who would have standing to complain?" (Raven-Hansen, p. 129). That the constable may have turned his back is no justification for theft nor is speculation about who would have standing a justification for the Congress to enact unconstitutional legislation.

## V. H. R. 4718 ISSUES

Even if all of the constitutional issues were removed or dealt with there remain a number of substantive problems in the provisions of H. R. 4718 itself.

Several provisions of the bill intended to deal with the District's special circumstances result in New Columbia being unequal in status to the 50 States. Many provisions of H. R. 4718 (particularly section 6) are simply unworkable and, if enacted, would produce absurdities. It is simply not a sufficient response for statehood proponents to rely on the courts and the executive branch to creatively interpret the bill in a manner that defeats its plain meaning in order to avoid such unintended results.

Each of the concerns addressed in this section raises a point which needs to be clarified or corrected before serious consideration can be given to H. R. 4718.

### 1. Continuing Special Federal Payment to New Columbia

Section 5(d)(1) of H. R. 4718 states in pertinent part, "the *annual* federal payment authorized to be appropriated...shall be authorized to be appropriated to the State of New Columbia." This permanent separate "federal payment" to New Columbia would go into its General Revenue Fund for spending at the discretion of the State legislature with no earmarking such as exists for categorical and other grant programs to the States in general.

Historically, as underdeveloped territories become states, it has been the accepted practice for the federal government to assist in economic development by providing land grants, one-time cash payments, public works projects and/or revenue from specific federal activities in the new State. However, the special "federal payment" to New Columbia contained in H. R. 4718 is unprecedented and represents a continuing, open-ended commitment by the nation's taxpayers to one State. No one State has ever been granted such a guarantee by the federal treasury.

<u>Current Federal Funding in the District of Columbia.</u> Current law takes into account the special nature of the District of Columbia as the nation's capital and provides that an annual federal payment will be made, in part, to offset District revenue shortages caused by:

1. Unreimbursed services to the federal government; and

2. Compensation for a reduced tax base due to:

   --federal and foreign diplomatic tax-exempt property
   --restriction on taxation of nonresident income
   --building height restrictions
   (*See*, Formula Federal Payment Act, P.L. 102-102; The District of Columbia Self-Government and Governmental Reorganization

Act of 1973 (the "Home Rule" Act) P.L. 93-198).

In FY 1992 the authorized and appropriated federal payment was $630.5 million. This payment is unique and made solely in recognition of the special responsibility which Congress has for the nation's capital under the District clause of the Constitution. However, once the capital city has been granted statehood, that responsibility and the rationale for a federal payment both come to an end.

The Rationale for the Federal Payment Disappears with Statehood. H. R. 4718 continues the federal payment after statehood has been granted. Close examination reveals little, if any, continued justification for an unrestricted, perpetual annual payment.

"Unreimbursed services to the federal government" is the first factor cited by advocates of a continuing federal payment. The current District of Columbia government operates as an arm of the federal government. It is not a sovereign body and derives its limited jurisdiction and use of sovereignty directly from the Congress. In particular, the Metropolitan Police Department and the D. C. Fire Department are called on by the federal government to perform a number of protective and inspection services on a nonreimbursed basis. Since the governments are intertwined and since several local and federal agencies act with cross jurisdictions (Secret Service, Park Police, Capitol Police, Metro Police, Architect of the Capitol, Supreme Court Police, D. C. Fire Department, etc.) this arrangement is justified and offset by a general federal payment. Other services, such as sewer and water, are reimbursed by the federal government on a direct basis.

If New Columbia were admitted to the Union, there is no reason to assume that the present service arrangements will continue. The needs of the federal government would always be secondary to the needs of New Columbia and understandably so in the minds of New Columbia politicians. But is this acceptable to the federal government? The National Capital Service Area, the new seat of government under the bill, would be a separate jurisdiction that would largely rely on federal agencies (such as the Capitol Police and the National Park Service Police) to provide for public safety. Many federal agencies already contract with private firms to provide security for employees. Such arrangements could simply be expanded to meet the needs of the federal government, but New Columbia certainly should not expect to be compensated.

If the capital enclave is to remain even marginally self-reliant, as the framers of the Constitution clearly intended, then the federal government would have to create new or expand existing agencies to guarantee its normal operations and functioning. Some limited use of New Columbia services may be appropriate, but those would have to be negotiated between the federal government and New Columbia. It may in fact be less expensive for the federal government to establish and operate its own fire protection and ambulance services than to pay the state of New Columbia for these services.

"Federal and foreign diplomatic tax-exempt property" is another factor used to call for

a continued annual federal payment to New Columbia. In 1989, the federal government owned 27.849 percent of the land in the District of Columbia. With the exclusion of the redesignated District of Columbia from New Columbia that figure would decrease substantially. New Columbia certainly cannot expect to be compensated for federal property outside its boundaries.

The land area to be included in the redesignated District of Columbia is not precisely known because the legislation is open to interpretation as to what would be excluded from New Columbia, but is estimated to be 3,000 acres (4.7 square miles) All of this land is owned by the federal government and is currently part of the 10,863.7 acres of federal land in the District. If these 3,000 acres are subtracted from the land area of both New Columbia and of federal ownership within the State then there would remain federal ownership of 7,864 acres out of 36,040 acres or a *federal ownership of 21.8 percent of New Columbia*.

By comparison, the federal government owns a higher percentage of 13 States than it would own in New Columbia. The 13 other States range from a low of 22.65 percent of Louisiana to a high of 82.27 percent of Nevada. Once the District attains statehood, it will be unacceptable to the other 50 states to provide a special annual federal payment for this reason when no such payment is made to either the 13 States with a higher percentage of federal ownership of land or to all States based on a per acre or percentage basis. The federal government literally could not afford to compensate all states in the same manner as New Columbia as advocates for New Columbia are demanding.

In addition (except for park land), much of the remaining federal property in New Columbia will actually be used by the new state itself (see section below). Many of the District's schools, recreational facilities, libraries, and public housing units, etc. are actually built on federal property. It is absurd to believe that the federal government should compensate New Columbia for such property. The most appropriate solution would be to convey ownership of land on a selected basis to New Columbia, but H. R. 4718 does not do so.

Section 6 of H. R. 4718 expressly *does not transfer* this land to New Columbia; rather it *grants New Columbia open-ended use and control of this federal land without compensation* to the federal government. This disjointed policy is unprecedented in prior statehood bills, makes no sense, and will serve only to bind and frustrate the new State (since such land, being federally owned, cannot be disposed of by the state).

Following precedent, land of this type should be transferred to the state free and clear. The legislation should be amended to conform with tradition and common sense by making land grants of those properties as individually identified.

Likewise, the total amount of land owned by foreign diplomatic missions in New Columbia is relatively small and the increased commercial and visitor activity created by the presence of these foreign missions should offset any revenue foregone.

Finally, continuation of the federal payment would be difficult to justify given the very

high level of federal funds which the District receives. In addition to the direct federal payment to the District's General Revenue Fund, the District government and its residents participate in every aid program, grant program, entitlement program and federal impact program currently operated by the federal government for which they would be eligible if they were a State.

In FY 1990, the latest year for which actual spending figures are available, the District of Columbia received $1,718,018 in assistance from the federal government. This amounts to $2,831 *per capita* as compared to a national total spending on these programs of $533 *per capita*. If the District of Columbia had been a state in FY 1990 it would have ranked 1st for *per capita* federal funding to state governments. By comparison some other state figures were: Alaska - $1,303, Hawaii - $540, Wyoming - $1,253, Vermont - $670 and New York - $876.

Funding under these programs would continue at least at these levels if New Columbia were admitted to the union. When the FY 1990 special federal payment and Metro subsidy are subtracted from the other federal assistance monies paid to the District of Columbia government, total federal funding amounted to $1,092,000,000. This comes to $1,799 *per capita* and represents *35% of the total District of Columbia budget*. By comparison, the average federal contribution to combined state and local governments amounts to 16% of their revenue (Economic Report of the President, Table B-81). *Even if it received no special federal payment* and no additional federal funds from its status as a State (a highly doubtful proposition - see below), *New Columbia would enter the union ranked 1st in per capita direct federal assistance to the state government*. Any additional, special federal payment would serve only to widen the gap by which New Columbia's reliance on federal funding exceeded any other State.

A third justification offered for a continued federal payment, that "federal limitations on building heights" deprive New Columbia of tax revenues, also becomes moot. It is true that currently the Building Height Limitations Act of 1910 restricts nonfederal buildings in the District of Columbia to 130 feet or less depending on their location. It is also true that this limitation probably reduces the property tax revenue of the District of Columbia because, without the restrictions, taller, more valuable buildings would have been constructed. But, the federal government will have *absolutely no power* to mandate any building height restrictions in New Columbia. In *Coyle v. Smith*, 221 U.S. 559, 573 (1911), the Supreme Court concluded that:

> [W]hen a new state is admitted into the Union, it is admitted with all of the powers of sovereignty and jurisdiction which pertain to the original states, and...such powers may not be constitutionally diminished, impaired, or shorn away by any conditions, compacts, or stipulations....

Because the federal government cannot *mandate* building heights for the new state, H. R. 4718 contains a "compact" with the United States in section 5 which, in part, premises the federal payment on continued state compliance with the existing limitations (rather than on a federal mandate to do so -- something which *Coyle* clearly forbids). The revenues lost due to the height limitations, however, are worth far less than the $630.5 million that the District



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receives in the federal payment and, hence, does not by itself provide a convincing rationale for continuing the payment at anywhere near current levels post-statehood.

**2. New Columbia Would Control Land in Maryland and Virginia**

Section 6(a) of H. R. 4718, states:

> The State of New Columbia and its political subdivisions shall have and retain title or jurisdiction for purposes of administration and maintenance to all property, real or personal, with respect to which title or jurisdiction for purposes of administration and maintenance is held by the territory of the District of Columbia as of the date of the enactment of this Act (emphasis added).

In essence, H. R. 4718 gives the state of New Columbia rent-free jurisdiction and control of federal property in perpetuity. There is no requirement that such lands be used in furtherance of a federal purpose, nor is there any reason to believe that they would be so used. Lands over which the new state would be given such control are located in Maryland and Virginia, as well as within the current District of Columbia. Though the new state would have control over the land, not being the owner, it would not have a right to dispose of the property.

H. R. 4718 gives New Columbia unrestricted control of territory in Maryland and Virginia. In all, H. R. 4718 grants the State of New Columbia unrestricted jurisdiction over and control of the use of approximately 3,800 acres of federal property in Maryland and Virginia -- the Forest Haven and Lorton facilities.[1] These lands -- all of which house correctional

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[1] In 1910, 1,154 acres of land was purchased and titled to the United States in Fairfax County, Virginia near the Occoquan River for the express and sole purpose of locating a corrections facility there known as the "Occoquan Workhouse" for the confinement of District of Columbia criminals. Since 1910 the federal government has purchased other parcels of adjacent land and the so-called "Lorton Reservation" now totals 2,970 acres. The District of Columbia exercises unrestricted authority over this land and currently uses it to house the Lorton Reformatory Complex with more than 3,000 District criminals. Other parts of this federal property are used to operate a landfill and a District run incinerator.

In 1923 Congress authorized the acquisition of land in the District, Virginia or Maryland "for a home and school for feebleminded persons" from the District. A total of 827 acres of land was acquired in Laurel, Maryland and titled to the United States. In 1925 this complex was officially named Forest Haven. The District of Columbia government uses this federally owned land and operates Forest Haven as the Bureau of Habilitation Services and also operates the Cedar Knoll and Oak Hill youth corrections facilities on the site.

Today, both the Virginia and the Maryland properties fall under the "jurisdiction" or

facilities -- fall under the exclusive jurisdiction of the federal government; are titled to the United States; and are controlled by the District of Columbia in support of federal purposes involving the maintenance of the Nation's capital. Whatever arrangement should be made with respect to Lorton and Forest Haven if statehood were granted, the one resolution clearly inappropriate and perhaps impermissible would be to allow the new state to continue to exercise complete control and jurisdiction over those properties while they continue to be owned by the federal government. Simply put, once New Columbia becomes a State, no federal purpose is advanced by allowing it continued control over federal lands in Maryland and Virginia; instead federal resources are devoted without compensation entirely to state purposes.

Maryland and Virginia sovereignty is infringed. Moreover, by giving New Columbia control and jurisdiction over lands in Virginia and Maryland without their approval, this legislation infringes the rights of those states. The Constitution provides for such coordination and cooperation between states through means of a negotiated and Congressionally approved compact. H. R. 4718 ignores this Constitutional provision, fails to provide any other means of gaining the express consent of the affected states and thus severely infringes upon the rights of Maryland and Virginia.

New Columbia would be admitted with unprecedented extraterritorial power. Additionally, New Columbia would attain a status higher than mere statehood and have a position of primacy over the other states by its Congressionally granted *jurisdiction over land* within its neighboring states which total more than one-tenth the size of New Columbia itself. H. R. 4718 would not create a state "on an equal footing with the other States" as stated in section 2; rather it would create a state of privilege and power beyond that of any other.

This more-than-statehood power for New Columbia would result in the new state being able to refuse to live up to all of the normal obligations of a state. The 50 states each provide the full range of government functions and services within their own territory. H. R. 4718 would enable New Columbia to maintain its adult corrections facilities in Virginia and its youth corrections and other facilities in Maryland without any agreement from those other states. How can New Columbia pretend to statehood if it refuses to accept the responsibility for its own prison system? The District has protested that it does not have enough land for a 10,000 bed facility which it needs. Yet, somehow, it currently intends to find land for a second (and larger) professional sport stadium and a second (and larger) convention center. The District's facilities in Maryland and Virginia sit on very valuable land, yet the District apparently has no intention to compensate either of those states for revenues lost.

H. R. 4718 would create an unequal state with some powers and privileges beyond the other states while allowing New Columbia to shirk some of the obligations of statehood which

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under the "general direction and supervision" of the Mayor of the District of Columbia under section 24-442 and 32-803 of the D.C. Code.

the other states have to live up to. Giving rights to the respective land in Maryland and Virginia to New Columbia in terms of land mass would be like giving Iowa to Alaska.

New Columbia would have jurisdiction over federal property within its borders. Federal law allows the U.S. Secretary of Interior and the Mayor of the District to exchange land or transfer jurisdiction over land to promote efficiency. The National Park Service (part of the Interior Department) over the years has transferred jurisdiction, *but not title*, of approximately 350 parcels of land to the District of Columbia. As a result, many of the government facilities operated by the District of Columbia ranging from public housing complexes to playgrounds to streets to parks are actually located on land titled to the United States. H. R. 4718 would continue both federal ownership and local control of these properties.

Further, Title 7 of the District of Columbia Code grants the Mayor exclusive jurisdiction for administration and maintenance purposes over all public roads and bridges within the original District of Columbia, including not only Independence, Constitution, and Massachusetts Avenues within the National Capital Service Area, but many other streets and tunnels within the United States Capitol Grounds and the Supreme Court grounds. Under H. R. 4718, the Governor of New Columbia would succeed the Mayor and would also enjoy such jurisdiction and control of the streets within the newly configured federal capital area. Such control by a state governor over the new District of Columbia would clearly violate the District clause which, as noted above, is universally agreed to prohibit joint federal and state jurisdiction over the seat of the federal government. Indeed, state control of roads and streets within the seat of government could lead to just that type of dependence by Congress on state authorities which the framers of the Constitution intended to prevent.

Other examples abound. Currently, no other State enjoys such a privilege of control over federal resources. As federal entities, District of Columbia facilities currently do serve a federal purpose. With the grant of State sovereignty contained in this bill, New Columbia would be responsible for its own land and facilities - just as are all States. However, this legislation would maintain federal ownership of land over which the federal government has no control and which would no longer serves a federal purpose.

Traditionally, Congress has been generous in conveying to newly admitted States substantial land grants for government use purposes. These purposes, as expressed in the various admission acts, include: schools, prisons, swamp reclamation, public works and seat of government. In the case of the District of Columbia it would be in keeping with tradition and the rational course to convey federal lands already used for state and local government purposes or needed for such purposes. If land were available, it would also be in keeping to transfer such parcels as would be appropriate for future state needs and even for state parks.

H. R. 4718 fails to take appropriate action, thereby depriving the federal government of control over federal property and saddling the new state with lands it may grow dependent upon yet be unable to dispose of. Moreover, the bill also gives the new state a right of control over lands within the federal seat of government, thus fostering Congressional dependence on state

authorities to fulfill essential functions within the new District of Columbia and in direct violation of the District clause of the Constitution.

### 3. H. R. 4718 Creates a New District of Columbia Without a Local Government

H. R. 4718 is more than a simple statehood admission act. In addition to admitting New Columbia to the union, the legislation also creates a new District of Columbia and purportedly leaves it under the "exclusive legislation" provision of article I, section 8, clause 17 of the Constitution. The contours of this new seat of government are described in subsection 5, below. Remarkably, however, H. R. 4718 fails to provide for any transitional, temporary or permanent governmental structure to manage the new capital enclave. What transition the bill does provide is for the current municipal government in the District to be transformed into the new government of the new state. Quite simply, the bill overlooks the four square mile area remaining of the nation's capital and fails entirely to provide for its governance.

### 4. H. R. 4718 Leaves the Status of Many Federal Laws and Their Effects in the District of Columbia

There are more than 2900 references to the District of Columbia in the federal code. As described above, H. R. 4718 would both admit New Columbia to the union and reconfigure the District of Columbia to a four square mile area encompassing the Capitol, the White House, the Supreme Court and the major monuments. Of these 2900 federal laws, some may continue to be applicable to the new District without change. Many will not and many may involve substantive policy questions. H. R. 4718 addresses few or none of these laws.

An example of one of these laws which are ignored by H. R. 4718 is the Foreign Missions Act. That Act was signed into law in 1983 and governs the "location, replacement, or expansion of chanceries in the District of Columbia." 22 U.S.C. 4306. Further, the Act creates a Foreign Missions Board of Zoning Adjustment, comprised of both federal and local officials, to process zoning applications involving embassies. The Act specifically charges the Board to consider not only local interests, but also the "international obligation of the United States to facilitate the provision of adequate and secure facilities for foreign missions in the Nation's Capital" and the "Federal interest, as determined by the Secretary [of State]." 22 U.S.C. 4306(d).

Under H. R. 4718, almost all of the embassies now located in the District of Columbia would be located in New Columbia. Clearly, agencies of the new state cannot be charged with responsibility for the "federal interest" and the "international obligations" of the United States. Yet, just as clearly, H. R. 4718 makes no provisions for how those obligations shall be discharged with respect to the location or expansion of embassies within New Columbia. As the State Department noted in a recent letter to Congressman Thomas J. Bliley, Jr.:

> If a significant portion of the District of Columbia, including areas where embassies are currently located, were incorporated into a new state, the

preservation of th[e] comprehensive and exclusive statutory scheme [contained in the Foreign Missions Act] would have to be carefully considered and addressed.

The Foreign Missions Act is just one example of the many federal statutes which should be carefully examined and amended before congressional action is taken on H. R. 4718. This examination has not been done. Thus, it is impossible to state what ramifications statehood will have for the United States and for the citizens of the new state.

**5. H. R. 4718 is Ambiguous with Respect to the Borders of New Columbia**

Section 4 of H. R. 4718 describes the boundaries and territories of New Columbia as follows:

> (a) Subject to the provisions of this section, the State of New Columbia shall consist of all of the territory, together with the territorial waters, of the District of Columbia. The State of New Columbia shall not include the National Capital Service Are of the District of Columbia, which is described in subsection (b). As of the date of admission of New Columbia into the Union, the District of Columbia shall consist of the National Capital Service Area.
>
> (b) The National Capital Service Area, subject to the provisions of section 16, is comprised of the principal Federal monuments, the White House, the Capitol Building, the United States Supreme Court Building, and the Federal executive, legislative, and judicial office buildings located adjacent to the Mall and the Capitol Building.
>
> (c) Notwithstanding any other provision of this section or of section 16, the boundaries of the State of New Columbia shall include the District Building.

Under section 16 of the bill, the District of Columbia is deemed to also include Fort Lesley McNair, the Washington Navy Yard, the Anacostia Naval Annex, the U.S. Naval Station, Bolling Air Force Base, and the Naval Research Laboratory. The provisions of section 4 are insufficient, in themselves, to establish the border between New Columbia and the National Capital Service Area. That border is purportedly established in section 16 of the bill. Section 16, however, is also insufficient to establish a border because, rather than providing a legal description of the property based upon a survey, it relies on existing buildings and streets which are subject to change. For example, the following portion of section 16 (page 19, lines 7 - 15) describe the border as running along Washington Avenue, Southwest, a street which no longer exists:

> (a) The National Capital Service Area referred to in section 4 is more particularly described as follows *****
>
> [running] thence west on D Street Southeast to Washington Avenue

Southwest;

thence southeast on Washington Avenue Southwest to E Street Southeast;

thence west on E Street Southeast to the intersection of Washington Avenue Southwest and South Capitol Street;

thence northwest on Washington Avenue Southwest to Second Street Southwest[.]

The legal infirmities of sections 4 and 16 with respect to establishing a border between New Columbia and the District of Columbia have implications for other provisions of the bill. Section 13 provides that federal military lands located within New Columbia will revert to the state if the federal government should cease to put such lands to military uses. Since the terms of section 16 are insufficient to establish a border, the military lands included within the new District of Columbia may also be subject to reversion.

Indeed, if the terms of section 16 are insufficient to establish a border, it would seem to follow that the District of Columbia would be part of the state of New Columbia. That conclusion is bolstered by section 5 of the bill, which, in part, provides for the continuation of a federal payment which mirrors the relationship currently between the federal government and the current municipal government of the District of Columbia. Further, since the District clause of the Constitution was intended to create a capital city independent of state sovereignty, the failure of section 16 to establish a valid border raises problems of constitutional dimensions.

There are hundreds of large and small legal and jurisdictional matters which H. R. ~~2042~~ has failed to address. The District receives privileges from federal agencies in law enforcement, personnel retirement systems, the purchase of medical supplies, etc. which are not afforded to other states. The record shows, however, that statehood advocates have not taken the time or the inclination to even identify these problems let alone solve them.

## VI. TRADITIONAL STATEHOOD REQUIREMENTS

By precedent and tradition, three main requirements have been considered by the Congress in evaluating statehood admission petitions. The requirements, as restated by the Senate Interior Committee Report accompanying the Alaska admission act, are as follows:

> (1) That the inhabitants of the proposed new State are imbued with and are sympathetic toward the principles of democracy as exemplified in the American form of government.
>
> (2) That a majority of the electorate wish statehood.
>
> (3) That the proposed new State has sufficient population and resources to support State government and to provide its share of the cost of the Federal government.

The third of these requirements is particularly important to our form of federalism as it demands that new States demonstrate that they can provide for their own self-government, independent of any other state as well as the federal government, and that the new State will provide its equitable share of the cost of the federal government at the time of admission and in the future.

### 1. Economic Viability

As will be seen below, the District's claim to be economically viable as a state is shaky at best. In the last twenty years, the District's population has declined by 157,000 people or more than 20 percent of its population. Despite the decline in population, both the local tax burden and cost of government have substantially increased. During that same period, the District has repeatedly attempted to shift the costs of its local government programs to neighboring jurisdictions and the federal government while at the same time receiving federal funds greater on a *per capita* basis than any state and enjoying nearly five dollars in federal funds for each dollar paid in federal taxes. Moreover, a substantial percent of the District's private sector earnings derive from business which service or are otherwise linked to the Federal government.

Population trends. When the 23rd amendment was debated more than 30 years ago, 11 states, including the recently admitted States of Alaska and Hawaii, had smaller populations than the District of Columbia. In 1970, with a population of 757,000, the District still ranked ahead of 10 States. But in the past two decades, the District has lost over 20 percent of its residents and is now slightly larger than only three States. No State has suffered a decline in population in each of the last three decades as has happened in the District. If the trend of the past 20 years continues, the District's population will be less than 500,000 by the year 2010, not merely making it the smallest State, but also shrinking it below the size of a Congressional District and threatening its economic viability.

**States with the Lowest Population Compared with the District of Columbia (Population in thousands)**

| 1960--11 | 1970--10 | 1980--4 | 1990--3 |
|---|---|---|---|
| **D. C. (764)** | Hawaii (770) | Hawaii (965) | Nevada (1,202) |
| **S. Dakota (681)** | **D. C. (757)** | Idaho (944) | New Hampshire (1,109) |
| **Montana (675)** | New Hampshire (738) | New Hampshire (921) | Hawaii (1,108) |
| Idaho (667) | Idaho (713) | Nevada (800) | Idaho (1,007) |
| Hawaii (633) | Montana (694) | Montana (787) | Montana (799) |
| N. Dakota (632) | S. Dakota (666) | S. Dakota (691) | S. Dakota (696) |
| New Hampshire (607) | N. Dakota (618) | N. Dakota (653) | Delaware (666) |
| Delaware (446) | Delaware (548) | D. C. (638) | N. Dakota (639) |
| Wyoming (330) | Nevada (489) | Delaware (594) | D. C. (607) |
| Vermont (390) | Vermont (445) | Vermont (511) | Vermont (563) |
| Nevada (285) | Wyoming (332) | Wyoming (470) | Alaska (550) |
| Alaska (226) | Alaska (303) | Alaska (402) | Wyoming (454) |

Since 1960, the District's population has declined by 157,000 people. Based on the large drop in the under 18 population, we know more specifically that *families* are leaving. The working age cohort, ages 20 to 64, has also declined, while the elderly population has increased.

The loss of working families reflects a trend which must be reversed if the District is to meet the requirement for a sufficient population to support its State and local government. The city on balance has failed to be able to attract new working aged citizens and, at the same time, has been unable to prevent those most productive members of the locality from leaving. The economic viability of the city is significantly threatened by this trend and, should it continue, the city will have an increasingly a difficult time maintaining that it is capable of meeting the "economic viability" requirement for statehood.

At the very least, the population trend is a warning sign that the new State's ability to sustain itself is shaky. Perhaps the most accurate status report on the District's economic health comes from local officials themselves who have testified that the high tax rate on District residents leaves no further room for expansion within the District. In response to this dramatic loss of population, the most recent District budget demonstrates the determination of local officials to shift the tax burden of District government programs to nonresidents - including the federal government.

2. District's Favored Status

The District's self-perceived need to shift the costs of its programs to neighboring jurisdictions together with its position as receiving more federal funds per capita than any state (see below) call into question whether New Columbia "has sufficient population and resources

to support State government and to provide its share of the cost of the Federal government."

Sufficient economic resources independent of the federal government. Despite the obvious dependence of the District's economy upon the presence of the federal government, statehood advocates have labored mightily to demonstrate economic viability apart from the federal government. Advocates point to a healthy service industry which accounts for a significant share of the District's economy. Indeed, the federal government accounts for "just" 34.6 percent of the personal income earnings in the District compared to 37.6 percent of personal income earnings attributable to services. However, this point overlooks the fact that much of their service industry is itself directly linked to the federal government. Of the District's service industry, the largest percentages of earnings come from legal services and management services, both of which reflect the federal government's presence. Together, these two service categories account for 45 percent of the total earnings generated by the District's private sector service industry (Bureau of Economic Analysis, Table 3).

The District's Gross State Product was $28,791,000,000 in 1986, the latest year for which data is available (Bureau of the Census, Table E). This was generated from the following sources:

District's Gross State Product
(earnings in millions of dollars)

| Industry | Earnings | Percentage of Total |
|---|---|---|
| Construction | $1,991 | 6.9 |
| Manufacturing | 1,050 | 3.6 |
| Transportation and public utilities | 1,805 | 6.3 |
| Wholesale and retail trade | 1,806 | 6.3 |
| Finance, Insurance, and real estate | 2,675 | 9.3 |
| Services | 8,251 | 28.7 |
| Government | 11,199 | 38.9 |
| Other | 14 | |
| TOTAL | $28,791 | 100% |

Government, including federal civilian and military, state, and local government employment, was the source of 38.9 percent of the District's Gross State Product in 1985. By comparison, all levels of government accounted for just 11.7 percent for the United States total gross national product.

While statehood advocates point with pride that the District Gross State Product is larger

than 15 states, they fail to acknowledge that in 1990, the federal government spent $17,353,000,000 in the District of Columbia, more than in all but 17 states (Bureau of the Census).

Clearly, New Columbia will have a strong economy so long as the federal government maintains its current level of spending here. But there are also signs of weakness. Since 1986, the rate of increase in total personal income in the District of Columbia has been only equal to or lower than the national growth rate in four of those five years. No one can predict how the federal government or the private sector will react to statehood. Statehood advocates have refused to even acknowledge the potential negative reactions which could occur.

Whether New Columbia could provide its share of the burden of the federal government. Statehood advocates routinely use two figures to demonstrate that New Columbia can provide for its share of the burden of the federal government. Advocates point out that the District pays more in federal taxes than do eight States and that D. C. residents pay higher *per capita* taxes than any other State except Alaska.

Neither of these two bits of trivia are significant when considered in context. If statehood advocates are allowed to use this argument, then they should assess not only what is paid to the federal government, but also what is received from the federal government as the following tables show.

Federal Tax Burden of Lowest Ten States
(in millions)

| State | Total 1990 Federal Tax Burden | 1990 Federal Expenditures | Amount Received in Federal Expenditures for $1 Paid in Taxes |
|---|---|---|---|
| Wyoming | $1,649 | $ 1,855 | $1.12 |
| N. Dakota | 2,067 | 2,910 | 1.41 |
| S. Dakota | 2,102 | 2,863 | 1.36 |
| Vermont | 2,136 | 1,772 | 0.83 |
| Montana | 2,446 | 3,345 | 1.37 |
| Alaska | 2,724 | 3,227 | 1.18 |
| Idaho | 2,940 | 3,888 | 1.32 |
| Delaware | 3,348 | 2,149 | 0.64 |
| D. C. | 3,530 | 17,353 | 4.92 |
| Maine | 4,414 | 4,925 | 1.12 |

The argument that the District pays more taxes than eight States is neutralized by the fact that the District also *receives* more of the federal largess than do the other States.

Statehood proponents have made much of the fact that District residents pay the second

highest *per capita* taxes in the nation. To some extent, this merely reflects the District's small population and the universal application of the Internal Revenue Code. The federal tax code does not discriminate on the basis of geographic area. The fact that the residents of the District pay the second highest *per capita* taxes in the nation merely indicates that personal income in the District, on average, is comparatively higher than other States in the nation. The tax burden of the federal government does not in any way provide evidence that the residents are somehow incurring a disproportionate share of the federal government's fiscal responsibilities in providing services to this country's citizens. In fact, the numbers indicate just the opposite - the District receives back far more in federal money that it pays in federal taxes.

The following chart compares the District to the States with the highest *per capita* federal tax burden.

Federal Tax Burden on Highest *Per Capita* States
(Taxes Paid and Expenditures in millions)

| State | Federal Per capita Tax Burden | Total Taxes Paid | 1990 Federal Expenditures | Amount Received in Federal Expenditures For $1 Paid in Taxes |
|---|---|---|---|---|
| Connecticut | $6,768 | $22,070 | $14,739 | $0.67 |
| New Jersey | 6,239 | 48,676 | 28,322 | 0.58 |
| **D. C.** | **5,770** | **3,530** | **17,353** | **4.92** |
| Massachusetts | 5,577 | 33,024 | 29,778 | 0.92 |
| New York | 5,178 | 93,103 | 70,493 | 0.76 |
| Maryland | 5,046 | 23,809 | 27,118 | 1.14 |
| New Hampshire | 5,014 | 5,648 | 3,559 | 0.63 |
| Delaware | 4,953 | 3,348 | 2,149 | 0.64 |
| Alaska | 4,891 | 2,724 | 3,227 | 1.18 |
| Illinois | 4,738 | 55,198 | 36,696 | 0.66 |

In comparison with either group of States (lowest total burden or highest *per capita*), the District has received a much greater share of federal expenditures than it has contributed to the funding of the federal government. The District certainly cannot claim that its present status has resulted in an unfair federal tax burden on its residents.

**The lack of voting representation in Congress has not been a handicap in claiming federal expenditures. As the following table shows, the federal government spends $28,592 *per capita* in the District, more than seven times the total U. S. spending *per capita* (Bureau of Census, Table 8).**

*Per Capita* Distribution of Federal Funds (1990)

| Ten Highest States | | | Ten Lowest States | | |
|---|---|---|---|---|---|
| 1. | District | $28,592 | 50. | N. Carolina | $3,043 |
| 2. | Virginia | 5,874 | 49. | Indiana | 3,051 |
| 3. | Alaska | 5,867 | 48. | Wisconsin | 3,052 |
| 4. | New Mexico | 5,703 | 47. | Michigan | 3,142 |
| 5. | Maryland | 5,671 | 46. | Vermont | 3,148 |
| 6. | Massachusetts | 4,949 | 45. | New Hampshire | 3,209 |
| 7. | Hawaii | 4,927 | 44. | Illinois | 3,210 |
| 8. | Missouri | 4,741 | 43. | Delaware | 3,226 |
| 9. | N. Dakota | 4,555 | 42. | Georgia | 3,265 |
| 10. | Connecticut | 4,483 | 41. | Texas | 3,428 |

Total U. S. *Per Capita*: $3,974

It is extremely difficult to assess precisely what each State's "fair share" of the burden of the federal government should be. But it is clear that by these comparisons, the District receives more than it provides. Revenues from the Federal government accounted for 35% of the District government's revenue in FY 1990. By comparison, federal revenues account for just 16% of total state and local revenues across the nation (Economic Report of the President). This fact alone destroys any argument in support of a special federal payment to New Columbia. Moreover, if the District were to become a state, it is likely that it would face greater competition for federal dollars which are spent on procurement. Clearly, members of Congress are unlikely to subsidize or favor a co-equal state at the expense of their own as they currently favor the District of Columbia, the nation's capital.

District officials will protest that federal expenditures include salaries paid to nonresidents who are beyond their taxing authority. It is true that if nonresidents are subtracted, the federal expenditures would be reduced. But the amount of federal taxes paid (through income tax withholding at the place of employment) would be reduced also. Therefore, the overall burden-benefit ratio would not be changed. Even if the salaries paid to nonresidents are excluded, it is clear that the District has received favored status, as the following tables on grants to State and local governments show:

**420**

***Per Capita* Amounts of Federal Expenditure FY 1990**
**Total Grants to State and Local Governments**

| | | |
|---|---|---|
| District | $2,831 | Rank 1 |
| Total U. S. | $533 | |

**Department of Agriculture--Child Nutrition Programs**

| | | |
|---|---|---|
| District | $23.92 | Rank 12 |
| Total U. S. | $19.07 | |

Department of Education--Compensatory Education

| | | |
|---|---|---|
| District | $35.85 | Rank 1 |
| Total U. S. | $17.59 | |

Environmental Protection Agency
--Construction of Wastewater Treatment

| | | |
|---|---|---|
| District | $27.25 | Rank 1 |
| Total U. S. | $ 9.09 | |

Department of Health and Human Services--Medicaid

| | | |
|---|---|---|
| District | $357.26 | Rank 1 |
| Total U. S. | $161.94 | |

Social Services Block Grant

| | | |
|---|---|---|
| District | $13.50 | Rank 1 |
| Total U. S. | 10.88 | |

Family Support Payments (AFDC)

| | | |
|---|---|---|
| District | $84.63 | Rank 2 |
| Total U. S. | $48.54 | |

Department of Housing and Urban Development
--Community Development

| | | |
|---|---|---|
| District | $23.94 | Rank 1 |
| Total U. S. | $11.17 | |

Department of Housing and Urban Development
--Housing Assistance

| | | |
|---|---|---|
| District | $89.51 | Rank 2 |
| Total U. S. | $29.22 | |

Department of Labor--Job Training Partnership Act

| | | |
|---|---|---|
| District | $28.34 | Rank 1 |
| Total U. S. | $12.21 | |

Department of Labor--State Employment Services

| | | |
|---|---|---|
| District | $26.70 | Rank 2 |
| Total U. S. | $10.23 | |

Department of Transportation--Highway Trust Fund

| | | |
|---|---|---|
| District | $110.48 | Rank 9 |
| Total U. S. | $ 54.25 | |

Department of Transportation
--Urban Mass Transportation Administration

| | | |
|---|---|---|
| District | $534.17 | Rank 1 |
| Total U. S. | $ 14.88 | |

The expenditures outlined above clearly demonstrate the leverage the District has in commanding federal resources. In addition to these grants, the federal government is contributing $52 million per year to one of the District's retirement funds as well making a $630.5 million payment to the District.

Statehood proponents have not proven that New Columbia will be able to support its State government without special federal considerations nor have they proven that New Columbia can provide its equitable share of the cost of the Federal government.

By seeking to admit part of the District of Columbia as a sovereign State, H. R. 4718 violates these time-honored traditions, giving us a State which is steadily shrinking in population, and is economically dependent upon the federal government. It is highly questionable as to whether New Columbia can in fact provide its fair share of the cost of the Federal government. Even the most staunch statehood advocate admits that any change in the relationship with the federal government could be devastating to New Columbia's State budget and/or economy.

But, what if the unthinkable indeed occurs? Let us assume that New Columbia is indeed

faced with the loss of the federal payment; the inability to tax federal workers within the redesignated District of Columbia - which is not part of New Columbia; the loss of federal contributions to its retirement system; the continued decline in working families; the loss of private businesses which find the high cost of locating in New Columbia prohibitive and no longer beneficial as it is no longer the nation's capital; and the burden of new expenses such as the $5 billion cost of constructing its own prison system.

Faced with such circumstances, it is not hard to foresee that the federal government could be subjected to influences from the new State which could hamper the orderly functioning of the national seat of government. Madison's fear of any State possessing *de facto* status of "first among equals" would be realized and our very form of government would again be put to the test.

3. Abandonment of the "Tennessee Plan"

The Tennessee plan. Of the 37 states admitted to the Union, 20 of them had received authority to embark on the statehood process in the form of an enabling act by Congress. The District chose not to follow the enabling act process, but rather, another process historically called the "Tennessee Plan." Only seven states, Tennessee, Michigan, Iowa, California, Oregon, Kansas, and Alaska, have entered the Union by this method. However, since proclaiming its intention to follow the process laid out by the "Tennessee Plan", the District has abandoned its adherence to those procedures.

The "Tennessee Plan" consists of a four step statehood process. First, delegates are elected to draft a state constitution. Second, the convention-drafted constitution is submitted to voters for ratification. Third, the voter-ratified constitution is submitted to Congress in petition for statehood. Finally, voters to elect two provisional or "shadow" senators and one provisional or "shadow" representative to present the case for statehood before members and pertinent committees of Congress.

At its inception in 1796, the Tennessee Plan raised constitutional questions. Several members of the Federalist party challenged the right of this territory to take the statehood procedure so far without Congressional authority. These members of Congress believed they alone had the right to determine whether a territory had the means and the desire to join the Union. There was however, very little precedent at the time with the Constitution of the United States having only been in effect for six years. Subsequently, Tennessee's ground breaking method, although not considered the norm, became acceptable. However, this method also set high standards for any territory choosing to adopt the Tennessee Plan.

The general motivation behind a territory taking up the Tennessee Plan seems to be an impatience in following the more normal channels of admission. In some cases there existed overriding political reasons which for one reason or another led Congress to believe a particular territory should not yet be granted statehood. Typically, a territory's population or strategic political implications on the issue of slavery resulted in Congress delaying admission. As a

result, the territory in question might act on its own in an attempt to force the issue. Regardless of the reasons, the method and execution of the Tennessee Plan with all seven states, including Alaska which sought statehood for years, remained the same. Following the example of Tennessee's Governor William Blount in 1796, the States implementing the Tennessee Plan carried out every detail of erecting a State government prior to petitioning Congress for admission.

New Columbia's quest for statehood followed the Tennessee Plan only until it was no longer a convenient means of achieving that goal. In November of 1980 the citizens of the District of Columbia approved a ballot initiative calling for a Constitutional Convention to begin the process of achieving statehood. In November 1981, the citizens of the District elected 45 delegates to the Constitutional Convention. The Convention met between March and May 1982. The Convention Constitution was adopted and signed on May 29, 1982. In November 1982, the Convention Constitution was ratified by a vote of 61,405 to 51,964 (54% to 46%).

On September 12, 1983, H. R. 3861, a bill to provide for the admission of the state of New Columbia into the Union was introduced. Section 2 of the bill provided that the Convention Constitution "adopted by a vote of the people of the District of Columbia in the election held on November 2, 1982, is hereby found to be republican in form and in conformity with the Constitution of the United States and the principles of the Declaration of Independence, and is hereby accepted, ratified, and confirmed." Statehood bills through January 1987 included this provision.

Serious questions were soon raised whether the Convention Constitution was "in conformity with the Constitution of the United States." As a result, in 1985, District and supportive Congressional officials began to rewrite what the people of the District of Columbia had ratified.

On June 11, 1986, the Subcommittee on Fiscal Affairs and Health of the House Committee on the District of Columbia held a hearing on the 1982 Convention Constitution and changes proposed by an *ad hoc* group of advocates of statehood. Arthur Spitzer, Legal Director, American Civil Liberties Union of the National Capital Area, testified that the ACLU "would oppose the entire proposed [Convention] Constitution unless substantial changes are made" (Spitzer p. 231) and provided the following critique of that document:

> ... Section 3 would make the all-male Cosmos Club, the all-female Sulgrave Club, the all-black Huntsman Club, the Sons of Italy, the Knights of Columbus, the Masons, the Daughters of the American Revolution, the Society of Cincinnati, the Gay Mens' Chorus, college fraternities and sororities, the Women's National Democratic Club, the Society of Women Geographers, Spa Lady, and other all-female health clubs, and probably hundreds of other existing all-male, all-female, all-black, all-gay, and all-whatever private organizations per se unlawful in the State of New Columbia. All of this would be true even if those organizations did not receive a penny of government benefits (Spitzer, p. 232).

The Catholic Church would not be allowed to limit the priesthood to males, nor would an orthodox Jewish synagogue be permitted to seat women in the balcony, because those would be acts of discrimination against sex. Indeed, a parochial school could not prefer a Catholic for the position of headmaster, nor could the B'nai B'rith prefer a Jew for the position of Executive Director, because those would be clear instances of religious discrimination, and the draft Constitution permits no exceptions of any kind to any of its prohibitions (Spitzer, p. 233).

Drinking and driving privileges could not be limited to persons over 21, or over 18, or even over 12, since that would be discrimination based on age, which is prohibited without limitation (Spitzer, p. 233, 234).

Private schools could not refuse admission to otherwise qualified students who could not afford the tuition, since that would be discrimination based on poverty. For the same reason, private lawyers, doctors, automobile mechanics or beauticians could not turn away indigent clients, patients or customers whose business they would accept on a paying basis. Movie ticket theaters could not refuse admission to people who could not pay the ticket price, nor, apparently, could a store refuse to "sell a television set or a mink coat to a poor person. Any number of equally absurd examples could easily be generated (Spitzer, p. 234).

Similarly, laws establishing minimum ages of consent for sexual intercourse, or marriage, or for signing binding contracts, or for becoming a police officer, would become unconstitutional. Laws requiring students to remain in school until a certain age would have to be struck down. *Even the D. C. child labor law would be unconstitutional* under this provision (emphasis in original)(Spitzer, p. 236, 237).

4. Abolishment of the People's 1982 Convention Constitution

It became clear to even the most ardent statehood advocates in Congress that the 1982 Convention Constitution could not meet the requirement of an acceptable constitution, so an entirely new Constitution was written, first by the *ad hoc* group of proponents and then by the District Council. The advocates of statehood abandoned the "Tennessee Plan", which requires the State Constitution to be ratified prior to passage of an admission act, by their failure to submit the completely new proposed constitution to the voters for ratification.

The refusal to submit the 1987 Council Constitution for ratification is an egregious violation of the democratic process in the District of Columbia. Local officials have broken faith with the voters, departed from the procedures of the Tennessee plan, and have ignored the operative provisions of the Convention Constitution. Article XVIII, section 9 of the Convention Constitution states:

> After the voters have approved it and before Article XVII enters into force, amendments to this Constitution may be adopted by the voters of the

**District of Columbia after affirmative recommendation by a District of Columbia Statehood Constitutional Convention or by a two-thirds vote of the Council of the District of Columbia. This Section shall take effect when the Constitution is approved by the voters.**

The intent and meaning of this provision is clear: either a Constitutional Convention or the District Council *may* propose amendments to the Convention Constitution before it takes effect, but the proposed changes *must* be submitted to the voters for ratification.

Near the end of the Constitutional Convention in 1982, Delegate Coates prophetically offered an amendment to the above provision of the Convention Consutution: "I am convinced now that this is potentially a devastating provision to all that we have laboriously and painfully articulated as a proposed Constitution for the new State, because if we adopt section 9 as presently postured, it means that every area of special interest and opposition to any word, period, comma, sentence, clause, phrase, Section, Article will then utilize the D. C. City Council to unwrite what we have torturedly labored through for ninety some days. That to me is totally unacceptable" (Coates, p. 1743)

Delegate Jordan responded. "What the Section says is, that first of all *the voters will approve any amendments* that are recommended by the Council or the Constitutional Convention" (Jordan, p. 1745). Delegate Shrag also spoke against the Coates amendment, emphasizing that Article XVIII, section 9 only authorized the Council to "*recommend changes to the voters*"(emphasis added)(Shrag, Legislative History, p. 1746).

The Coates amendment was defeated 13-15. As Delegate Coates feared, the D. C. Council indeed wrote an entirely new and different State Constitution in 1987.

Proponents argue that a few states were admitted before their constitutions were ratified.[3]

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[3] A review of the history of State Constitutions being ratified by the citizens prior to a submission to Congress for statehood shows an overwhelming trend in favor of popular ratification of the new state's constitution prior to admission. Twenty-six out of thirty-seven of the new states admitted to the Union had popularly approved their state constitutions before an Admission Act was approved. The citizens of Mississippi began what would become the standard in the admission process by popularly ratifying their constitution in 1817. Only one state, Arkansas joined the Union after 1821 without popularly ratifying its Constitution prior to an admission. But Arkansas' constitution had been ratified by popularly elected delegates prior to admission act being passed. Ninety-six percent of the states which have entered the Union since 1821 have ratified their constitutions by a popular vote before an admission act was passed by Congress. Congress passed admission acts without constitutions in place for only Kentucky, West Virginia, and Wisconsin.

Every state which has been admitted to the Union in this century had popularly ratified

But in the case of the District, a constitution has been ratified and sent to Congress and since then there has been a concerted effort to supercede it with another proposed constitution which has not been ratified. This situation is unprecedented and should not be tolerated. The people have spoken their minds in their choice of Delegates to the Constitutional Convention and in their ratification of the product of that convention. Congress runs a grave risk in considering admitting a new State under a proposed constitution with specific limitations on government and responsibilities for citizens when those citizens have so strongly expressed their contrary desires.

A forced choice for District voters. Even though the Council Constitution was passed five years ago, it has never been submitted to the citizens for approval. H. R. 4718 proposes to put the question of the Council Constitution on the same ballot as the admission referendum. This coupling of the issues is unfair to the voters of the proposed "State of New Columbia" because it makes voter-acceptance of the unratified constitution the price of statehood. Unless there is a popular referendum on the Council constitution before Congress takes any further action on admitting New Columbia to the Union the voters will not be able to freely express their choice.

While there is some precedent for Congress to admit a state that lacks a voter-ratified constitution, there is no precedent for Congress to force voters to choose in favor of one constitution over another. Yet that is exactly what H. R. 4718 requires. Such a procedure would subvert the very concept of what a constitution should be. As Thomas Paine wrote:

> A constitution is not a thing in name only, but in fact. It has not an ideal, but a real existence . . . A constitution is a thing antecedent to a government, and a government is only the creature of a constitution. The constitution of a country is not the act of its government, but of the people constituting a government (Paine, p. 71.)

Nearly five years have passed since the Council acted unilaterally to adopt a wholesale revision of the Convention Constitution ratified by the citizens of the District of Columbia. The proponents of H. R. 4718 simply have not bothered to explain why the Council Constitution has not been submitted to the citizens of the District for ratification. To be consistent with the District's own plan for achieving statehood it should be.

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its constitution prior to passage of its admission act. Regardless of the method used in seeking admission, Congress has insisted that the people give their vote of approval to the document that is to guide and determine the future of their lives within the newly created political entity.

The fact that such an overwhelming majority of the most recent states to enter the Union did so by popularly ratifying their state constitutions before Congressional acceptance provides incontrovertible evidence in favor of such a method.

In summary, the advocates of statehood for New Columbia are not following the "Tennessee Plan"--the procedure which the District adopted, they have jettisoned the Constitution ratified by the voters, and they have even ignored the advice of their own scholarly experts.

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The George Washington Law Review

JANUARY, 1992

*60 Geo. Wash. L. Rev. 475*

**LENGTH:** 11068 words

ARTICLE: Partisan Rhetoric, Constitutional Reality, and Political Responsibility: The Troubling Constitutional Consequences of Achieving D.C. Statehood by Simple Legislation.

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**LEXISNEXIS SUMMARY:**
... The issues surrounding statehood for the District of Columbia have become so intertwined with partisan politics that it is easy to dismiss all arguments as blatant partisan rhetoric. ... In support of statehood, George Washington University Law Professor Peter Raven-Hansen and Georgetown University Law Professor Philip Schrag have argued that the District of Columbia could become a state by "simple" legislation -- without the necessity of a constitutional amendment. ... Moreover, the statehood-through-simple-legislation scenario likely would trigger intractable constitutional challenges and present justiciability problems concerning both the admission of New Columbia and the legality of the repeal of the District's Electoral College enabling legislation. ... Could a state today repeal its electoral vote selection statute, thereby eliminating that state's participation in a presidential election? Such a scenario, while unlikely, cannot be discounted entirely. ... Moreover, should the statehood proponents "prevail" in the short term by achieving D.C. statehood before confronting the Twenty-third Amendment issues; then promulgating the repeal of the District of Columbia Electoral College enabling legislation; and then successfully arguing that the issues cannot be framed in a justiciable fashion, they would win a hollow victory. ...

**HIGHLIGHT:** A majority, held in restraint by constitutional checks, and limitations . . . is the only true sovereign of a free people.

Abraham Lincoln n1

**TEXT:**
[*475] *Introduction*

The issues surrounding statehood for the District of Columbia have become so intertwined with partisan politics that it is easy to dismiss all arguments as blatant partisan rhetoric. Such dismissal, while understandable, is lamentable because the relevant constitutional and policy issues warrant serious consideration. Because the State of New Columbia would likely send two liberal Democratic senators to the Senate far into the foreseeable future, however, the [*476] partisan edge to the issue must be acknowledged before one can realistically confront the issue on legal terms. n2

And the partisan edge is sharp indeed. The polar rhetorical views can be summed up by the Reverend Jesse Jackson on the Left and President George Bush on the Right. The Reverend Jackson claims not only that statehood for the District of Columbia "is the number one 'social justice' issue facing America today," n3 but that it also "is a cause for global concern and action." n4 Less flamboyantly, but no less clearly, President Bush has trumpeted the tautological line that the District is a "federal city" and therefore was never meant to be a state. n5

To be sure, both positions have been buttressed by a prodigious amount of scholarly constitutional support, most of which has been viewed with some skepticism because of the perceived partisan identification of the commentators. n6 This Article attempts to avoid the partisan political thicket and focuses on the constitutional meaning [*477] and consequences of the Twenty-third Amendment. This dimension of the statehood debate soon will move to the forefront. Congress inevitably must consider how the current legislative proposals for statehood would affect the workings of the Electoral College and the concept of constitutional rights generally. As explained in this Article, these issues are inexorably related to the Twenty-third Amendment. n7

[*478] In support of statehood, George Washington University Law Professor Peter Raven-Hansen and Georgetown University Law Professor Philip Schrag have argued that the District of Columbia could become a state by "simple" legislation -- without the necessity of a constitutional amendment. n8 This position has been adopted in the recently introduced D.C. Statehood legislation that would provide for the admission of "the State of New Columbia." n9 Because amending the Constitution is much more difficult than passing a law, the result-oriented benefits of this position are readily apparent. Whether the position is legally sound and constitutionally appropriate is another matter.

The Twenty-third Amendment of the Constitution authorizes the District of Columbia, or, to use the precise constitutional term, "the seat of Government of the United States," to participate in presidential elections through the Electoral College. n10 This amendment was modeled after Article II, section 1 of the Constitution, which provides for the manner in which the respective States of the Union select their representatives to the Electoral College. n11 The Twenty-third Amendment also contains "enabling" or "enforcement clause" language identical to several other constitutional provisions. Typically, the "enforcement" language provides that "Congress shall have power to enforce [the particular constitutional right] by appropriate legislation." n12

[*479] The idea that D.C. statehood might be achieved by simple legislation indirectly raises the issue of whether particular constitutional rights, when coupled with constitutional "enabling" language, are "self-executing." The issue arises because any statehood legislation not requiring repeal of the Twenty-third Amendment inevitably would necessitate *further* legislation. This additional legislation would be needed to repeal existing federal "enabling" statutes that set forth the procedures by which "the seat of Government of the United States" selects its presidential electors. These legislative maneuvers would seem to be a radical attempt to extinguish constitutionally-protected rights by the expedient process of simple legislation.

This Article contends that the meaning of the Twenty-third Amendment can be gleaned from a historical and constitutional understanding of Article II, section 1. The interrelationship between Article II, section 1 and the Twenty-third Amendment demonstrates that any interpretation of the Twenty-third Amendment that permits its protections to be avoided by simple legislation will do lasting damage to the concept of constitutional rights. Such an interpretation also would endanger Article II, section 1, because it would set a dangerous and radical precedent that

would effectively eliminate the requirement that state legislatures guarantee their state's participation in the Electoral College in every presidential election. Moreover, the statehood-through-simple-legislation scenario likely would trigger intractable constitutional challenges and present justiciability problems concerning both the admission of New Columbia and the legality of the repeal of the District's Electoral College enabling legislation.

This result is constitutionally unacceptable. The only other means of obtaining D.C. statehood without a constitutional amendment would require that the remaining, drastically reduced District of Columbia be entitled to its constitutionally-mandated three electoral votes for president. However, this result is politically and civically irresponsible. n13

This Article concludes by noting that, although full and equal representation for the District is a noble end, the current proposed D.C. statehood legislation is not a justifiable means to that end. Even the most noble of ends cannot justify the means when the means include eviscerating the Constitution and the constitutional process. The Constitution protects the rights of the minority from [*480] the tyranny of momentary and ever-shifting majorities. n14 Any proposal that implies that constitutional protections can be avoided by simple legislation must be viewed with suspicion, no matter how just the particular cause may be. These arguments are sometimes dismissed by statehood proponents as obstruction tactics masquerading as legal analysis. n15 However, as Justice Robert H. Jackson cautioned, "the validity of a [constitutional] doctrine does not depend on whose ox it gores." n16 The Constitution was designed to be difficult to amend so as to safeguard its protections against the whims of a mere majority. The Twenty-third Amendment cannot be ignored. If it is to be eliminated, a constitutional amendment is required. Accordingly, any D.C. statehood legislation should be made contingent upon the repeal of the Twenty-third Amendment.

*I. An Overview of the Problem of Statehood by Legislation*

*A. The Unique Constitutional Status of the District of Columbia*

It is undisputed that, as a general rule, a new state may be admitted into the Union solely by act of Congress and presidential approval. n17 No constitutional amendment is necessary. Not surprisingly, proponents of legislation that would create the State of New Columbia rely on this "hornbook" proposition to support their position that statehood for New Columbia may be obtained without amending the Constitution.

Simple legislation also comports favorably with political realities. It is widely accepted that D.C. statehood would result in the election [*481] of two Democratic senators. n18 Thus, D.C. statehood cannot be completely separated from the partisan political realities. The Democratic platform in 1984 and 1988 has unequivocally called for D.C. statehood. n19 Because the Democrats presently control both houses of Congress, statehood partisans understandably see legislation as a potentially successful and relatively quick method of achieving it. Further, D.C. statehood advocates surmise that President Bush would be under intense pressure not to veto a statehood bill, so as to avoid being characterized as anti-equality with respect to the right to vote and the right to equal representation. n20

D.C. statehood proponents wish to avoid the constitutional amendment process because they believe the national consensus, as measured by the state legislatures, is decidedly against them. The concern is that, under the current political climate, any proposed constitutional amendment facilitating D.C. statehood and repealing other related provisions of the Constitution would not receive the support of the required three-fourths of the states necessary to amend the Constitution. n21

The statehood-by-legislation scenario, however, ignores the fact that the District of Columbia, "the Seat of Government of the United States," is constitutionally unique, and should not be treated [*482] like any other territory seeking statehood. n22 The District's unique constitutional status is evidenced both by Article I, section 8, which authorizes Congress "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," n23 and by the Twenty-third Amendment, which provides "the seat of Government

of the United States" with three electoral votes for president and vice-president. n24

These constitutional commands are an integral part of the federalism themes that underlie the Constitution n25 and cannot be ignored or dismissed as insubstantial technicalities. n26 The Constitution must remain paramount. Because proponents of D.C. statehood recognize the constitutional requirements of Article I, section 8, all recent legislative proposals for statehood have been drafted in a manner that is constitutionally consistent with these requirements. In this way, the proponents of the legislation hope to avoid both amending the Constitution and violating Article I, section 8. n27

*B. Avoiding the Constitutional Issues*

Recognizing that Article I, section 8 provides no minimum size for the seat of Government of the United States, statehood advocates have proposed that the constitutionally required "seat of Government of the United States" be reduced in size to the "National Capital Service Area," n28 and that the remaining area, which currently comprises the balance of the District become, the State of [*483] New Columbia. n29 These changes could be accomplished by legislation. n30 Although some have quarreled with this result on the somewhat dubious ground that it offends the spirit of the underlying rationale for establishing the federal district, n31 legislation reducing the size of the District offends no constitutional principle. In fact, precedent exists for reducing the size of the District of Columbia by legislation. The original boundaries of the District were ten miles square, and included what is now Arlington County, Virginia, as well as part of the city of Alexandria. In 1846, Congress retroceded that geographic area back to the state of Virginia through legislation. n32

The Twenty-third Amendment, ratified in 1961, poses more difficult and intractable problems. This amendment, the product of a long and considered constitutional debate, provides the "District [*484] constituting the seat of Government of the United States" with electoral representation in presidential elections. n33 Reducing the size of the constitutionally-required "seat of Government of the United States," as posited above, would create the state of New Columbia. However, because of the language of the Twenty-third Amendment, the remaining National Capital Service Area, which would comprise the new District of Columbia (constitutionally necessary in order to comply with Article I, section 8), n34 would seem to be entitled to three electoral votes. Although statehood proponents have tried to craft geographical boundaries that would effectively drain the remaining District of all residents, this result can never be fully achieved. n35 As a consequence, the constitutional end result would be politically irresponsible because it would mean that a handful of citizens -- the residents of the White House, the homeless, perhaps some military personnel, and the few residences that may remain in the National Capital Service area -- would control three electoral votes. n36

[*485] To avoid this problem, the Twenty-third Amendment could be repealed. n37 However, as noted above, statehood proponents want to avoid the uncertain and lengthy amendment process. n38 In arguing against the need for an amendment, some proponents have asserted that the Twenty-third Amendment is not "self-executing." According to this theory, Congress could eliminate the problem posed by the Twenty-third Amendment by simply passing a statute that repeals the present federal enabling legislation that sets forth the procedures by which the District selects its presidential electors. n39

[*486] The concept that certain provisions of the Constitution are not "self-executing" and can be eliminated by Congress is troubling and could have serious consequences concerning other aspects of constitutional interpretation. James Madison explicitly rejected such a suggestion, and commented that "it would be a novel and dangerous doctrine that a legislature could change the Constitution under which it held its existence." n40

Relegating certain constitutional provisions to "nonself-executing" status should not be done out of momentary convenience for a particular cause. The next Part of this Article will address the alleged "nonself-executing" status of the Twenty-third Amendment, and the attendant consequences that would arise with other constitutional provisions as a result of such an interpretation.

*II. Is the Twenty-third Amendment Self-executing?*

*A. Arguments from the Text*

The Twenty-third Amendment provides in its entirety:

Section 1. 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.

Section 2. The Congress shall have power to enforce this article by appropriate legislation. n41

The concept that the Twenty-third Amendment is not self-executing means that despite the substantive provisions of section one, if Congress decided either to repeal or not enact the enabling legislation that provides the method and procedure for the District's Electoral College selection, the District would be deprived of its constitutional right to three electoral votes. n42 This logic, if sound, [*487] would apply even if Congress never intended to establish New Columbia. In other words, under this theory Congress could repeal the enabling legislation today, and never enact legislation providing for D.C. statehood. This result would effectively deprive the current District of Columbia residents of their hard-fought constitutional right to electoral representation in presidential elections. It is somewhat inexplicable that statehood proponents would accept such a legal position, let alone implicitly endorse it as sound constitutional principle. n43

Proponents of the view that the Twenty-third Amendment is not self-executing contend that the amendment contains a double requirement that Congress affirmatively act to create and enforce this constitutional right. The first requirement is contained in section 2, which gives Congress the authority to enact "appropriate legislation." To further support the contention that the Twenty-third Amendment is not self-executing, proponents set forth a legislative history argument. They note that there was a six-month gap between the time the Twenty-third Amendment was ratified and the time that Congress finally enacted the enabling legislation. n44 They argue that this conclusively demonstrates that the rights contained in the Twenty-third Amendment are not self-executing -- they are dependent on Congressional legislation, and may be extinguished by Congressional legislation. Thus there is no need to repeal the Twenty-third Amendment because the same congressional majority that votes for statehood also could repeal, by simple legislation, the enabling statutes that give effect to the Twenty-third Amendment.

Second, proponents note that in section 1 there is the allegedly ambiguous command -- partially mandatory, partially permissive -- that the "District . . . *shall* appoint [electors] in such manner as the Congress *may* direct." n45 They assert that this language gives Congress discretionary authority to bring the right into fruition. These [*488] contentions, which are disingenuous and dangerous, will be discussed in turn.

*B. The Enforcement Clause of the Twenty-third Amendment*

It is alarming that anyone would suggest that the enforcement clause language of section 2 makes a substantive constitutional provision useless without the enabling legislation. Several constitutional amendments authorize Congress to enforce their provisions through "appropriate legislation." Few, if any, constitutional commentators have taken the position that the mere *presence* of congressional enforcement clause language renders the substantive provision a dead letter without the congressional legislation. n46 Professor Laurence Tribe has summarized thusly:

The [individual] rights Congress is thereby empowered to enforce [through an "appropriate legislation" clause in

the constitution] include the right to be free from slavery or involuntary servitude, except as a punishment for crime, established by the thirteenth amendment; the rights to enjoy the privileges or immunities of national citizenship, due process of law, and equal protection of the laws, established by the fourteenth amendment; the right not to be deprived of the vote on account of race, color, or previous condition of servitude, established by the fifteenth amendment; the right not to be deprived of the vote on account of sex, established by the nineteenth amendment; *the right of residents of the District of Columbia to participate in presidential and vice-presidential elections,* established by the twenty-third amendment; [and] the right not to be deprived of the vote in federal elections on account of failure to pay any poll tax or other tax, established by the twenty-fourth amendment. n47

The Supreme Court has long held that the "fifteenth amendment's guarantee of a racially unconditioned right to vote, like the various guarantees of the fourteenth amendment, is self-executing." n48 In other words, the substantive constitutional right exists even in the absence of "enabling" legislation enacted pursuant to the "appropriate legislation" clause. The same should certainly hold true for the Twenty-third Amendment's guarantee of voting [*489] representation in presidential elections by whatever constitutes the Seat of Government of the United States. To decide otherwise simply because of the presence of the section two enforcement clause would call into question the validity of the several constitutional provisions embodying individual rights listed by Professor Tribe. Such a result would, at minimum, create a substantial uncertainty that would work a devastating shift in constitutional law. n49 Moreover, the debate concerning the parameters of the appropriate legislation clause found in several constitutional amendments has centered largely on whether Congress can *expand* the substantive constitutional right beyond the limits found by the courts. n50 It has only rarely been suggested that the enforcement clause language gives Congress the opportunity to enact legislation *constricting* the scope of the substantive constitutional right. n51

[*490] The above discussion only goes so far as saying that the appropriate legislation clause is not a talisman for categorizing a particular amendment as impotent without congressional legislation. n52 One must still address the time-gap argument, which asserts that because the enabling legislation that established the District of Columbia Electoral College selection procedures was not enacted until six months after the Twenty-third Amendment was ratified, the right did not exist in the interim. n53 Analysis of this issue requires a focus on several interrelated issues concerning the structure of the Electoral College. n54

First, the time lag, at least in this context, is factually and constitutionally irrelevant. This is a false issue. The Twenty-third Amendment was ratified on March 29, 1961. Its *sole* purpose was to provide the District of Columbia with representation in the Electoral College for presidential and vice-presidential elections. n55 The next presidential election was to be held in November 1964, which was more than three years away. Under no circumstances could there have been a presidential election before that time. n56 Thus, the only relevant time measure to gauge the effect of the Twenty-third Amendment was November 1964. So long as the required enabling legislation was enacted prior to November 1964, as it was, no real constitutional issue arose. The six-month gap between ratification and enactment of enabling legislation was constitutionally irrelevant, and thus lends no support to the argument that the substantive right was not self-executing.

Next, statehood proponents who wish to avoid the amendment process claim that rejection of earlier proposed language for the Twenty-third Amendment suggests that it creates a permissive right of Congress, rather than a self-executing right of the people. n57 In [*491] support of this position, proponents rely on a few statements culled from the legislative history, and on an earlier proposal that would have provided that *"the people of the District of Columbia shall elect* the presidential electors." n58 The proponents argue that the rejection of that language for the adopted language, which states that "The District constituting the seat of Government of the United States shall appoint in *such manner as the Congress may direct,"* n59 indicates that section 1 is permissive and not mandatory. n60 This argument, if successful, would mean that the Twenty-third Amendment, despite the presence of near identical "enforcement clause" language, is unlike the Fourteenth Amendment or Fifteenth Amendment, or any other constitutional provision containing an enforcement clause. Arguably, it would provide a unique reason for determining that the Twenty-third Amendment is not self-executing. Moreover, this rationale would have no precedential carry over effect to other constitutional provisions. n61

This is a somewhat disingenuous misreading of constitutional history and the Constitution, excerpts of the Congressional Record notwithstanding. The actual language of the Twenty-third Amendment provides that the "seat of Government of the United States *shall* appoint in such manner as the Congress may direct." n62 This command is mandatory. The plain language does not give Congress the option of absolutely refusing to direct, in any manner whatsoever, the method of appointment of presidential electors. n63 A far [*492] more plausible reason for the rejection of the earlier language, and for the acceptance of the language actually resulting in the Twenty-third Amendment, was that the accepted language was consistent with the constitutional provisions concerning the method whereby the states selected their respective members of the Electoral College. This rationale was explicitly endorsed by the House subcommittee that proposed the actual language of the Twenty-third Amendment. n64

[*493] Article II of the Constitution provides that "Each State shall appoint, *in such Manner as the Legislature thereof may direct*, a Number of Electors, equal to the whole Number of Senators and Representatives." n65 Thus, the Twenty-third Amendment was not making some unique statement denigrating the constitutional right of the citizens of the District of Columbia. Rather, it was putting them, no matter how few in number, on equal footing with the citizens of the states with respect to the manner in which their representatives to the Electoral College were selected. n66

Article II does not refer to the people of a particular state, it refers to "the State." For the sake of constitutional symmetry, the Twenty-third Amendment was drafted to refer to the corporate body politic that makes up the geographical designation of the territory consisting of "the seat of Government of the United States." n67 The reference in the Twenty-third Amendment that "*Congress* may direct" is identical to the language in Article II, section 1 that provides that the governing legislative body of each state choose the selection procedures. For the respective states, the governing legislative body is the state legislature, for the District it is Congress. Thus, Congress' role in providing electoral college representation for the "seat of Government of the United States" under the Twenty-third Amendment is substantively identical to the respective states' role in providing electoral college representation for each respective state under Article II. n68 So long as there exists a geographical entity comprising the "seat of Government of the United States" -- no matter how small in area and tiny in population -- and so long as the Twenty-third Amendment remains part of the Constitution, Congress must meet its obligation under the Twenty-third Amendment. n69

[*494] Exactly what is Congress' obligation? To answer that question, one must understand the scope of discretion given to state legislatures under Article II, section 1 to select presidential electors and the *equivalent* discretion given to Congress to select the presidential electors for the District of Columbia. In both cases, the discretion does not include the right to deny the right to choose presidential electors all together.

Contrary to what has now developed as common practice, the Constitution does not mandate that each state's electoral votes be allocated by a unit rule, what is more commonly referred to as "winner take all." Similarly, the Constitution does not mandate that each state adopt the identical method of electoral selection. n70 Accordingly, the range of discretion to appoint electoral votes includes: appointment by the state legislature; n71 appointment by proportionate share of the popular vote; n72 appointment by district system or modified district system; n73 or appointment by winner take all general ticket system ("unit rule"), where, in essence, the candidate who receives a plurality of the state's popular vote receives all the state's presidential electors. n74

[*495] All of these procedures have been utilized throughout history at one time or another; some have been in use simultaneously during the same presidential election. n75 These procedures represent the appropriate legitimate range of choices that can be exercised by the respective state legislatures under Article II and by Congress under the Twenty-third Amendment. Under no circumstance, however, can a state or Congress deny electoral votes all together. n76

Truth be told, history does not neatly square with that assertion. In the first presidential election in 1789, the state of New York did not provide any presidential electors. This result occurred because the Federalist-controlled State Senate and the Anti-Federalist controlled State Assembly failed to agree on a method to select the presidential electors. As a consequence, New York did not participate in the election of 1789. n77

However interesting, the 1789 experience is not useful precedent for the proposition that a state can refuse to establish a procedure to select presidential electors (thereby effectively eliminating its participation in the Electoral College), or that Congress can refuse to appoint electors for the District of Columbia altogether by repealing the enabling legislation. First, New York's failure to appoint presidential electors was never challenged in the courts. Second, one could certainly argue that this first presidential election was plagued with the usual kinks present in any start-up operation. n78 Finally, [*496] one also could argue that President Washington's unopposed candidacy reduces the significance of the nascent party warfare in New York. n79 The New York experience therefore, rather than being real precedent, is not much more than a *sui generis* historical curiosity.

Moreover, perhaps the most compelling reason for not permitting Congress to eliminate the District's Electoral College selection procedures lies in modern notions of equal protection and the privileges and immunities of U.S. citizenship; the guarantee of a republican form of government; and the structure of federalism implicit in the constitutional order. Each of these principles mandates the result that those entities constitutionally designated to cast electoral votes are constitutionally entitled to them. n80

The few Supreme Court pronouncements on the issue appear to support this position. In *McPherson v. Blacker,* n81 the Supreme Court considered whether a Michigan law that altered that state's Electoral College selection procedure was constitutionally valid. In preparation for the 1892 presidential election, the Michigan legislature passed a law that changed the selection procedure from winner take all to the district system. The Court, finding no constitutional infirmity, noted that Article II had not been altered by the Fourteenth and Fifteenth Amendments. n82 The Court further reiterated that the "appointment and mode of appointment of electors belong exclusively to the States under the Constitution" n83 and that such appointment of presidential electors may be made by the legislatures directly, or by popular votes in the districts, or by general ticket, as may be provided by the legislature. n84 While leaving the method of appointment to the states, the Court nevertheless implicitly recognized the obligations of the respective states to provide for *some* [*497] form of electoral vote selection. n85

At least with respect to the range of alternatives available to the respective state legislatures, *McPherson* retains vitality today. Although forty-nine states and the District of Columbia have statutes which provide for "winner take all" electoral vote selection, Maine chooses its electors by a partial district system. n86

Could a state today repeal its electoral vote selection statute, thereby eliminating that state's participation in a presidential election? Such a scenario, while unlikely, cannot be discounted entirely. n87 Such a move would be subject to various legal challenges, [*498] some of them instructive to the analogous eventuality of Congress repealing the enabling legislation for the District.

First, any state law that purported to eliminate that state's participation would likely be challenged on state law constitutional grounds. n88 However, because the District of Columbia has no separate "state" constitution, there are no analogous "state law" grounds available to the citizens of the District of Columbia. Second, the action conceivably could be challenged as a violation of Article IV, section 4 of the Constitution, which "guarantee[s] to every State in this Union a Republican Form of Government." n89 Whatever success a state citizen could have challenging an action by a "state," a challenge to a congressional repeal would likely face an additional hurdle because the clause by its terms is a guarantee to "each State," so that the protections afforded by the clause arguably would not extend to the District of Columbia.

Finally, the state action may be challenged on equal protection or privileges and immunities grounds under the Fourteenth Amendment. n90 Although the Fourteenth Amendment applies to state action, and is likewise inapplicable as a limitation on congressional [*499] action, the Due Process Clause of the Fifth Amendment *is* a valid limit on congressional action. The Supreme Court has held that the Due Process clause of the Fifth and Fourteenth Amendments also have been held to yield norms of equal treatment indistinguishable from those of the Due Process Clause. n91 Here, any congressional legislation that would repeal the enabling legislation establishing procedures for the District's participation in the Electoral College would extinguish the political franchise provided by the Twenty-third Amendment

to those remaining citizens of the truncated District of Columbia. The Supreme Court has noted that "the political franchise of voting" is a "fundamental political right, because [it is] preservative of all rights." n92 As such, in order for such congressional action that infringes on this fundamental right to be upheld as constitutional, it must be *necessary* to promote a compelling governmental interest. n93

[*500] An attempt to sidestep the requirements of the Twenty-third Amendment by repealing the statute providing for the District of Columbia Electoral College provisions is neither necessary or compelling. It is not necessary for it is not the *only* alternative -- indeed, the possibility of amending the Constitution is available. The proposed legislative repeal also is not compelling. Regardless of how "compelling" the quest for New Columbia statehood may be, the creation of New Columbia is not mutually exclusive with the existence of a federal District of Columbia that is subject to the continuing operation of the rights afforded by the Twenty-third Amendment. Congress' only justification for enacting a statute repealing the District of Columbia electoral vote provisions is that the elimination, by legislation, of the politically irresponsible but constitutionally valid situation of having a handful of voters in the truncated District exercising their control over three electoral votes is easier than amending the Constitution. These justifications would surely fail to qualify as compelling governmental interests.

Moreover, the only type of legislative prohibition of the suffrage on a class of persons that has withstood an equal protection challenge has been the restriction of voting rights of ex-felons. n94 The Supreme Court has upheld those prohibitions in the face of equal protection challenges because of the express language of section 2 of the Fourteenth Amendment, which sanctions the denial of the right to vote to those who "participat[ed] in rebellion, or other crime." n95

The Twenty-third Amendment poses the exact opposite situation. Here, the Constitution *expressly and affirmatively sanctions* Electoral College representation for the "seat of Government of the United States" -- the District of Columbia. n96 Accordingly, given that the Twenty-third Amendment provides the District of Columbia, no matter how small, with the right to participate in the Electoral College, any congressional action which extinguishes that right necessarily must violate the equal protection or fundamental rights component of the Due Process Clause.

Moreover, every constitutional amendment enacted since the [*501] Twenty-third Amendment has dealt either with the presidency directly, or with eliminating barriers and expanding the constitutional right to vote for president. These constitutional amendments provide an inclusionary umbrella principle that the citizens of the United States who reside in constitutionally defined entities that can participate in the Electoral College have the constitutional right to have their entity participate in the Electoral College. n97 In fact, the Twenty-fourth Amendment arguably shifts the right to participate in presidential elections from an exclusive corporate right of the body politic to an explicit co-equal individual right of the citizenry. n98 Thus, any legislation that would purport to eliminate that exercise should face an almost insurmountable presumption of invalidity.

Imagine the result if this were otherwise. A determination that the Twenty-third Amendment is not self-executing because of the first sentence in section 1 leads to the inescapable conclusion that the first clause of Article II, section 1 is not self-executing as well. As noted above, that would mean that a state legislature that wanted to eliminate that state's participation in a presidential election could constitutionally repeal its enabling legislation designating its selection method of electoral votes, and thereby disenfranchise its citizens from a presidential election. Such a result is repugnant to modern notions of equal protection and the privileges and immunities of United States citizenship. That result should not be ignored for the sake of expedience simply to achieve New Columbia's statehood without a constitutional amendment.

*C. Is Congress' Repeal of the Enabling Legislation Justiciable?*

Envision this scenario. Statehood proponents pass legislation which creates New Columbia and reduces the size of the federal enclave of the District of Columbia. In that same bill -- or in a later bill that surely must follow -- Congress purports to repeal the statutes which set up the selection procedures for District of Columbia representation in the

Electoral College. n99 Homeless advocates protest [*502] in a media-tailored display of civil disobedience. Predictably, some well-known public interest lawyer holds a press conference on the steps of the federal courthouse, and announces that she has filed suit in federal court seeking to enjoin enforcement of the statute that has repealed the legislation n100 or seeking to direct Congress to enact new enabling legislation for the Electoral College for the District. n101 The suit alleges a violation of the Twenty-third Amendment.

A strange specter occurs. D.C. Statehood proponents, many of whom have been tireless advocates for rights for the homeless, n102 and whom have opposed those who made "states' rights" and jurisdictional arguments asserting that federal courts had no authority to decide issues, n103 would be aligned against the homeless in their moment of truth. Ironically, they would likely defend the suit on the ground that it was nonjusticiable. n104 The main crux of the argument would be that Congress' decision to admit new states is a nonjusticiable political question. n105

[*503] But wait. Reliance on that line of legal authority surely would not control. The suit does not challenge the granting of statehood *per se,* it challenges the elimination of the District of Columbia's constitutional right to three electoral votes by legislation, rather than by amending the Constitution. This clearly presents a legal issue that is capable of being resolved by applying judicially manageable standards. As such, this presents no more of a nonjusticiable political question than would a state's effort to totally eliminate its' participation in the Electoral College. As discussed above, a determination that such issues are nonjusticiable would be unfathomable. n106

Next, a federal court likely would have to face the novel and complex question of whether it could force Congress to enact legislation in order to comply with constitutional rights. n107 The companion issue, whether a federal court could fine legislators and the president for civil contempt should they fail to cooperate, would also have to be addressed. n108 Even if Statehood proponents could orchestrate a political *fait accompli,* and achieve Statehood without addressing the Twenty-third Amendment issue, and then subsequently attempt to nullify or repeal the Twenty-third Amendment so as to avoid the politically irresponsible consequences, n109 the resulting litigation would be an ugly mess. The constitutional consequences would [*504] reach far beyond the Twenty-third Amendment. Congress could avoid this by simply adhering to the unambiguous constitutional commands. If Congress seriously considers enacting D.C. statehood legislation, it should make the statehood legislation contingent on the repeal of the Twenty-third Amendment effected through constitutional amendment.

*Conclusion*

This Article has proceeded on the premise that, except for the Twenty-third Amendment, legislation can resolve the other purported legal barriers to D.C. statehood in a way that would be consistent with the Constitution. Whether the State of New Columbia should be created and whether a small "National Capital Service Area" should remain as the constitutionally-required exclusively federal District of Columbia are, in the final analysis, policy questions that Congress should debate and resolve. The Constitution demands only that *some* area remain that is the independent "seat of Government of the United States." Barring a constitutional amendment repealing the Twenty-third Amendment, this seat of Government is constitutionally entitled to participate in the Electoral College with at least three electoral votes. It would be politically irresponsible, but not unconstitutional, for such a drastically reduced District, with a minuscule population, to be entitled to three electoral votes. Statehood proponents who claim this problem can be avoided by simple legislation are wrong, their invocation of the nobleness of the cause notwithstanding. Indeed, one need look no further than the proposed Equal Rights Amendment. That was for many a noble cause that nevertheless failed to become part of the Constitution because it was not ratified by the constitutionally-required three-fourths of the states. n110 When moral claims seek vindication through the legislative process, they must adhere to constitutional requirements. The District of Columbia is a unique constitutional creature. The integrity of the Constitution cannot be ignored when fealty to the Constitution is inconvenient.

Moreover, should the statehood proponents "prevail" in the short term by achieving D.C. statehood before confronting the [*505] Twenty-third Amendment issues; then promulgating the repeal of the District of Columbia Electoral College enabling legislation; and then successfully arguing that the issues cannot be framed in a justiciable

fashion, they would win a hollow victory. Statehood would then have been achieved at the enormous cost of undermining the responsibility of state legislatures to ensure participation in the presidential selection process; of cheapening the concept of constitutional rights generally; and of shortsightedly putting into jeopardy the continuing validity of several individual constitutional rights. That is an unduly high and irresponsible price to pay.

The solution is obvious. Any proposed statehood legislation should be made contingent on the repeal of the Twenty-third Amendment. This solution is politically responsible and constitutionally correct. More importantly, this solution would ensure that the bizarre constitutional issues raised in this Article will remain on the law review pages, not the front pages. #PQ920312SP# #PQ920313LEujoseme#

**Legal Topics:**

For related research and practice materials, see the following legal topics:
Constitutional LawElections, Terms & VotingGeneral OverviewGovernmentsFederal GovernmentElectionsGovernmentsLegislationEnactment

**FOOTNOTES:**

n1 Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *in* 4 COLLECTED WORKS OF ABRAHAM LINCOLN 262, 268 (Roy P. Basler ed., 1953).

n2 Registered Democrats outnumber registered Republicans in the District by approximately a nine-to-one ratio. *See* DISTRICT OF COLUMBIA BD. OF ELECTIONS AND ETHICS, MONTHLY REPORT OF VOTER REGISTRATION STATISTICS FOR THE JUNE 11, 1991 SPECIAL ELECTION CITYWIDE SUMMARY. In the recent 1990 mayoral election, the Democratic candidate received over 85% of the vote. DISTRICT OF COLUMBIA BD. OF ELECTIONS AND ETHICS, DISTRICT OF COLUMBIA GENERAL ELECTION, NOVEMBER 6, 1990, FINAL AND COMPLETE ELECTION RESULTS. Since the District was granted participation in the Electoral College commencing with the 1964 presidential election, the District's presidential popular vote has gone to the Democratic candidate every time by an overwhelming percentage. *See* GUIDE TO U.S. ELECTIONS 361-66 (2d ed. 1985); 1988 CONGRESSIONAL QUARTERLY ALMANAC 7-A.

Members of both political parties have commented on the strength of the Democratic party in D.C., and the resulting consequences for D.C. statehood. Senator Edward Kennedy alleged in 1970 that opposition to congressional representation for the District was based on the conviction that it is "too liberal, too urban, too black, or too Democratic." Arlen J. Large, *Full Representation for D.C.?*, WALL ST. J., Aug. 30, 1978, at 14 (statement of Sen. Kennedy). He noted those same opposition arguments in 1991, criticizing them as "[unable to] stand the light of day," and "an insult to everything America stands for." 137 CONG. REC. S17,684 (daily ed. Nov. 22, 1991) (Part II) (statement of Sen. Edward Kennedy). Edward Rollins, a strategist for the Republican party, has noted that "[g]enerally, Republicans do not favor statehood [because] you're going to get two liberal Democrats [in the Senate] and keep getting them for the next 100 years." Ann Devroy & R.H. Melton, *President Opposes Statehood,* WASH. POST, Mar. 24, 1990, at A1.

n3 Letter from Rev. Jesse L. Jackson to the Hon. Robert A. Borski (Jan. 12, 1990) (on file with *The George Washington Law Review*).

n4 *See* Jesse L. Jackson, *Foreword: The State of New Columbia -- A Call for Justice and Freedom, 39*

*CATH. U. L. REV. 307, 309 (1990).*

n5 *See* Devroy & Melton, *supra* note 2, at A1. In addition, the Washington Post noted that the President relied on erroneous statistical information vastly overstating the percentage of federal monies that support the District. *Id.* The President's views, however, remain the same. *Id.*

n6 The most detailed legal analysis of the constitutional and policy arguments against D.C. statehood is found in OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL ON THE QUESTION OF STATEHOOD FOR THE DISTRICT OF COLUMBIA (1987) [hereinafter ATTORNEY GEN. REPORT]. For similar views adapted from that Report, see STEPHEN J. MARKMAN, NAT'L LEGAL CTR. FOR THE PUBLIC INTEREST, STATEHOOD FOR THE DISTRICT OF COLUMBIA: IS IT CONSTITUTIONAL? IS IT WISE? IS IT NECESSARY? (1988) [hereinafter NAT'L LEGAL CTR. REPORT]. Stephen J. Markman was Assistant Attorney General for the Office of Legal Policy in the Reagan Administration, the administration that authored the 1987 Attorney General Report. Briefly, these articles set forth the following arguments against statehood or congressional representation for the District: that the Constitution does not appear to provide for retrocession; that a greatly truncated Federal District would be unwise for constitutional, historical, economic, and policy reasons; that Maryland's consent may be necessary to change the status of the District; that D.C. representation in the Senate would deny the states "equal suffrage" in the Senate; and that the Twenty-third Amendment precludes D.C. statehood. *See* ATTORNEY GEN. REPORT, *supra,* at iii-vii; NAT'L LEGAL CTR. REPORT, *supra,* at 16-32, 45-62.

For the major legal arguments for D.C. Statehood which refute many of the anti-statehood arguments noted above, see *Constitutional and Economic Issues Raised by D.C. Statehood: Hearings Before the Subcomm. on Fiscal Affairs and Health of the House Comm. on the District of Columbia,* 99th Cong., 2d Sess. (1986) (statement of Peter Raven-Hansen) [hereinafter Raven-Hansen Statement]; Peter Raven-Hansen, *The Constitutionality of D.C. Statehood, 60 GEO. WASH. L. REV. 160 (1991)*[hereinafter Raven-Hansen, *D.C. Statehood*]; Philip G. Schrag, *The Future of District of Columbia Home Rule, 39 CATH. U. L. REV. 311 (1990).* Professor Raven-Hansen has been advocating novel theories of expanded representation for the District of Columbia since 1975. *See* Peter Raven-Hansen, *Congressional Representation for the District of Columbia: A Constitutional Analysis, 12 HARV. J. ON LEGIS. 167, 168-69 (1975)* [hereinafter Raven-Hansen, *Congressional Representation*]. Professor Philip Schrag was a delegate and framer of the proposed New Columbia State Constitution. *See* PHILIP G. SCHRAG, BEHIND THE SCENES: THE POLITICS OF A CONSTITUTIONAL CONVENTION (1985). Despite his long identification as an ardent statehood proponent, Professor Schrag and others have argued that statehood by any scenario may not be politically feasible in the near future. Accordingly, they propose that energy be directed toward obtaining as much self-determination for the District as possible, short of actual statehood. *See* Schrag, *supra,* at 322-45; Louis Michael Seidman, *The Preconditions for Home Rule, 39 CATH. U. L. REV. 373, 379, 408 (1990)* (arguing that, at most, statehood for D.C. would provide only "a modicum of legal protection"). That view has been criticized on the ground that "statehood represents the only authentic form of political equality for American citizens living in the District of Columbia." Jamin B. Raskin, *Commentary: Domination, Democracy, and the District: The Statehood Position, 39 CATH. U. L. REV. 417, 425 (1990).*

Two excellent sources on the statehood controversy have been authored by persons not obviously identified with the current partisan struggle. For an excellent analysis concluding that retrocession of the District to Maryland is the "elegant solution," see JUDITH BEST, NATIONAL REPRESENTATION FOR THE DISTRICT OF COLUMBIA 80 (1984). For a candid analysis of several related constitutional issues, but taking no ultimate position, see Letter and Memorandum from Robert F. Kennedy, Attorney General, to Rep. Basil L. Whitener (Dec. 13, 1963), *reprinted in* ATTORNEY GEN. REPORT, *supra,* app. J at 123-35 [hereinafter Robert Kennedy Memorandum].

n7 This Article proceeds on the premise that the myriad of other legal issues surrounding the statehood debate can be resolved without the necessity of a constitutional amendment. The major constitutional obstacles to Statehood, other than the Twenty-third Amendment issue, appear avoidable because the proposed legislation does not contemplate the elimination of the District of Columbia entirely, but rather seeks to reduce its size. For a further discussion, see *infra* notes 28-32 and accompanying text. The constitutional problems of retroceding the District to Maryland or providing for congressional representation, options not seriously considered on the legislative agenda, raise issues not relevant here and thus need not be considered in detail.

Resolution of the constitutional problems does not necessarily mean that statehood is a good idea from a political or policy standpoint. That decision is ultimately a legislative responsibility. Several vital issues, not of constitutional dimension, would have to be addressed adequately. For example, statehood likely would mean a drastic reduction or outright elimination of an annual $ 650 million federal payment to the District. The economic effects could be catastrophic. In addition, statehood would require resolution of several logistical problems concerning unglamorous but essential services. *See* Statement of Assistant Attorney General Patricia M. Wald, *reprinted in* ATTORNEY GEN. REPORT, *supra* note 6, app. E at 100 (noting problems relating to fire, power, police, and sewer services). Congress would also have to address logistical problems concerning the location of the foreign embassies outside of the federal district. This is not, however, a problem of constitutional dimension. It is not the federal government's exclusive jurisdiction over the District that protects the vital interests of the foreign embassies and their diplomats in the United States. Rather, these interests are protected by means of the principles of extraterritoriality, sovereign immunity, and the Vienna Convention on Diplomatic Relations. *See also* U.S. DEP'T OF STATE, DIPLOMATIC LIST, NOVEMBER 1990, at 22 (1990) (at present, two foreign embassies are not in the District of Columbia).

n8 *See* Raven-Hansen, *D.C. Statehood, supra* note 6, at 183-89; Raven-Hansen Statement, *supra* note 6, at 3-6; *see also* Schrag, *supra* note 6, at 348-50.

n9 H.R. 2482, 102d Cong., 1st Sess. (1991). The bill adopts the "Statehood by simple legislation" scenario by *not* including a provision that ties the effective date of the legislation to a repeal of the Twenty-third Amendment. *Compare id. with* H.R. 4193, 101st Cong., 2d Sess. (1990) (proposed bill authorizing District residents to vote in Maryland federal elections containing specific provision tying effective date of legislation to repeal of Twenty-third Amendment) *and* H.R. 4195, 101st Cong., 2d Sess. (1990) (proposed bill retroceding District to Maryland containing specific provision tying effective date of legislation to repeal of Twenty-third Amendment). In addition, in support of the statehood by legislation scenario, Senator Paul Simon, chairman of the Senate Subcommittee on the Constitution, expressly stated that he was "convinced that a constitutional amendment was not required." 137 CONG. REC. S17,685 (daily ed. Nov. 22, 1991) (Part II).

n10 U.S. CONST. amend. XXIII.

n11 U.S. CONST. art. II, § 1.

n12 *See* U.S. CONST. amend. XIII, § 2; *id.* amend. XIV, § 5; *id.* amend. XV, § 2; *id.* amend. XIX; *id.* amend XXIII, § 2; *id.* amend. XXIV, § 2; *id.* amend. XXVI, § 2.

n13 This characterization is not being used in the partisan political sense. It is being used in much the same way that it would be politically and civically irresponsible for Congress to decide today to repeal the Internal Revenue Code.

n14 *See In re Duncan, 139 U.S. 449, 461 (1891).* The *Duncan* Court noted: "[W]hile the people are thus the source of the political power, their governments, National and State, have been limited by written constitutions, and they have themselves thereby set bounds to their own power, as against the sudden impulses of mere majorities." *Id.* For somewhat contrasting views on the concept of constitutional protections against a legislative "tyranny of the majority," see JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 101-04 (1980), and MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 77-90 (1982).

n15 *See, e.g.*, Schrag, *supra* note 6, at 349-50 ("The constitutional arguments against statehood are unpersuasive, but they are politically weighty. . . . Members of Congress opposed to statehood echo them, and they would provide good camouflage for a President who wanted to veto a statehood admission act without appearing to be a foe of home rule or voting representation in Congress." (footnotes omitted)).

n16 *Wells v. Simonds Abrasive Co., 345 U.S. 514, 525 (1953)* (Jackson, J., dissenting); *see also Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 483 (1934)* (Sutherland, J., dissenting) ("If the provisions of the Constitution be not upheld when they pinch as well as when they comfort, they may as well be abandoned.").

n17 U.S. CONST. art. IV, § 3 ("New States may be admitted by the Congress into this Union."). *See generally* Luis R. Dila-Colon, *Equal Citizenship, Self-Determination, and the U.S. Statehood Process: A Constitutional and Historical Analysis, 13 CASE W. RES. J. INT'L L. 315 (1981).* Historically, territories have been admitted as new states pursuant to this provision. Currently, in the debate concerning statehood for Puerto Rico, all sides impliedly concede that statehood can be achieved by simple legislation. *See generally* Laurence I. Barrett, *Puerto Rico, the 51st Estado,* TIME, Mar. 26, 1990, at 19; Bill McAllister, *Puerto Rico Statehood Movement Gains,* WASH. POST, Dec. 27, 1990, at A1, A12 (noting that the debate centers around whether Puerto Rico residents want statehood or continued commonwealth status, and setting forth the attendant economic consequences).

n18 *See supra* note 2 and accompanying text.

n19 DEMOCRATIC NAT'L COMM., 1984 DEMOCRATIC NATIONAL PLATFORM 37; DEMOCRATIC NAT'L COMM., 1988 DEMOCRATIC PLATFORM 5.

n20 However, somewhat similar pressure from civil rights groups failed to prevent President Bush from vetoing the Civil Rights Act of 1990. *See* Ann Devroy & Sharon LaFraniere, *Bush Outlines Objections to Civil Rights Proposal,* WASH. POST, May 18, 1990, at A6. The Senate narrowly sustained the President's veto. Helen Dewar, *Senate Upholds Civil Rights Bill Veto, Dooming Measure for 1990,* WASH. POST, Oct. 25, 1990, at A15. The President eventually signed a compromise civil rights bill, but the administration still set off a firestorm of protest by suggesting that its interpretation of the new bill would be exceedingly narrow. *See* Ann Devroy & Sharon LaFraniere, *U.S. Moves to End Hiring Preferences,* WASH. POST, Nov. 21, 1991, at A1; Ann Devroy, *President Signs Civil Rights Bill,* WASH. POST, Nov. 22, 1991, at A1.

n21 After a proposed constitutional amendment has received the approval of two-thirds of both houses of Congress, the ratification of the proposed constitutional amendment requires approval by three-fourths of the states. U.S. CONST. art. V. A 1978 proposed constitutional amendment to treat the District of Columbia "as if it were a state" by providing the District with two seats in the Senate and proportionate representation in the House and in the Electoral College faced a "colossal rejection" by the state legislatures, when the seven year

limitation expired in 1985. *See* Hal Stratton, *Foreword* to NAT'L LEGAL CTR. REPORT, *supra* note 6, at vii. Only sixteen states ratified the proposed amendment, less than half the number needed for ratification. *Id.* at vii n.2.

There is some question concerning what lessons should be drawn from the rejected amendment. It was not a D.C. statehood proposal. More fundamentally, even the Reverend Jesse Jackson recognizes the importance of galvanizing nationwide popular support for D.C. Statehood. Press Release of Jesse L. Jackson, Rainbow Opens Office for DC Statehood Campaign (Jan. 15, 1990) (noting campaign will include conducting petition drive and letter-writing campaign in all 50 states) (statement of Jesse Jackson) (on file with *The George Washington Law Review*).

n22 For a review of the history of the creation of the District of Columbia, see CONSTANCE MCLAUGHLIN GREEN, WASHINGTON, CAPITAL CITY, 1879-1950 (1963); CONSTANCE MCLAUGHLIN GREEN, WASHINGTON, VILLAGE AND CAPITAL, 1800-1878 (1962).

n23 U.S. CONST. art. I, § 8.

n24 U.S. CONST. amend. XXIII. The Twenty-third Amendment limits the District's number of electoral votes so as not to exceed the number of the least populous state. *Id.* This number can never be less than three, because each state gets two votes based on its Senate representation, and must have at least one vote based on its representation in the House. For the complete text of the Twenty-third Amendment, see *infra* text accompanying note 41.

n25 *See* Orrin G. Hatch, *Foreword* to BEST, *supra* note 6, at vii-xi (observing that the constitutional issues concerning the status of the District of Columbia are rooted in federalism).

n26 *See Metropolitan Washington Airport Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 111 S. Ct. 2298, 2312 (1991)* (rejecting the argument that a violation of separation of powers principles should be overlooked if the provision that would violate it is "the kind of practical accommodation between the Legislature and the Executive that should be permitted in a 'workable government'"); *United States v. Munoz-Flores, 110 S.Ct. 1964, 1969-70 (1990)* (stating that the issue of whether legislation violates the origination clause is not a minor constitutional argument that can be ignored); *see also* Grover Rees III, *Throwing Away the Key: The Unconstitutionality of the Equal Rights Amendment Extension, 58 TEX. L. REV. 875, 882-84 (1980)* (listing and severely criticizing arguments claiming that constitutional requirements concerning time requirements to ratify a proposed constitutional amendment could be ignored because they were mere "matters of detail," "procedural," and "not 'substantive'").

n27 *See infra* notes 28-39 and accompanying text.

n28 The National Capital Service Area already exists as an administrative entity. *40 U.S.C. § 136* (1988). In the proposed legislation introduced in the 102d Congress by Representative Eleanor Holmes Norton, the National Capital Service Area would be "comprised of the principal Federal monuments, the White House, the Capitol Building, and the Federal executive, legislative, and judicial office buildings located adjacent to the Mall and the Capitol building." H.R. 2482, 102d Cong., 1st Sess. § 4(b) (1991). More precise geographical boundaries are set forth in § 16 of the bill. *Id.* § 16. The proposed geographical boundaries are virtually identical to the existing boundaries set forth in *40 U.S.C. § 136*(f)(1)(A) (1988).

n29 *Id.* This has become a staple of all recent statehood proposals. *See* S. 2647, 101st Cong., 2d Sess. § 4 (1990) (stating that the "State of New Columbia shall not include the Capital Service Area," and that "[a]s of the date of admission of New Columbia into the Union, the District of Columbia shall consist of the National Capital Service Area"); *see also* H.R. 2482, 102d Cong., 1st Sess. § 4 (1991) (setting forth the exact language of S. 2647). As this Article entered its final stages, Senator Kennedy reintroduced statehood legislation in the Senate identical to S. 2647 and H.R. 2482. S. 2023, 102d Cong., 1st Sess. (1991).

n30 *See infra* text accompanying notes 31-32. *See generally* Raven-Hansen, *D.C. Statehood, supra* note 6, at 166-77.

n31 *See, e.g.,* ATTORNEY GEN. REPORT, *supra* note 6, at 23-25; Robert Kennedy Memorandum, *supra* note 6, at 126-30. Responding to a proposal to retrocede the District to Maryland without providing for a federal enclave, Kennedy asserted that the founders' original plan for a capital city envisioned a city with a large population that would symbolize national aspirations, *id.* at 129, and further argued that "[r]eduction of the District to [sic] small strip of territory occupied wholly by Federal buildings is thus clearly inconsistent with the concept of the Federal City held by the framers," *id.* at 131.

n32 An Act to retrocede the County of Alexandria, in the District of Columbia, to the State of Virginia, ch. 35, *9 Stat. 35 (1846).* The reasons underlying the retrocession are varied. On one hand, residents of Alexandria claimed they were deprived of all benefits of D.C. sovereignty because of the congressional ban prohibiting the construction of any federal buildings on the Virginia side of the District. *See* An Act to amend "An act for establishing the temporary and permanent seat of Government of the United States," ch. 17, *1 Stat. 215 (1791).* A more skeptical view suggests that the District was about to abolish the slave trade as part of what would become the Compromise of 1850, and the port of Alexandria, a thriving slave port, wished to remain in the slave trade as part of Virginia. *See* Charles Paul Freund, *The States of the District,* WASH. POST, Mar. 11, 1990, at B2. The slave trade, as opposed to slavery itself, was abolished in the District in the Compromise of 1850. Congress did not abolish slavery in the District until 1862. *See* MELVIN I. UROFSKY, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES 374-76, 418-19 (1988). For a view that the Virginia retrocession provides no valid precedent for reducing the size of the District on the ground that the constitutionality of the retrocession was never definitely litigated, see ATTORNEY GEN. REPORT, *supra* note 6, at 19-21.

n33 *See* H.R. REP. NO. 1698, 86th Cong., 2d Sess. (1960) (to accompany S.J. Res. 39), *reprinted in* 1960 U.S.C.C.A.N. 1459-63 [hereinafter Proposed Constitutional Amendment Report].

n34 *See supra* notes 23-26 and accompanying text.

n35 As noted above, the National Capital Service Area already exists as an administrative entity, with virtually identical boundaries to those proposed in the statehood legislation. *See supra* note 28. Congress has already acknowledged that citizens with voting rights reside in that geographic area, even though the boundaries should exclude all privately owned properties. *See 40 U.S.C. § 136*(g)(1) (directing that "in conducting survey [to establish metes and bounds of National Capital Service Area] the President shall make such adjustments as may be necessary in order to exclude from the National Capital Service Area any privately owned properties"); *id.* § 136(j) ("In no case shall any person be denied the right to vote or participate in any election in the District of Columbia because such person resides in the National Capital Service Area.").

n36 *See* Robert Kennedy Memorandum, *supra* note 6, at 132-33 (The result of having three electoral votes for a handful of residents "would reduce the 23d amendment to an absurdity. . . . It is inconceivable that Congress would have proposed, or the States would have ratified, a constitutional amendment which would confer three electoral votes on a [federal district] which has 75 families or which [has] no population at all.").

While such a result may be an irresponsible political and civic absurdity, it is a constitutional plausibility. The unique constitutional method of calculating the District's number of electoral votes actually lends additional support to the proposition that the District, no matter how small, should get its electoral representation. The Twenty-third Amendment limits the District to a number of electoral votes not to exceed the number of votes for the least populous state. This number can be no less than three, no matter how miniscule the population. *See supra* note 24. Census data is normally used to determine a state's population, which then determines its representation in the House of Representatives. That figure is then used to help establish the number of that state's electoral votes. The framers of the Twenty-third Amendment were aware that, because of the nature of the District as the locus of the federal government, census data, when applied to the District, might inadvertently include those who were still registered to vote in their home states, and thus not reflect the true number of permanent D.C. residents. *See* Proposed Constitutional Amendment Report, *supra* note 33, at 1462. Accordingly, since D.C. electoral representation under the Twenty-third Amendment is not tied to the census, even a minute population should get the three electoral votes.

The fact that homeless persons may make up a large percentage of the "residents" of the remaining District of Columbia should not affect this analysis. Federal courts have held that the homeless can use a park as their official voting residence. *See Pitts v. Black, 608 F.Supp. 696, 710 (S.D.N.Y. 1984).* For an argument contending that anti-homeless laws, which might be used to deny the homeless the right to claim the truncated District as their voting residence, are unconstitutional, see generally Paul Ades, Comment, *The Unconstitutionality of "Antihomeless" Laws: Ordinances Prohibiting Sleeping in Outdoor Public Areas as a Violation of the Right to Travel, 77 CAL. L. REV. 595 (1989).* With respect to the other residents of the National Capital Service Area, it is undisputed that the White House would be included, and that those who reside there could use it as their official voting address. Moreover, in recent years, residential development has crept up to and perhaps into the boundaries of the proposed National Capital Service Area. *See* Linda Wheeler, *Pioneers Trek Back to 'Main Street,'* WASH. POST, Oct. 2, 1990, at B1 (discussing the residents of the first residential building erected along the Pennsylvania Avenue corridor that is "part of the federal government's 16-year-old master plan to renovate 'America's Main Street'" with retail stores and housing in an area nearly void of housing for 40 years).

n37 Although some statehood proponents have acknowledged that this may be necessary, they have not fully addressed the additional constitutional implications discussed in this Article. *See, e.g.,* J. Otis Cochran, *District of Columbia Statehood, 32 How. L.J. 413, 419-20 (1989)* ("Admission of the District of Columbia is a special case, however, because it is an entity explicitly recognized and provided for in the Constitution. . . . [R]epeal of the twenty-third amendment is also an option.").

n38 Even under the best of circumstances, it is exceedingly difficult to amend the Constitution. *See generally* JAMES L. SUNDQUIST, CONSTITUTIONAL REFORM AND EFFECTIVE GOVERNMENT 239-51 (1986) (characterizing the amendment process as "so formidable" because any proposed amendment can be effectively blocked by adverse vote, or simple inaction, of a relatively small percentage of House members or state legislatures).

n39 Schrag, *supra* note 6, at 349. This scenario would, in essence, keep the Twenty-third Amendment as part of the Constitution, but would render it a sort of latent suppressed virus in the constitutional body. In essence, this would destroy the effect of granting a substantive right by eliminating the statutory mechanism for

selecting presidential electors.

Professor Raven-Hansen has also suggested that the repeal of the Twenty-third Amendment would be unnecessary. He argues that the electoral vote provisions would automatically become inoperative because the statehood legislation would trigger the constitutional power to admit new states under Article IV, section 3, and thereby implicitly repeal the District's right to three electoral votes. Raven-Hansen, *D.C. Statehood, supra* note 6, at 183-89; Raven-Hansen Statement, *supra* note 6, at 3-6. This theory is flawed for several reasons. First, a constitutional provision can be repealed, explicitly or implicitly, only by a subsequent constitutional amendment. The Twenty-third Amendment was enacted more than 170 years *after* Article IV, section 3, so it is difficult to fathom how Article IV, section 3 could eliminate the rights granted in the Twenty-third Amendment.

Professor Raven-Hansen also purports to find some support in cases holding that legislation passed pursuant to the Fourteenth Amendment can "override" certain constitutional provisions in some circumstances. His purported reliance, however, on legislation enacted pursuant to the enforcement clause of the Fourteenth Amendment is also inapposite. "The Fourteenth Amendment . . . was avowedly directed against the power of the States." *Pennsylvania v. Union Gas Co., 491 U.S. 1, 42 (1989)* (Scalia, J., concurring in part and dissenting in part); *see City of Rome v. United States, 446 U.S. 156, 174-80 (1980)* (stating that the Fourteenth Amendment intrudes on state sovereignty and alters the normal federal-state balance). Accordingly, legislation enacted pursuant to the Fourteenth Amendment which implicitly alters the federal-state relationship that existed prior to the enactment of the Fourteenth Amendment is proper. In the case of the Twenty-third Amendment and D.C. representation in the Electoral College, however, the extraordinary power of the Fourteenth Amendment is not at issue, nor is there a claim that a subsequent constitutional amendment has impliedly altered an earlier provision.

n40 RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN 14 (1987) (quoting James Madison) (citations omitted).

n41 U.S. CONST. amend. XXIII.

n42 Professor Schrag advocates such an interpretation. *See* Schrag, *supra* note 6, at 348-50. Professor Raven-Hansen seemingly has endorsed Professor Schrag's position as well. *See* Raven-Hansen, *D.C. Statehood, supra* note 6, at 187-89. The current federal statute authorizing the District of Columbia to enact selection procedures for its participation in the Electoral College is the Act of Oct. 4, 1961, Pub. L. No. 87-389, *75 Stat. 817 (1961).*

n43 Bashing the District of Columbia may not be in vogue today. *See* Kent Jenkins, Jr., *House Votes to Give District the Money,* WASH. POST, June 27, 1991, at C1 (Rep. Norton stating that "it has become unfashionable to beat up on the District"). The political winds shift on this issue quickly, however. *See* Kent Jenkins, Jr., *District Favor Fades Fast With Senator,* WASH. POST, June 28, 1991, at B7 (observing that Sen. Gorton's criticism of the District marks an abrupt halt to a short era of unbridled good feelings for the District on Capitol Hill). It is possible that a legislative majority could be so hostile to the District that they would consider taking this type of action. The District bears the brunt of national politicians' frustrations on several issues. *See* Schrag, *supra* note 6, at 314-15 (noting the positions of members of Congress on abortion, consensual adult sodomy, and AIDS testing).

n44 *See* Raven-Hansen, *D.C. Statehood, supra* note 6, at 188; Schrag, *supra* note 6, at 348-49.

n45 U.S. CONST. amend. XXIII, § 1 (emphasis added).

n46 Professor Schrag apparently takes the position that the mere presence of "enforcement clause" language necessarily means that a constitutional right is not self-executing. As a delegate to the New Columbia State Constitutional Convention, he commented that a proposed "equal protection" constitutional provision "seems to be internally inconsistent, saying simultaneously that the Section shall be self-executing and enforced by appropriate legislation, *which means that it's not self-executing."* HOUSE COMM. ON THE DISTRICT OF COLUMBIA, 98TH CONG., 2D SESS., LEGISLATIVE HISTORY: DISTRICT OF STATEHOOD CONSTITUTIONAL CONVENTION 406 (Comm. Print 1984) (comments of Del. Schrag) (emphasis added).

It is *not* being asserted here that every constitutional provision that is accompanied by an enforcement clause is self-executing. This leads into the inquiry of implied rights of action. It also touches on the metaphysical question asked when I was a student in a class on civil rights legislation: what would happen if *42 U.S.C. § 1983* were repealed?

n47 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-2, at 300 (2d ed. 1988) (emphasis added).

n48 TRIBE, *supra* note 47, § 5-14, at 335 & n.2; *see, e.g., Guinn v. United States, 238 U.S. 347, 363 (1915).*

n49 Professor Best also has alluded to these serious concerns:

A legislative act conferring statehood on the District would either directly conflict with the Twenty-third Amendment or make it a dead letter. Direct conflict of a legislative act with a provision of the Constitution is unconstitutional, and a congressional act that attempts to finesse a constitutional provision is surely also unconstitutional. If the courts permitted such a congressional finesse, the integrity of other constitutional provisions would also be in jeopardy. To proceed to grant statehood without a constitutional amendment in the face of the Twenty-third Amendment would constitute a grievously dangerous precedent.
BEST, *supra* note 6, at 71. This is not just fanciful academic doomsaying. The present Supreme Court majority apparently needs little impetus to revisit previously settled constitutional issues. In *Payne v. Tennessee, 111 S. Ct. 2597 (1991),* the Court overturned a two-year-old precedent and held that victim impact statements could be considered at capital sentencing proceedings. *Id. at 2608.* In a strongly worded dissent, Justice Marshall stated:

[The conservative] majority declares itself free to discard any principle of constitutional liberty which was recognized or reaffirmed over the dissenting votes of four Justices and with which five or more Justices *now* disagree. The implications of this radical new exception to the doctrine of *stare decisis* are staggering. The majority today sends a clear signal that scores of established constitutional liberties are ripe for reconsideration, thereby inviting the very type of open defiance of our precedents that the majority rewards in this case.
*Id. at 2619* (Marshall, J., dissenting) (emphasis in original).

n50 *See, e.g., City of Rome v. United States, 446 U.S. 156 (1980)* (allowing Congress to regulate electoral changes); *Katzenbach v. Morgan, 384 U.S. 641 (1966)* (allowing Congress to expand voting qualification); *South Carolina v. Katzenbach, 383 U.S. 301 (1966)* (allowing Congress to use any rational means to prevent voting discrimination based on race).

n51 The enforcement language typically reads that Congress *shall* have the power to *enforce* the right by appropriate legislation. Robert Bork has criticized the "prevailing" wisdom on the issue, tartly observing that

Justice Brennan was forced [in *Katzenbach v. Morgan*] into the position that the power to enforce was a liberal ratchet, it could only go in one direction. He said that section 5 "does not grant Congress power to

exercise discretion in the other direction and to enact 'statutes so as in effect to dilute equal protection and due process decisions of this Court.' We emphasize that Congress's power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees." No evidence is cited for the proposition that the ratifiers intended to give Congress power to amend the fourteenth amendment by statute but only by expanding the definitions of what states are constitutionally forbidden to do. The passage states that Congress can change the meaning of the clause only if it requires more equality rather than less. Only liberal, egalitarian statutes need apply. The notion that Congress can change the meaning given a constitutional provision by the Court is subversive of the function of judicial review; and it is not the less so because the Court promises to allow it only when the Constitution is moved to the left. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 92-93 (1990) (footnote omitted).

n52 This inquiry is distinct from the related issue of whether the issue is a nonjusticiable political question. *See generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.6 (1989) (discussing the political question doctrine). For a further discussion, see *infra* text and accompanying notes 99-109.

n53 Raven-Hansen, *D.C. Statehood, supra* note 6, at 188; Schrag, *supra* note 6, at 348-50.

n54 For a general review of the Electoral College, see NEAL R. PEIRCE & LAWRENCE D. LONGLEY, THE PEOPLE'S PRESIDENT: THE ELECTORAL COLLEGE IN AMERICAN HISTORY AND THE DIRECT VOTE ALTERNATIVE (rev. ed. 1981).

n55 *See* Proposed Constitutional Amendment Report, *supra* note 33, at 1460.

n56 Indeed, President Kennedy was assassinated in November 1963, but even this ultimate cataclysmic event could not result in a presidential election earlier than November 1964.

n57 *See* Schrag, *supra* note 6, at 348-50 & n.186. Professor Schrag relies heavily on a colloquy in the Congressional Record between Rep. Rogers and Rep. Meader to suggest that it was Congress' intention that the Twenty-third Amendment was not self-executing, and that it could be denied totally by Congress. *See id.* (quoting 106 CONG. REC. 12,560 (1960)). Professor Raven-Hansen also finds the same colloquy "instructive." Raven-Hansen, *D.C. Statehood, supra* note 6, at 187. For a further discussion of this point, see *infra* note 64.

n58 *See* 106 CONG. REC. 12,560 (1960) (comments of Rep. Meader discussing original, rejected language).

n59 U.S. CONST. amend. XXIII (emphasis added).

n60 *See* Schrag, *supra* note 6, at 348-50 & n.186.

n61 *Id.*

n62 U.S. CONST. amend. XXIII (emphasis added).

n63 Justice Scalia would seem to endorse this position. *See United States v. Taylor, 487 U.S. 326, 345 (1988)* (Scalia, J., concurring in part) (stating that "it must be assumed that what the Members of the House and Senators thought they were voting for . . . was what the text plainly said, rather than what a few Representatives, or even a Committee Report, said it said"); *Thompson v. Thompson, 484 U.S. 174, 191-92 (1988)* (Scalia, J., concurring) (asserting that "[c]ommittee reports, floor speeches, and even colloquies between Congressmen are frail substitutes for bicameral vote upon the text of a law" (citation omitted)). Although these comments are directed toward legislative interpretation as opposed to constitutional interpretation, the principle seems equally applicable, especially where the debate centers around new constitutional amendments whose constitutional language was drafted by Congress and where there exists no venerable equivalent of the *Federalist Papers*. *Cf. Marbury v. Madison, 4 U.S. (1 Cranch) 137, 174 (1803)* ("It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible unless the words require it.").

n64 *See* Proposed Constitutional Amendment Report, *supra* note 33, at 1462 ("It should be noted that this language follows closely, insofar as it is applicable, the language of article II of the Constitution."). The Report also clearly states that section 2 provides Congress with the authority to enact technical provisions to bring the right into fruition, but no authority to deny the right altogether:

Section 2 of the proposed article provides that Congress shall have power to enforce this article by appropriate legislation. This section and section 1 of the proposed article . . . are authorizations for Congress to establish, among other things, the qualifications of electors and of voters for President and Vice President as well as to provide for the conduct, manner, time, and place of elections.
*Id.* at 1463.

Moreover, the legislative history that Professors Schrag and Raven-Hansen apparently find so compelling, *see supra* note 57, when viewed in the proper context, actually supports the position set forth in this Article. Both Professors Schrag and Raven-Hansen rely heavily on a colloquy between Congressmen Rogers and Meader as proof that the Twenty-third Amendment was not to be self-executing. Raven-Hansen, *D.C. Statehood, supra* note 6, at 187; Schrag, *supra* note 6, at 348-50. However, in that same discussion, Congressman Meader specifically quotes Article II, section 1 of the Constitution, and states:

I want to call your attention to the fact that the phrase I have quoted does not require popular election of electors for President and Vice President; the legislature is given complete authority in article II, section 1, to determine how presidential electors are to be selected. *That is the same position Congress will be in if this resolution becomes an amendment to the Constitution.*
106 CONG. REC. 12,560 (1960) (emphasis added). Thus, while both Congressmen opine that they believe it would take affirmative action by Congress before "anyone could vote for electors in the District of Columbia," this language is actually in response to the question of whether another mode of selection other than popular vote may be utilized. It is not, as Professors Schrag and Raven-Hansen seem to suggest, a discussion concerning whether the right to cast electoral votes may be denied all together.

Most telling is the colloquy that immediately precedes the statements that Professors Schrag and Raven-Hansen find so compelling:

MR. ROGERS of Colorado. . . . I understand the gentleman's argument is that the State legislatures may now, if they so desire, provide the method of selection of the electors without referring it to a vote of the people; is that correct?

MR. MEADER. I am simply reading the exact language of the Constitution. I do not intend to make any interpretation of it other than what the language imparts. I do not know whether the legislature of any State has

ever provided for the selection of presidential electors or for the appointment, to use the constitutional phrase, of presidential electors in any other fashion than by a direct vote of the people. I know of no state where that has been done, and I do not know whether there is any litigation involving the interpretation of article II, section 1, or not. *I am assuming, however, that this resolution will give Congress the same authority with respect to the appointment of electors that the State legislatures have under article II, section 1.*
*Id.* (emphasis added).

Viewed in context, this discussion conclusively establishes several points. First, the discussion concerned methods of electoral selection for the District, not the possibility of denying electoral representation all together. Second, it conclusively establishes that the Twenty-third Amendment was to be the substantive equivalent of Article II, section 1. Both points support the position taken in this Article and refute Professor Schrag's position. Finally, the discussion reveals a startling ignorance on the part of Rep. Meader concerning presidential electoral history and the operation of Article II, section 1. *See infra* note 71 (discussing the first several presidential elections where several state legislatures selected presidential electors directly *without* a popular vote). This ignorance should fatally undercut Professor Schrag's reliance on Rep. Meader's purported "authoritative" comments concerning whether the proposed amendment was to be self-executing or not, because Rep. Meader admitted he had absolutely no knowledge of the relevant electoral history and had no understanding of how the constitutional provision that served as the amendment's model had been interpreted.

n65 U.S. CONST. art. II, § 1 (emphasis added).

n66 The one exception is that the number of the District's electoral votes was not tied to the census. *See supra* note 36.

n67 For a discussion on the constitutional meaning of the term "state," see *Texas v. White, 74 U.S. (7 Wall.) 700, 720-21 (1869).*

n68 *See* Robert Kennedy Memorandum, *supra* note 6, at 131-35.

n69 Professor Schrag has developed an imaginative scenario in an attempt to avoid this constitutional reality. First, he notes that the New Columbia Constitution provides that the residents of the shrunken District of Columbia can vote in New Columbia elections. CONSTITUTION OF THE STATE OF NEW COLUMBIA art. V, § 1, 1 D.C. CODE ANN. 375, 395 (1991). This provision cannot be required by Congress as a permanent condition for statehood, *see Coyle v. Oklahoma ex rel. Smith, 221 U.S. 559, 573 (1911)* (finding a congressional condition of statehood that prohibited Oklahoma from moving its state capital prior to 1918 unconstitutional as a violation of "equal footing" principles), and in any event would likely be unconstitutional as violative of the structural underpinnings of federalism, *cf. Griffin v. Breckenridge, 403 U.S. 88, 101-02 (1971)* (suggesting that the structural constitutional constraints of federalism that deliniate the scope of federal and state authority would likely prohibit Congress from federalizing the entire field of general tort law). Moreover, his reliance on federal legislation providing for Americans abroad to vote in federal elections as residents of the state in which they resided formerly, is inapposite. The residents of the remaining District of Columbia, by definition, never resided in the geographical boundaries of New Columbia and have no rational nexus to New Columbia. Congress could no more direct that the residents of the District of Columbia vote in New Columbia than they could direct them to vote in Alaska elections. *Cf. Evans v. Cornman, 398 U.S. 419, 426 (1970)* (holding that residents of a federal enclave that is *within* the geographic boundaries of a state are residents of that state and may vote in state and federal elections of that state).

Professor Raven-Hansen has suggested that the Twenty-third Amendment may be "mooted" by the passage of a *federal* statute authorizing the remaining residents of the shrunken District to vote in either New Columbia or in the state of their last domicile. Raven-Hansen, *D.C. Statehood, supra* note 6, at 185-86. While this scenario, which would allow District residents to vote somewhere by virtue of a federal law, may be a little less egregious than simply repealing the District's electoral college enabling statutes, it still raises serious constitutional questions on the ground that it seeks to extinguish, by legislation, a constitutionally authorized entity's participation in the Electoral College. *See infra* note 80 and accompanying text. Although one might argue that such legislation should be allowed as "the kind of practical accommodation . . . that should be permitted in a workable government," the Supreme Court would likely be unreceptive to such an argument. *See Metropolitan Washington Airport Auth. v. Citizens for Abatement of Noise, Inc., 111 S. Ct. 2298, 2312 (1991).*

Professor Raven-Hansen's suggestion that no one would have standing to sue, Raven-Hansen, *D.C. Statehood, supra* note 6, at 188-89, is not convincing. A resident of the District, compelled to cast his presidential ballot elsewhere, would seem to have standing to challenge the abrogation of the rights provided by the Twenty-third Amendment.

n70 *See generally* PEIRCE & LONGLEY, *supra* note 54, at 91-92; N. POLSBY & A. WILDAVSKY, PRESIDENTIAL ELECTIONS 41 n.103, 325 (7th ed. 1988).

n71 This was the most common method for the first several presidential elections, *see* PEIRCE & LONGLEY, *supra* note 54, at 45.

n72 *Id.* at 45-46.

n73 *Id.*

n74 *Id.* at 46-47.

n75 *Id.* at 44-47, 91-92; *see also McPherson v. Blacker, 146 U.S. 1, 22-35 (1892).*

n76 Robert F. Kennedy, the United States Attorney General when the Twenty-third Amendment was ratified, testified shortly after its adoption:

Congress [so it is argued] could fail to provide any means of appointing the three electors, thus causing the 23d amendment to become a dead letter before it was ever used. This would do violence to the terms of the amendment. That amendment does not leave it up to Congress to determine whether or not the District of Columbia shall cast three electoral votes in a particular presidential election. It contains a clear direction that the District "shall appoint" the appropriate number of electors, *and gives Congress discretion only as to the mechanics by which the appointment is made.*
Robert Kennedy Memorandum, *supra* note 6, at 132 (emphasis added); *see also* Proposed Constitutional Amendment Report, *supra* note 33, at 1462-63. Kennedy was commenting on a proposal to retrocede the District of Columbia to Maryland.

n77 For a review of the history of the political stalemate culminating in New York's failure to appoint presidential electors in the Election of 1789, see 3 THE DOCUMENTARY HISTORY OF THE FIRST

FEDERAL ELECTIONS 1788-1790,at 195-97, 217 (Gordon DenBoer et al. eds., 1986); 1 A. SCHLESINGER & F. ISRAEL, HISTORY OF AMERICAN PRESIDENTIAL ELECTIONS 1789-1968, at 15-16 (1971).

n78 Various problems plagued the first presidential election. First, there were several questions concerning the Electoral College selection procedures. Second, there was the problem of "double balloting" (subsequently resolved by the Twelfth Amendment) in which each elector was required to cast two votes for president with no method of designating a preference for president and vice-president. Moreover, several states had not yet ratified the Constitution, and some presidential electors, for one reason or another, failed to actually cast their votes. All told, only 69 out of a possible 91 ballots were cast in the first election. PEIRCE & LONGLEY, *supra* note 54, at 33.

n79 The New York experience is the only time a state legislature failed to provide for a method of Electoral College selection. In several presidential elections, the propriety of whether a certain state's electoral votes should be counted by Congress has been raised. For example, whether a state was fully admitted into the Union and thus entitled to have its electoral votes counted was the question of the day for Indiana in 1817, Missouri in 1821, and Michigan in 1837, although in no case was the election's outcome held in the balance. *See id.* at 104-06. Similar problems arose when several states of the Old Confederacy tried to cast their electoral votes immediately after the Civil War. *Id.* In most cases, Congress declared that the southern states were in a state in which no government existed, and Congress declared their votes void. The Reconstruction Acts set down the guidelines for the former Confederate States to be readmitted. *See, e.g.*, UROFSKY, *supra* note 32, at 447-76. Lastly, multiple sets of Electoral College returns from four states required Congress to form the Electoral Commission to resolve the disputed Hayes-Tilden Election of 1876. For a historical analysis of the resolution of the election of 1876, see KEITH POLAKOFF, THE POLITICS OF INERTIA: THE ELECTION OF 1876 AND THE END OF RECONSTRUCTION (1973); C. VAN WOODWARD, REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION (1951).

n80 *See generally Gregory v. Ashcroft, 111 S. Ct. 2395 (1991)* (discussion of federalism and state decisions that go to the heart of representative government); THE FEDERALIST NO. 39 (James Madison) (Clinton Rossiter ed., 1961); THE FEDERALIST NO. 68 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasizing each state's role in the election of the president through the electoral college).

n81 *146 U.S. 1 (1892).*

n82 *Id. at 37-42.*

n83 *Id. at 35.*

n84 *Id. at 33* (citing 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1466, at 328 (Boston, Hilliard 1833)).

n85 *See id. at 25-35.* Curiously, Neal Peirce and Lawrence Longley contend that *McPherson* may be read to stand for the extreme proposition that "the state legislatures have 'plenary power' over appointing electors and could refuse to provide for appointment of any electors at all if they so chose." PEIRCE & LONGLEY, *supra* note 54, at 91-92. This is in error. Whether a state could totally eliminate its participation in the Electoral College was not at issue in *McPherson*. Although the *McPherson* Court reviewed the history of the first

presidential election where New York failed to participate, the Court never held, or even suggested in dicta, that a state could refuse to participate in the Electoral College altogether. In 1800, Rep. Charles Pinkney expressed his view that the Constitution did not compel the states to select presidential electors. *See* Raven-Hansen, *D.C. Statehood, supra* note 6, at 187 (quoting Rep. Pinkney). More than a decade earlier, the Anti-Federalists had alluded to similar fears as part of their unsuccessful effort to defeat the Constitution. *See The Anti-Federalist Papers and The Constitutional Convention Debates* 322-23 (Ralph Ketcham ed., 1986) (Cato VII) (discussing the potential for abuse in giving the federal government the ability to regulate elections for the House of Representatives, but also arguing that under the proposed constitution, the state legislatures could "omit the appointment of senators and [presidential] electors, so that the government [could] not proceed in its exercise"). In 1826 Rep. Henry Storrs went even further, claiming that "nothing in the Constitution prevented a state legislature from vesting the power to choose presidential electors 'in a board of bank directors -- a turnpike commission -- or a synagogue.'" PEIRCE & LONGLEY, *supra* note 54, at 91-92. While historically interesting, these random remarks represented no consensus when spoken over 165 years ago, and should be given little, if any, weight today. *See supra* text accompanying note 80 (discussing modern notions of equal protection and the privileges and immunities of U.S. citizenship).

n86 *ME. REV. STAT. ANN. tit. 21-A, § 802* (West Supp. 1990) ("One presidential elector shall be chosen from each congressional district and 2 at large."). The practical effect is that Maine's four electoral votes will be split either 4-0 or 3-1. *See* PEIRCE & LONGLEY, *supra* note 54, at 45-46.

n87 Perhaps only a bit more plausible, a state legislature may try to orchestrate its electoral selection procedures to select a slate of "independent" electors, who might hold a balance of power in a close election. *See, e.g.,* Sidney Blumenthal, *Getting It All Wrong: The Years of Robert Caro,* THE NEW REPUBLIC, June 4, 1990,at 29, 34 (reviewing ROBERT A. CARO, THE YEARS OF LYNDON JOHNSON: MEANS OF ASCENT (1990)):

In May 1944 the anti-Roosevelt forces, openly mobilized by Senator O'Daniel, tacitly supported by Governor Stephenson, and well financed by conservative business interests, succeeded in packing the Democratic convention with a slight majority of delegates. After seizing control, their agenda was unveiled: to place "uninstructed" electors on the national ballot in Texas, who would cast their votes in the Electoral College for the Republican ticket. By this stratagem, Texans would be disfranchised in the general election, and the White House perhaps delivered to the Republicans, regardless of the popular vote. In short, the presidential election would be stolen.

*Id.* But in a particularly bitter struggle, perhaps over an abortion rights issue, a state that has one house controlled by one party and the other house controlled by another party may end up with a political gridlock that could result with no electoral vote selection procedure, as was the case in New York in 1789.

n88 For a review of the role of state constitutional law in our federal system, see G. ALAN TARR & MARY CORNELIA ALDIS PORTER, STATE SUPREME COURTS IN STATE AND NATION 50-51 (1988); *see also* William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights, 61 N.Y.U. L. REV. 535 (1986).* For a recent plea from a former State Supreme Court Justice for state courts to develop a strong and coherent doctrine for addressing state constitutional claims before reaching federal constitutional claims, see Joseph R. Grodin, *Take the State Constitution Seriously,* CAL. LAW., Aug. 1991, at 100.

n89 U.S. CONST. art. IV, § 4. The Guarantee Clause challenge in this manner would be somewhat novel. Generally, challenges based on the Guarantee Clause have been determined to be nonjusticiable. *See, e.g., Luther v. Borden, 48 U.S. (7 How.) 1, 39-43 (1849).* For several different perspectives of potential uses of the

Guarantee Clause, see Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude, 46 MINN.L.REV. 513 (1962);* Adam H. Kurland, *The Guarantee Clause as a Basis for Federal Prosecutions of State and Local Officials, 62 S. CAL. L. REV. 367 (1989);* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century, 88 COLUM. L. REV. 1 (1988).*

n90 U.S. CONST. amend. XIV. The situation would force a close reevaluation of *McPherson,* which, based on 1892 equal protection jurisprudence, held that the Equal Protection Clause was inapplicable. *See McPherson v. Blacker, 146 U.S. 1, 40 (1892).* A federal court would appear to have the authority to enjoin enforcement of the repealing legislation and to direct the state to choose some method of presidential electors. *See generally Missouri v. Jenkins, 110 S. Ct. 1651, 1665-66 (1990)* (holding that a federal court has authority to direct state and local jurisdictions to enact tax increases to comply with a constitutionally required desegregation order).

Since a State's proposed elimination of electoral participation would affect all citizens in a particular state equally, it is conceivable that, under traditional equal protection doctrine, no equal protection challenge could be framed because the actions effect everybody equally. However, the blanket denial of the right to participate in a federal presidential election denies the citizenry of a fundamental right of American citizenship (even though the right need only be indirectly provided, as where a state legislature chooses the electors without reference to a popular vote), and such action would likely trigger the protections of the Privileges and Immunities Clause of the Fourteenth Amendment. *See generally Corfield v. Coryell, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823)* (No. 3,230) (Washington, J., sitting as Circuit Judge) (stating that the privileges and immunities language in the constitution protects fundamental rights, which include the elective franchise); *see also* Philip B. Kurland, *The Privileges or Immunities Clause: "Its Hour Come Round At Last"?, 1972 WASH. U. L.Q. 405* (endorsing principle that when constitutional limits of the Equal Protection Clause are exhausted, constitutional protection of fundamental rights will be found in defining the attributes of the privileges and immunities of American citizenship); *see generally* ELY, *supra* note 14, at 22-30 (endorsing the same general principle as Philip Kurland). Even Judge Bork, who takes a very dim view on giving the Privileges and Immunities Clause any meaning whatsoever, essentially concedes that the "Corfield definition," which is sufficiently broad to resolve the instant issue, is a relatively tame use of the clause. *See* BORK, *supra* note 51, at 181 (asserting that "even the full list of rights set out by one Justice in *Corfield* is something far different from a judicial power to create unmentioned rights by an unspecified method").

Any state governmental action that allegedly infringes on fundamental rights protected by the Privileges and Immunities Clause should be subject to constitutional strict scrutiny analysis. Applied to federal governmental action, the substantive protections of the Privileges and Immunities Clause, like the protections of the Equal Protection Clause, should apply with equal force through the Due Process Clause of the Fifth Amendment. *See infra* text accompanying notes 91-97.

n91 *See, e.g., Buckley v. Valeo, 424 U.S. 1, 93 (1976)* ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."); *Shapiro v. Thompson, 394 U.S. 618, 642 (1969), overruled in part by Edelman v. Jordan, 415 U.S. 651 (1974); Bolling v. Sharpe, 347 U.S. 497 (1954).*

n92 *Harper v. Virginia Bd. of Elections, 383 U.S. 663, 667 (1966)* (quoting *Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)); see also* ELY, *supra* note 14, at 116-25 (discussing the right to vote).

n93 *Shapiro, 394 U.S. at 634; Harper, 383 U.S. at 670.*

There is some authority that federal legislation affecting the residents of the District of Columbia need only satisfy a rational basis test, and that in some instances the rationality of the legislation is automatically supplied

by virtue of the "exclusive legislation" clause of the Constitution. *See United States v. Cohen, 733 F.2d 128 (D.C. Cir. 1984)* (en banc). The issue in *Cohen* was whether certain civil commitment procedures, which applied only to defendants in the District of Columbia, violated the Equal Protection Clause. Although the result in *Cohen* was unanimous, the en banc panel divided six separate ways, and there was a wide divergence of opinion as to what actually constituted the holding. The court determined that the procedures were not violative of equal protection, *see id. at 132-39* (Scalia, J., joined by five judges); *Id. at 141* (Mikva, J., concurring, joined by two other judges); *Id. at 154* (Edwards, J., concurring in result only); *id. at 129* (Wald, J., concurring in result only). There was considerable debate regarding whether a rational basis test should apply or whether a higher level of scrutiny was necessary. *Compare id. at 132-39* (Scalia, J.) (applying rational basis test) *with id. at 141-50* (Mikva, J., concurring) (criticizing majority for an "overly hasty analysis" and suggesting that a higher level of equal protection scrutiny should apply where Congress enacts national legislation uniquely applicable to the District of Columbia).

*Cohen* does not control the present inquiry for several reasons. First, *Cohen* did not concern the fundamental right to vote or the Twenty-third Amendment. In addition, the *Cohen* court relied, at least in part, on the principle that strict scrutiny of the classifications of punishments or impositions was unlikely to have "any place in modern equal protection law," *id. at 134* (Scalia, J.), and that the ordinary rational basis test applies in equal protection problems raised in the civil commitment of criminal defendants, *id. See also Clarke v. United States, 886 F.2d 404 (D.C. Cir. 1989)* (acknowledging that Congress has near plenary authority over the District of Columbia, but recognizing that such control is not boundless and must not contravene the Constitution); *vacated as moot on other grounds, 915 F.2d 699 (D.C. Cir. 1990).*

n94 *See Richardson v. Ramirez, 418 U.S. 24, 56 (1974).*

n95 U.S. CONST. amend. XIV, § 2; *see Richardson, 418 U.S. 24.*

n96 This express constitutional recognition of the District's right to participate in the Electoral College further distinguishes the present issue from those faced in *Cohen.*

n97 *See generally* ELY, *supra* note 14, at 99 (endorsing same principle).

n98 U.S. CONST. amend. XXIV, § 1, provides in relevant part that, "*[t]he right of citizens of the United States* to vote in any . . . election for President or Vice-President, for electors for President or Vice-President . . . shall not be denied or abridged . . . by reason of failure to pay any [tax]." (emphasis added).

n99 It is instructive to note that the present proposed statehood legislation does not purport to repeal the District of Columbia's enabling legislation for the Electoral College, although the bill does provide for a drastically reduced "seat of Government of the United States." *See* H.R. 2482, 102d Cong., 1st Sess. (1991) (for the relevant text of the bill, see *supra* note 28). The reduced "seat of Government of the United States" therefore, would be entitled to the rights afforded by the Twenty-third Amendment. Perhaps a repealing provision was omitted from H.R. 2482 in an attempt to avoid contemporaneous discussion of statehood issues and the type of issues addressed in this Article, so as to later try to frame the repeal issue as a *fait accompli* after statehood had been obtained. Inevitably, should D.C. statehood pass and become a reality, these issues would have to be addressed. Political responsibility requires that these integrally related issues be addressed together.

n100 For an example of how a repeal of legislation can arguably infringe on a constitutional right, see

*Reitman v. Mulkey, 387 U.S. 369 (1967).*

n101 *Cf. Missouri v. Jenkins, 110 S. Ct. 1651 (1990).* For good measure, the plaintiff would cite *Spallone v. United States, 110 S. Ct. 625(1990),* in effect informing Congress they may face a contempt citation if they do not enact the new legislation. *Id. at 634-35* (stating that a contempt citation against an individual legislator for open and sustained defiance of constitutional requirements is extraordinary and should not be considered except as a last resort). *Jenkins* and *Spallone* concern the authority of a federal court to direct a state or local legislature to enact particular legislation in order to comply with constitutional requirements. *See Spallone, 110 S. Ct. at 646 n.12* (Brennan, J., dissenting) (explaining that "voting to implement a remedial decree is best understood as a ministerial step in the process of executing a decision made by government actors with superior authority"). The present situation concerns the authority of a federal court to direct Congress to enact particular legislation in order to comply with constitutional requirements. One well-known scholar has noted in an analogous situation that such a scenario would raise "a plethora of novel legal questions." *See* CHEMERINSKY, *supra* note 52, § 2.6, at 143 (hypothesizing one "novel legal question[]" -- that the requisite number of states call for a constitutional convention, and querying whether "if Congress does not call a convention into existence; can the federal judiciary compel congressional action?").

n102 *See, e.g.,* Press Release of Nat'l Rainbow Coalition, Inc., D.C. Statehood -- Not for DC Only (claiming, *inter alia* that D.C. Statehood would mean two more Senate votes for a national housing plan, "including safe housing . . . for the homeless") (on file with *The George Washington Law Review*).

n103 For a brief review of the "states' rights" response to *Brown v. Board of Education, 349 U.S. 294 (1955),* see UROFSKY, *supra* note 32, at 769-77. For a more detailed account of "states' rights" grounded obstruction litigation in the wake of *Brown,* see DEBORAH J. BARROW & THOMAS G. WALKER, A COURT DIVIDED: THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM (1988).

n104 *See generally* CHEMERINSKY, *supra* note 52, § 2.6; *see also* Louis Henkin, *Is There a "Political Question" Doctrine?, 85 YALE L.J. 597 (1976);* J. Peter Mulhern, *In Defense of the Political Question Doctrine, 137 U. PA. L. REV. 97 (1988).*

n105 *See supra* note 104. This may be a double-edged sword for statehood proponents. In order to obtain the maximum benefit of this legal argument, no matter how dubious, the same bill providing for statehood would at least have to contain a provision repealing the Electoral College selection procedures. *See* Schrag, *supra* note 6, at 349 (suggesting that "as part of the act admitting the District to the Union, Congress [should] merely repeal[] the law that provides a method [for the District to] choos[e presidential] electors"). On the other hand, as indicated *supra,* note 99, the bill presently before Congress does not even do that, and proponents probably hope that this debate can somehow be avoided.

n106 The manner in which the States and the District of Columbia participate in the presidential election process goes to the very heart of the structural concerns of federalism. *See generally* THE FEDERALIST No. 68 (Alexander Hamilton) (Clinton Rossiter ed., 1961); THE FEDERALIST No. 39 (James Madison) (Clinton Rossiter ed., 1961); PEIRCE & LONGLEY, *supra* note 54, at 10-30 (reviewing birth of the Electoral College); *see also South Carolina v. Baker, 485 U.S. 505, 511 n.5 (1988)* (stating that the "Tenth Amendment . . . encompass[es] any implied constitutional limitation on Congress' authority to regulate state activities, whether grounded in the Tenth Amendment itself or in principles of federalism derived generally from the Constitution").

These concerns are generally deemed to be justiciable. *See generally Gregory v. Ashcroft, 111 S. Ct. 2395, 2399-2403 (1991)* (whether state constitutional provision mandating retirement of judges at age 70 violates constitution or federal law raises significant issues concerning proper balance between state and federal government but issues are justiciable); Rees, *supra* note 26 (arguing that the states' participation in constitutional amendment process is justiciable).

n107 *See supra* notes 100-06 and accompanying text.

n108 *See, e.g., Spallone v. United States, 110 S. Ct. 625, 634-35 (1990).* In *Spallone,* a case concerning the violation of a court order that directed the city of Yonkers to enact particular legislation, the Court allowed the contempt citation against the city to stand but reversed the imposition of sanctions against individual legislators. The Court stated that such sanctions should only be considered in extraordinary circumstances as a last resort. *Id.*

n109 Professor Schrag somewhat euphemistically refers to such a scenario when he states that "Congress could then at its leisure propose repealing the twenty-third amendment, which would have no further utility." Schrag, *supra* note 6, at 349. At minimum, the dangerous precedent of having legislation make a constitutional provision dead letter would have already been set. *See supra* note 49 and accompanying text.

n110 The Equal Rights Amendment commanded substantial majorities in both houses of Congress for several years, but no one seriously considered that it could become part of the Constitution by a majority vote of Congress. The fight for the Equal Rights Amendment spawned its own constitutional battles, which generally concerned the constitutionality of Congress' three-year extension for possible ratification beyond the original seven-year period. In *Idaho v. Freeman, 529 F. Supp. 1107 (D. Idaho 1981), vacated as moot sub nom. NOW, Inc. v. Idaho, 459 U.S. 809 (1982),* a federal district court ruled that Congress' three-year extension by simple majority raised a justiciable question. *Id. at 1135.* On the merits, the court held that the three-year extension was unconstitutional. *Id. at 1153.* A Supreme Court decision on the merits was avoided when the three-year extension expired without the proposed amendment having obtained the requisite number of states' approval for ratification, and the district court decision was vacated as moot. *NOW, Inc. v. Idaho, 459 U.S. 809 (1982).* For a discussion of the relevant constitutional issues, see Ruth Bader Ginsburg, *Ratification of the Equal Rights Amendment: A Question of Time, 57 TEX. L. REV. 919 (1979);* Rees, *supra* note 26.

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September 9, 2014

The Hon. Tom Coburn
Ranking Member
Committee on Homeland Security
and Governmental Affairs
United States Senate
340 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Coburn,

Thank you for the opportunity to share my views on S. 132, the "New Columbia Admission Act," which purports to admit most of the territory of the District of Columbia to the Union as the state of "New Columbia." I must emphasize at the outset that the views expressed in this letter are my own, and should not be attributed to my law firm, any of its clients, or any other group or organization with which I may be associated.

I joined the United States Department of Justice's Office of Legal Policy (OLP) as an attorney-adviser in November, 1986. At that time, OLP was in the process of preparing a series of in-depth reports to the Attorney General on important issues of constitutional law and policy. In early 1987, I was tasked with preparing such a report to the Attorney General on the question of statehood for the District of Columbia. A copy of that report (dated April 3, 1987), as reviewed, edited and issued by OLP is enclosed.

The report concludes that neither the District of Columbia, nor any part of its territory, can be admitted to the Union as a state without a constitutional amendment, and also details the many policy reasons why such an amendment should be opposed. In particular, the report noted OLP's,

> considered opinion . . . that amendment of the Constitution would be required before the District of Columbia can be admitted to the Union as a state. The clause creating the District of Columbia gives Congress exclusive legislative authority over the district that was to become the seat of the federal government, not merely over the seat of government. The authority of Congress, thus, extends over that entire district – the District of Columbia. Further, the ratification of the Twenty-third Amendment in 1961 gave the District additional

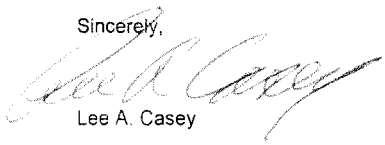
> constitutional recognition as a unique juridical entity. Accordingly, it does not appear that Congress has the power to abdicate its exclusive authority over any part of this district, absent an amendment to the Constitution. This objection cannot be answered by retaining a truncated federal district as the seat of government. Such would contravene the language of the Constitution as well as the intentions of the Founders.

U.S. Department of Justice, Office of Legal Policy, Report to the Attorney General, *The Question of Statehood for the District of Columbia* (Apr. 3, 1987), at 69.

I believed that OLP's conclusion was correct as a matter of law and policy in 1987, and this remains my view. As Attorney General Robert F. Kennedy explained nearly 25 years before the April 3, 1987 report was prepared: "While Congress' power to legislate for the District is a continuing power, its power to create the District by acceptance of cession contemplates a single act. The Constitution makes no provision for revocation of the act of acceptance or for retrocession. In this respect the provisions of article I, section 8, clause 17, are comparable to the provisions of article IV, section 3, which empower Congress to admit new States but make no provision for the secession or expulsion of a State." *Id.* at 128. In preparing the report, I found this analysis to be both compelling and irrefutable, as I do today. If the District of Columbia is to become a state, then article I, section 8, clause 17 of the Constitution must be amended, and the 23rd Amendment repealed, before that admission can take place.

I hope that these thoughts, and the enclosed report, will be of assistance to the Committee.

Sincerely,



Lee A. Casey

Cc: The Hon. Thomas R. Carper
Chairman
Committee on Homeland Security
and Governmental Affairs
United States Senate

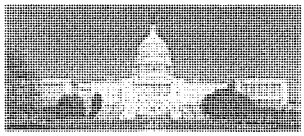
(Enclosures)

# JONATHAN TURLEY

## Res ipsa loquitur ("The thing itself speaks")

## New Columbia: Congress Considers The Creation of America's First City-State

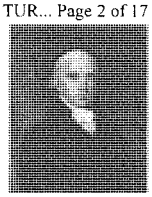
1, September 12, 2014 by jonathanturley



(http://jonathanturley.files.wordpress.com/2008/05/260px-capitol_building_full_view.jpg)On Monday, the Senate will hold a hearing in the Senate Committee on Homeland Security and Governmental Affairs on entering a new state into the Union: New Columbia. I was asked if I could testify on S. 132 (https://beta.congress.gov/bill/113th-congress/senate-bill/132) since I have written a long academic publication on the status of the District of Columbia and testified at the prior hearings (http://jonathanturley.org/2009/01/27/congress-re-considers-dc-vote-legislation/) on allowing for voting representation of District residents. *See* Jonathan Turley, *Too Clever By Half: The Partial Representation of the District of Columbia in the House of Representatives*, 76 George Washington University Law Review 305-374 (2008). Unfortunately, the hearing was moved to the afternoon on Monday, which made it impossible because I have to be in Newport News on Monday for a long-planned debate with John Yoo on presidential powers (http://cnu.edu/news/newsarticle/8-21-14constitutionday.asp). Accordingly, I had to reluctantly decline. I have great respect and sympathy for those trying to secure a vote for the District residents. I have previously suggested different means to accomplish that end. However, before Congress embraces the path to statehood, it should give the original concerns of the Framers (and some new ones) full consideration.

The establishment of the District of Columbia as the nation's 51st state has the support of President Barack Obama (http://www.politico.com/story/2014/07/washington-dc-statehood-president-obama-109186.html) and leading Democrats who insist that it is time to give District residents full representation in Congress. This proposal differs from other past approaches in some notable respects. However, the main question is whether the nation is not just ready for a 51st state but its first city-state? The establishment of a Vatican-like status for the District not only leaves some past questions unanswered but raises some new and rather novel ones.

(http://jonathanturley.files.wordpress.com/2011/10/220px-james_madison.jpg)The impetus behind the creation of District began with a protest (perhaps a fitting start of a city that has long been a magnet for demonstrations). It was 1783 when hundreds of armed Revolutionary War veterans descended on Congress meeting in Philadelphia to demand their long-overdue back pay. Alarmed members called



upon the Pennsylvania officials to intervene but they refused. The members had to flee the city. The humiliating experience was still on the minds of the members when they gathered four years later in Philadelphia in the summer of 1787 to draft a new constitution. James Madison and other framers resolved that the federal seat of government should never again be found within the borders of a state.

**The Neutrality Principle**

A city-state represents something of a paradigm shift in abandoning the neutrality principle that has defined the U.S. capital city for over two hundreds years. In creating the District, James Madison and other framers believed that no state should have the honor of being the location for the national capital or have the control that comes with that status. Instead, they created a "federal enclave" that left the capital on neutral ground and represented by Congress as a whole. Few people have argued against the neutrality concept, but the lack of voting representatives in Congress has long been troubling.

In 2007, Congress considered a plan that would have given the District a single vote in the House of Representatives. I testified at successive hearings on why that plan was facially unconstitutional. I strongly recommended a constitutional amendment approach that would allow the American people to vote on a change in status (as was proposed in the 1970s). I also suggested an alternative "modified retrocession" plan where the District of Columbia could be reduced to the National Mall, White House, Supreme Court, Capitol, and related federal buildings. The rest of the District of Columbia would return (or retrocede) from whence it came: Maryland. That is what happened in 1847 when the land (and residents) from Alexandria decided to return to Virginia. The current proposal embraces the modified approach but replaces retrocession with statehood.

The new state would create something of an oddity: a federal enclave that would be entitled to federalism guarantees accorded to all states. This state however would have local control over largely federal areas and interests. The District is replete with government buildings, embassies, and foreign missions. While the jurisdiction over these locations is limited, the access and surrounding areas would be under the jurisdiction of a new state. That would give New Columbia far greater control over dealings with both the federal government and foreign governments than other states.

The control of New Columbia would extend to the infrastructure of the District of Columbia from roads to electricity (though this issue can be found in other cities to a lesser extent). For many federal agencies, the infrastructure of the city is tied directly to national security and administrative functions stretching across the city. That could become more difficult after statehood and, frankly given the District's history of poor city management, there could be considerable concerns over severing the control of Congress. Additionally, as a state, New Columbia would have enhanced powers in setting taxation and residency requirements affecting those who work and live in the Capitol.

**The Micro-State Model**

Putting aside the abandonment of the neutrality principle, the creation of a city-state represents something of a paradigm shift in how we view states in the union.

(http://jonathanturley.files.wordpress.com/2014/09/1280px-st_peters_square_vatican_city_-_april_2007.jpg)This would be the first city-state in our union. Of course, there are some analogies, including the Vatican City, which is not only a separate city but an actual foreign state within the borders of Rome. That walled-in enclave is just 110 acres but has its own diplomatic status.

However, this would be a city as a state within the United States. The question is whether there is something inherently incongruous about having a Monaco or a Liechtenstein within the United States of America.

It is certainly true that the District's 650,000 residents constitute a slightly greater population than two states: Vermont (626,000) and Wyoming (582,000). However, that common comparison misses other distinctions. The District occupies only 68 miles (in comparison to the 97,814 square miles of Wyoming) and there are 22 larger cities in the United States. Even tiny Vermont at over 9600 miles is almost 150 times larger than D.C. (Notably, even the smallest state – Rhode Island – is almost 20 times the size of D.C. and has 39 cities and towns). Moreover, cities tend to grow or sink in time. The District has shrunk from an all-time high in high in 1950 of 802,178 people. This plan would allow the District to retain two senators and a house member no matter how much the city shrinks (a problem that is more acute for a city than a large state).

The district also has a much narrower economy. Wyoming has a relatively diverse economy with mining, industry, ranching, farming, and tourism. Vermont is remarkably diverse for its size with a well-distributed economy with industry, health care, finance, and real estate industries. The District acknowledges that it has a service-oriented economy, with approximately 98 percent of all DC jobs in service-providing industries and only two percent in goods-producing industries. The largest industry sectors remain the government and professional and businesses services. Of these, DC remains largely a one-company town when it comes to government, supporting agencies and Congress from rental properties to legal support to catering to maintenance.

The narrow geographic and economic interests of micro-state would come with a very different political profile. Existing states have a greater variety of constituencies and interests that create more complex political, economic, and social units. The more concentrated (and purely urban) demographic of a city-state loses the most important dynamics of a conventional state. Even low-density states like Wyoming have a mix of constituencies and interests that tend to interact with each other in political decisionmaking. Political issues are filtered through this mix of urban/rural or industrial/agricultural or other factional interests. The result is often not only greater compromise within states on given issues but also shared constituencies between states that allow for interstate coalitions on the federal level. New Columbia will have not just the most concentrated and narrow profile of any state but, unlike these states with full legislatures, the District is run by a city council and, despite suggested cosmetic name changes, will continue to function as a city.

The New Columbia delegation would be representing a micro state inextricably linked to the federal government. The delegation would be viewed by many as a virtual vote of the federal government in Congress with constituent and economic interests favoring the federal agencies. At a time of growing concern over the rise of the "administrative state", the New Columbia members would be viewed as the federal government's own representatives within the legislative branch.

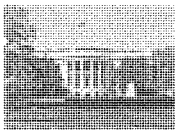
**The Anticipatory State**

In a reform premised on giving people a vote in Congress, the actual proposal itself has a less than empowering purpose. The bill appears designed to avoid any national vote on the status of Capital until after the District has been made the 51st state. In 1978, Congress passed a proposed constitutional amendment that would have allowed for voting members for the District. It failed to be ratified and there is now a desire to avoid such a threshold national vote.

Under the proposal, New Columbia would be created before any amendment of the Constitution, particularly the 23rd amendment which gives the District an allotment of electors to select the President and Vice President). The bill states in relevant part:

> At any time after the date of the enactment of this Act, it shall be in order in either the House of Representatives or the Senate to offer a motion to proceed to the consideration of a joint resolution proposing an amendment to the Constitution of the United States repealing the 23rd article of amendment to the Constitution.

This creates a type of anticipatory statehood status – creating a state before resolving the constitutional foundation for statehood.



(http://jonathanturley.files.wordpress.com/2009/12/248px-whitehousesouthfacade-jpg.jpeg)The need for the change is obvious. The only residents left in the new District of Columbia would be the first family, which could then theoretically control votes in the Electoral College. Of course, the first family usually votes in the original state of the President, leading to an even more bizarre situation. There would however be no vote on the change of the status of the Capital. That language in Article I, Section 8, Clause 17 would be theoretically satisfied by preserving the District in skeletal form. However, unlike modified retrocession, the original intent of Article I would be violated with the creation of the very thing that the Framers sought to avoid: a state with effective control over the Capital. Indeed, it would create a new state that would be almost entirely defined by its jurisdiction over the Capital. By the time that any vote occurs on the 23rd Amendment, the founding premise of the nation's Capital would be changed forever.

If the American people are going to be given a constitutional amendment vote, why not allow them to vote on changing the status of the District of Columbia itself or alternatively giving the District a vote in the House of Representatives without statehood?

The status of our Capital is a decision that affects us all. It is our Capital and the proposal would alter a defining element of the plan of the Framers. It may be time to break with the Framers or their vision may still hold true today. However, the decision should rest with the nation as a whole. If Congress wants to change the status of the Capital and create our first city-state, it should directly ask the citizens of all fifty existing states.

Jonathan Turley

Posted in Congress, Constitutional Law, Media, Politics, Society | 69 Comments

## 69 Responses

**Nick Spinelli** *on 1, September 12, 2014 at 9:10 am*

I learned a lot from this superb post. I think Obama should just act via Executive Order. Screw Congress and of course screw the citizens of this country, there's Dem votes to be mined. Then use Executive Order to make Puerto Rico a state. Those Rep have no counter to that!!

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U.S. Department of Justice
Office of Legal Policy

# Report to the Attorney General

# The Question of Statehood for the District of Columbia

*April 3, 1987*

115093

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# REPORT TO THE ATTORNEY GENERAL

# ON

# THE QUESTION OF

# STATEHOOD FOR THE DISTRICT OF COLUMBIA

115093

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**April 3, 1987**

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In 1790, almost two centuries ago, the District of Columbia was created as the permanent seat of the government of the United States. Since the federal government took up residence in the new capital, ten years later, the people of the District of Columbia have not had a voting Representative in Congress, although they are currently represented by a single non-voting delegate. This arrangement has engendered debate among Americans from the very first, and a number of efforts have been made to alter the constitutional status of the District.

In 1978, a constitutional amendment was proposed that would have given the District of Columbia representation in the Senate and House of Representatives as if it were a state. The states, however, declined to ratify the amendment and it lapsed in 1985. Efforts have, therefore, shifted to focus on attempts to admit the District of Columbia to the Union as a state. Proposals of this nature have caused a lively debate over the legal, economic, and moral questions raised by the District's status in our constitutional scheme.

The present study, "Report to the Attorney General on the Question of Statehood for the District of Columbia" is a contribution to that debate. It was prepared by the Justice Department's Office of Legal Policy, which functions as a policy development staff for the Department and undertakes comprehensive analyses of contemporary legal issues.

This study will generate considerable thought on a topic of great national importance. It will be of interest to anyone concerned about a provocative and informative examination of the pertinent legal issues.

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## Executive Summary

Efforts to admit the District of Columbia to the Union as a state should be vigorously opposed. Granting the national capital statehood through statutory means raises numerous troubling constitutional questions. After careful consideration of these issues, we have concluded that an amendment to the Constitution would be required before the District of Columbia may be admitted to the Union as a state. Statehood for the Nation's capital is inconsistent with the language of the Constitution, as well as the intent of its Framers, and would work a basic change in the federal system as it has existed for the past two hundred years. Under our Constitution, power was divided between the states and the federal government in the hope, as Madison wrote, that "[t]he different governments will control each other," thus securing self-government, individual liberty, and the rights of minorities. In order to serve its function in the federal structure a state must be independent of the federal government. However, the District of Columbia is not independent; it is a political and economic dependency of the national government.

At the same time, it is essential that the federal government maintain its independence of the states. If the District of Columbia were now admitted to statehood, it would not be one state among many. Because it is the national capital, the District would be *primus inter pares*, first among equals. The "State of Columbia ... could come perilously close to being the state whose sole business is to govern, to control all the other states. It would be the imperial state; it would be 'Rome on the Potomac.'" It was this very dilemma that prompted the Founders to establish the federal capital in a district located outside of the borders of any one of the states, under the exclusive jurisdiction of Congress. Their reasons for creating the District are still valid and militate against granting it statehood.

Many have recognized the fundamental flaws in plans to grant the District of Columbia statehood. For instance, while testifying in support of the proposed 1978 District amendment, which would have treated the District of Columbia "as if it were a State" for purposes of national elections, Senator Edward Kennedy dismissed what he called "the statehood fallacy," and stated that, "[t]he District is neither a city nor a State. In fact, statehood may well be an impossible alternative, given the practical and constitutional questions involved in changing the historical

status of the Nation's Capital." A pamphlet entitled "Democracy Denied" circulated in support of the 1978 amendment, and fully endorsed by District Delegate Walter E. Fauntroy, plainly acknowledged that granting statehood to the District of Columbia "would defeat the purpose of having a federal city, i.e., the creation of a district over which the Congress would have exclusive control." That pamphlet also recognized that statehood "presents a troublesome problem with the 23rd Amendment if the federal district were to be wiped out by legislation." Indeed, Delegate Fauntroy has opposed statehood for the District in the past, correctly pointing out that "this would be in direct defiance of the prescriptions of the Founding Fathers." As former Senator Mathias of Maryland stated, "[i]t is not a State . . . it should not be a State."

These points are well taken. The factors that mitigated against statehood for the District of Columbia in 1978 have not changed. The rejection of the District voting rights constitutional amendment by the states does not make statehood any more desirable, or any less constitutionally suspect, today than it was a decade ago. Granting statehood to the District of Columbia would defeat the purpose of having a federal city, would be in direct defiance of the intent of the Founders, and would require an amendment to the Constitution.

## I. Need for an Amendment to the Constitution Before the District of Columbia May Be Admitted to the Union as a State

Even if statehood for the District of Columbia represented sound policy, we do not believe that it can be accomplished merely by a statute admitting the District to the Union. The Constitution contemplates a federal district as the seat of the general government, and would have to be amended. The Department of Justice has long taken this position. In 1978, Assistant Attorney General John M. Harmon concluded on behalf of the Carter Administration that, "it was the intent of the Framers that the actual seat of the Federal Government, as opposed to its other installations, be outside any State and independent of the cooperation and consent of the State authorities .... If these reasons have lost validity, the appropriate response would be to provide statehood for the District by constitutional amendment rather than to ignore the Framers' intentions."

The retention of federal authority over a truncated federal service area would not answer this constitutional objection. The language of the Constitution grants Congress exclusive authority over the district that became the seat of government, not merely over the seat of the government. The district that became the seat of government is the District of Columbia. It does not appear that Congress may, consistent with the language of the Constitution, abandon its exclusive authority over any part of the District.

Further, the Twenty-third Amendment requires that "[t]he District constituting the seat of Government of the United States" appoint electors to participate in the Electoral College. The amendment was proposed, drafted and ratified with reference to the District of Columbia. When the states adopted this amendment, they confirmed the understanding that the District is a unique juridical entity with permanent status under the Constitution. Another amendment would be necessary to remake this entity.

Finally, we believe that Congress' ability to admit the District of Columbia into the Union as a new state would depend upon the consent of the legislature of the original ceding state. Article IV, section 3 of the Constitution provides that: "no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or parts of States, without the Consent of the legislatures of the States concerned as well as of the Congress." Accordingly, the consent of Maryland would be necessary before the District of Columbia could be admitted to the Union. Should Maryland refuse to consent, the area that is now the District of Columbia could not be made a state without amendment of Article IV, section 3.

Thus, before the District of Columbia may be admitted to the Union as a state, the Constitution would have to be amended. Such an amendment, however, would be unwise.

## II. The Sound Historical Reasons for a Federal District Still Operate Today

In the Founders' view, a federal enclave where Congress could exercise complete authority, insulating itself from insult and securing its deliberations from interruption, was an "indispensible necessity." They settled upon the device of a federal district as the means by which the federal government might remain independent of the influence of any

single state, to avoid, in the words of Virginia's George Mason, "a provincial tincture to ye Natl. deliberations."

The passing years have, if anything, increased the need for ultimate congressional control of the federal city. The District is an integral part of the operations of the nation's government, which depends upon a much more complex array of services, utilities, transportation facilities, and communication networks than it did at the Founding. If the District were to become a state, its financial problems, labor troubles, and other concerns would still affect the federal government's operations. Congress, however, would be deprived of a direct, controlling voice in the resolution of such problems. In a very real sense, the federal government would be dependent upon the State of Columbia for its day to day existence.

The retention of congressional authority over a much reduced federal enclave would not solve this problem. The Founder's contemplated more than a cluster of buildings, however grand, and their surrounding parks and gardens as the national capital. The creation of a new "federal town" was intended, in large part so that Congress could independently control the basic services necessary to the operation of the federal government. As former Senator Birch Bayh pointed out in 1978, "when our Founding Fathers established this as a capital city ... they did not just establish a place that should be the Federal city and say this is where the Federal buildings are. But they envisioned this as a viable city, a capital city with people who work, have businesses, and have transportation lines, and homes. The essential establishment of the Nation's Capital was not an establishment of the Nation's Federal buildings but the Nation's city."

Further, there remain virtually insurmountable practical problems with District statehood. The operations of the federal government sprawl over the District. As a result, the new "state" would be honeycombed with federal installations, its territory fragmented by competing jurisdictions. As Assistant Attorney General Patricia Wald asked while testifying on behalf of the Carter Administration, regarding the proposed 1978 District amendment, "[w]ould the remaining non-Federal area constitute in any real sense a geographically homogeneous entity that justifies statehood?" It was for these very reasons that former Mayor Washington expressed doubts about statehood for the District. In 1975 he commented that the city of Washington is "so physically, and economically and socially bound together that I would have problems

with statehood in terms of exacting from it some enclaves, or little enclaves all around the city. Ultimately, it seems to me, that would erode the very fabric of the city itself, and the viability of the city."

Finally, in a very real sense the District belongs not only to those who reside within its borders, but to the Nation as a whole. In opposing statehood for the District in 1978, Senator Bayh, an otherwise ardent proponent of direct District participation in congressional elections, eloquently summed up the objection: "I guess as a Senator from Indiana I hate to see us taking the Nation's Capital from [5,000,000] Hoosiers. It is part ours. I do not see why the District should be a State because it is, indeed, the Nation's Capital."

## III. The District of Columbia is Not Independent of the Federal Government

### A. Dependence on the Federal Establishment

The states of the American Union are more than merely geographic entities: Each is what has been termed "a proper Madisonian society" -- a society composed of a "diversity of interests and financial independence." It is this diversity which guards the liberty of the individual and the rights of minorities. As Madison wrote, "the security for civil rights . . . consists in the multiplicity of interests . . . . The degree of security . . . . will depend on the number of interests . . . and this may be presumed to depend on the extent of country and number of people comprehended under the same government."

The District of Columbia lacks this essential political requisite for statehood. It has only one significant "industry," government. As a result, the District has one monolithic interest group, those who work for, provide services to, or otherwise deal with, the federal government. The national government was, historically, the city's only reason for being. Close to two-thirds of the District's workforce is employed either directly or indirectly in the business of the federal government. Indeed, in 1982 the District government maintained that, in the Washington Metropolitan area, for every federal worker laid off as a result of government reductions in force, one person would be thrown out of work in the private sector.

The implications of this monolithic interest are far reaching. For instance, the Supreme Court, in *Garcia v. San Antonio Metropolitan*

*Transit Authority*, 469 U.S. 528 (1985), has recently decided that the delicate balance between federal and state power is to be guarded primarily by the intrinsic role the states play in the structure of the national government and the political process. The congressional delegation from the District of Columbia, however, would have little interest in preserving the balance between federal and state authority entrusted to it by *Garcia*. The continued centralization of power in the hands of the national government would, in fact, be to the direct benefit of "Columbia" and its residents. Hence, the system of competing sovereignties designed to preserve our fundamental liberties would be compromised.

### B. Economic Dependence

In addition to political independence and diversity, a state must have "sufficient population and resources to support a state government and to provide its share of the cost of the Federal Government." The District of Columbia simply lacks the resources both to support a state government and to provide its fair share of the cost of the federal government. The District is a federal dependency. Annually, in addition to all other federal aid programs, it receives a direct payment from the federal treasury of a half billion dollars; some $522 million was budgeted for the District in Fiscal 1987, $445 million to be paid directly to the District's local government. All in all, District residents outstrip the residents of the states in per capita federal aid by a wide margin. For instance, in 1983 the District received $2,177 per capita in federal aid, some five and one-half times the national average of $384.

Not surprisingly, Washington Mayor Marion Barry has plainly stated that the District would still "require the support of the Federal Government" if statehood were granted. The continuation of federal support is ordinarily justified because of the percentage of federal land in the District of Columbia that cannot be taxed by the local government. However, the federal government owns a greater percentage of the land area of 10 states, each of which bears the full burdens of statehood without the sort of massive federal support annually received by the District of Columbia. If the District aspires to statehood, it must be prepared to stand as an equal with the other states in its fiscal affairs.

### Conclusion

The District of Columbia should not be granted statehood. In our considered opinion, an amendment to the Constitution would be needed

before the District could be admitted as a state, and in any case, the reasons that led the Founder's to establish the national capital in a district outside the borders of any state are still valid. The District's special status is an integral part of our system of federalism, which itself was a compromise between pure democracy and the need to secure individual liberties and minority rights. The residents of the District enjoy all of the rights of other citizens, save the right to vote in congressional elections. They exchanged this right, as Mr. Justice Story wrote, for the benefits of living in the "metropolis of a great and noble republic." Instead, "their rights [are] under the immediate protection of the representatives of the whole Union." This was the price of the national capital, and District residents have enjoyed the fruits of this bargain for almost two centuries.

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APPENDIX

## Introduction

On August 22, 1985, the seven years allowed for ratification of the proposed 1978 District of Columbia Representation Amendment expired. The plan, which would have granted residents of the District of Columbia the right to elect members of Congress as if the District "were a state," was resoundingly rejected by the states.[1] Proponents of direct participation in congressional elections for District residents have, therefore, turned their attention to achieving full statehood for the District of Columbia. In his inaugural address on January 3, 1987, Mayor Marion Barry made statehood for the city of Washington, "our first order of business on the Hill."[2]

This is not the first time in the District's almost two hundred years that demands have been made for full participation in congressional elections, but never before has statehood been the favored means of achieving this end by District leaders. Several have actually opposed statehood in the past.

Statehood for the District of Columbia presents numerous troubling constitutional and policy questions. After careful consideration of these issues, the Office of Legal Policy has concluded that statehood for the national capital is unsound as a matter of policy and, in our considered opinion, would require amendment of the Constitution.

The cornerstone of our federal system is the independence of the states from the federal government and the federal government from the states. As will be discussed in detail below, our system of federalism was more than a historical accident. It was the result of a conscious decision by the Founders, who adopted it as the best means of securing self-government, individual liberty, and the rights of minorities. The components of the federal structure must be independent of each other if they are to serve these functions. However, because it is the federal capital, the District of Columbia cannot be independent as are the states.

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[1]Only sixteen states ratified the proposal: Connecticut, Delaware, Hawaii, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, Ohio, Oregon, Rhode Island, West Virginia and Wisconsin. *See Congressional Quarterly 1985 Almanac* 404-405. Under Article V, an amendment must be ratified by at least three-fourths (38) of the states.

[2]The Washington Post, Jan. 3, 1987, at A16, col. 4.

The economy of Washington is dependent upon the federal government. A majority of the District's workforce is employed either directly by the federal government, or in private sector jobs providing services to the federal government. Each year the District receives a direct payment from the federal treasury of close to a half billion dollars. At the same time, because it is the seat of the national government, the "State of Columbia" would be in a position to exercise far more influence over the federal government than any of its sister states. It was this very dilemma which prompted the Framers to establish the federal capital in a district located outside of the borders of any one of the states, under the plenary jurisdiction of Congress. Sound policy reasons led the Founders to exclude the residents of the seat of the national government from participation in national elections, policy reasons that are as compelling today as in 1787. Accordingly, any attempt to admit the District of Columbia to the Union as a state should be vigorously opposed.

## I. Founding the National Capital

From the meeting of the First Continental Congress on September 5, 1774, to the time the new government took up residence on the Potomac in November of 1800, the Congress met in at least eight different locations, often dictated by the exigencies of war. Sessions were held in Philadelphia, Baltimore, Annapolis, Trenton and New York, among other sites.[3] As early as November, 1779, this nomadic existence prompted several members to propose that a few square miles be purchased in the vicinity of Princeton, N.J., where a permanent meeting place for the Congress could be erected.[4] Three and-a-half years later, in the first few weeks after the end of the War for Independence (on April 30, 1783), the subject was raised in Congress.[5] By June 4, offers of sites were received from New York and Maryland. Other states readily followed suit.[6] That summer, James Madison was appointed by his colleagues in the Congress to chair a committee to investigate the matter.

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[3] H. P. Caemmerer, *Washington: The National Capital*, S. Doc. 332, 71st Cong., 2d Sess. 3 (1932) [hereinafter Caemmerer].

[4] *Id.* at 4.

[5] *Id.* at 17.

[6] New York offered two square miles within the township of Kingston. Maryland offered to allow the establishment of the national government in Annapolis. Virginia offered the entire city of Williamsburg, with its colonial capitol, governor's palace, public buildings, 300 acres of additional land, a cash payment of up to 100,000 pounds, and a contiguous district not to exceed five miles square. New Jersey offered to cede a suitable site anywhere in the state. *Id.* at 4.

Madison's committee reported on September 18, 1783, recommending that the Congress have exclusive jurisdiction over the site to be chosen as the permanent seat of government, and that the enclave be no less than three, nor more than six, miles square. For the next four years the question of the site of this district occupied the attention of Congress and little was resolved. Locations on both the Delaware and Potomac Rivers were proposed, accepted and then rejected.[7] A site on the Susquehanna was favored by many.[8]

When the Constitutional Convention met in May of 1787 little had been settled. There was, however, a general consensus that Congress, and not one of the states, should have jurisdiction over the permanent seat of the new government.[9] Accordingly, a proposal for a district over which Congress would exercise exclusive jurisdiction was included in Charles Pinckney's early draft of the Constitution, submitted on May 29, 1787. On August 18, Madison sent a recommendation to the Committee of Detail granting Congress exclusive legislative authority over the district, "not to exceed ___ miles square," to become the seat of the federal government. This provision survives, virtually unaltered, in Article I, section 8, clause 17 of the Constitution, the "District Clause".[10]

When the Constitution took effect in the Spring of 1789, the site of the new capital remained unsettled. The location of this sought-after prize was a bone of much contention, in and out of Congress. Both New York and Philadelphia felt entitled to the plum. New York was the greatest port on the continent, and had been the home of Congress since 1785. Washington was inaugurated in New York, and the old city hall,

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[7] *Id.* at 5-6.

[8] 12 *The Papers of James Madison* 397-98 (C. Hobson & R. Rutland eds. 1981) [hereinafter *Madison Papers*].

[9] C. M. Green, *Washington: A History of the Capital 1800-1950* 8-9 (1962) [hereinafter Green].

[10] D. Hutchinson, *The Foundations of the Constitution* 125 (1975). *See also* Caemmerer, *supra* note 3, at 6. Article I, section 8, clause 17 provides that Congress shall have the power:

> To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may by Cession of particular States and the acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.

where Congress had been meeting, was replaced with a new more spacious building in the hope that Congress would make its home there.[11] Philadelphia, on the other hand, had been the customary seat of the Continental Congress, was the Nation's most populous city, and had the added advantage of a more central location. According to Alexander White, a member of the House of Representatives from Virginia, the citizens of Philadelphia, "[s]hew[ed] almost a childish anxiety for the removal of the Congress to this place."[12] The members of the 1st Congress, at the insistence of Messrs. Lee and Madison of Virginia, took up the subject in September 1789, although no resolution was reached until the following July.

There is no doubt that the Congress understood the vast benefits awaiting the site chosen as the permanent seat of the national government. As Madison pointed out:

> The seat of Government is of great importance, if you consider the diffusion of wealth that proceeds from this source. I presume that the expenditures which will take place, where the Government will be established by those who are immediately concerned in its administration, and by others who may resort to it, will not be less than half a million dollars a year . . . .
>
> Those who are most adjacent to the seat of Legislation will always possess advantages over others. An earlier knowledge of the laws, a greater influence in enacting them, better opportunities for anticipating them, and a thousand other circumstances will give a superiority to those who are thus situated.[13]

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[11] Caemmerer, *supra* note 3, at 7.

[12] 12 *Madison Papers*, *supra* note 8, at 329.

[13] 1 Annals of Cong. 864 (1789). Dr. Franklin, perhaps the canniest of the Founders, suggested that Pennsylvania cede the ten miles square moments after the new Constitution was first presented to the Pennsylvania legislature. On September 19, 1787, "[a]s soon as the Speaker had concluded [reading the Constitution], Dr. Franklin rose and delivered a letter . . . [containing] a recommendation to the legislature, 'that a law shall be immediately passed vesting in the new Congress a tract of land of ten miles square by which that body might be induced to fix the seat of the federal government in this state -- an event that must be highly advantageous to the Commonwealth of Pennsylvania.'" 2 *The Documentary History of the Ratification of the Constitution: Ratification of the Constitution by the States - Pennsylvania* 61 (M. Jensen ed. 1976).

Outside of Philadelphia and New York, there was little enthusiasm for selecting one of the Nation's great cities as the site for the new capital. It was widely assumed that the "federal town" would be built from scratch, or upon the foundations of a smaller town already extant.[14] Many members are said to have agreed with Washington "that America should establish the precedent of a nation locating and founding a city for its permanent capital by legislative enactment."[15] The Founders saw the folly in fixing the national capital in an established urban center, particularly one which was also the seat of a state government, like Philadelphia. This concern was voiced by George Mason of Virginia during the Constitutional Convention. He observed that:

> [I]t would be proper, as he thought, that some provision should be made in the Constitution agst. choosing for the seat of the Genl. Govt. the City or place at which the seat of any State Govt. might be fixt. There were 2 objections agst. having them at the same place, which without mentioning others, required some precaution on the subject. The 1st. was that it tended to produce disputes concerning jurisdiction. The 2d. & principal one was that the intermixture of the two Legislatures tended to give a provincial tincture to ye Natl. deliberations.[16]

Alexander White articulated the concern that the capital not be located at the site of an existing commercial center:

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A few weeks later, Dr. Benjamin Gale of Connecticut wrote "[t]hat [Pennsylvania] has raised expectations of being made the seat of government which [will] naturally throw into it the riches and wealth of all the States in the Union." 3 *The Documentary History of the Ratification of the Constitution: Ratification of the Constitution by the States - Del., N.J., Ga. & Conn.* 397 (M. Jensen ed. 1976) [hereinafter *Ratification Documents - Del., N.J., Ga., & Conn.*]. That same October, Elbridge Gerry of Massachusetts wrote that "the wealth of the Continent will be collected in Pennsylvania, where the seat of the federal Government is proposed to be." 13 *The Documentary History of the Ratification of the Constitution: Commentaries on the Constitution Public & Private, Vol. 1 -- 21 Feb. - 7 Nov. 1787* 407 (J. Kaminski & G. Saladino eds. 1983).

[14] At the Constitutional Convention Elbridge Gerry, "conceived it to be the genl. sense of America, that neither the Seat of a State Govt. nor any large commercial City should be the seat of the Genl. Govt." J. Madison, *Notes of Debates in the Federal Convention of 1787* 379 (A. Koch ed. 1966) [hereinafter *Notes on the Federal Convention*].

[15] Caemmerer, *supra* note 3, at 10.

[16] *Notes on the Federal Convention*, *supra* note 14, at 378. Charles Pinckney, agreed that the seat of a state government should be avoided, but felt that "a large town or its vicinity would be proper." *Id.* at 379.

> [M]odern policy has obliged the people of European countries, (I refer particularly to Great Britain,) to fix the seat of Government near the centre of trade. It is the commercial importance of the city of London which makes it the seat of Government; and what is the consequence? London and Westminster, though they united send only six members to Parliament, have a greater influence on the measures of Government than the whole empire besides. This is a situation in which we never wish to see this country placed.[17]

After much wrangling, and no little horse trading, the site favored by the southern members, below Georgetown, Maryland, near the fall line of the Potomac River, was chosen. In return for northern acceptance of a southern location for the capital, the southern delegates agreed to support the assumption of state Revolutionary War debts by the national government.[18]

By an Act of July 16, 1790,[19] the Potomac site was selected and a "district of territory, not exceeding ten miles square . . . accepted for the permanent seat of the government of the United States." President Washington was given authority to appoint a commission to survey the district, to acquire such land on the eastern side of the river deemed necessary for the use of the United States, and, according to "such plans as the President shall approve," to erect "suitable buildings for the accommodation of Congress, and of the President, and for the public offices of the Government of the United States."[20] All of this was to be accomplished prior to the first Monday in December, 1800, when "the seat of the government of the United States shall, by virtue of this act, be transferred to the district."[21] Until then, Philadelphia would serve as the seat of the new government.

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[17] 2 Annals of Cong. 1661 (1790).

[18] The debts incurred by the northern states during the Revolution were significantly higher than those incurred by their southern sisters.

[19] Act of July 16, 1790, 1 Stat. 130.

[20] *Id.*

[21] *Id.*

## II. Early Efforts to Provide National Representation

Congress convened in the District of Columbia for the first time on November 21, 1800. Two weeks earlier, on November 11, the residents of the District cast their last ballots in national congressional elections.[22] While both Maryland and Virginia had ceded the territory comprising the new district in 1788 and 1789 respectively, the seat of government was not established there until December of 1800. District residents did not lose their state citizenship until that time. The Act of July 16, 1790, by which the cessions were accepted, provided that "the operation of the laws of the [ceding] state[s] 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."[23] By an Act of February 27, 1801, Congress provided that the laws of Maryland then in force would continue to be applied in the Maryland cession (to be called Washington County), and the laws of Virginia then in force would apply to the Virginia cession (to be called Alexandria County). A new circuit court was created to hear cases arising in the District.[24]

The disenfranchisement of the inhabitants of the District did not go unnoticed. In December, 1800, Representative Smilie of Pennsylvania noted that "[n]ot a man in the District would be represented in the government, whereas every man who contributed to the support of a government ought to be represented in it."[25] In a pamphlet published in 1801, Augustus B. Woodward, a Virginia lawyer recently moved to the District, wrote that, "[t]his body of people is as much entitled to the enjoyment of the rights of citizenship as any other part of the people of the United States. There can exist no necessity for their disfranchisement .... They are entitled to a participation in the *general councils* on the principles of equity and reciprocity."[26] In May, 1802, the residents of the

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[22] *See* Green, *supra* note 9, at 23.

[23] Act of July 16, 1790, *supra* note 19.

[24] Act of February 27, 1801, 2 Stat. 103; Act of March 3, 1801, 2 Stat. 115.

[25] T. W. Noyes, *Our National Capital and its Un-Americanized Americans* 60 (1951) [hereinafter Noyes].

[26] *Id.* From 1801 to 1803 Woodward published a series of eight pamphlets entitled "Considerations on the Government of the Territory of Columbia" under the pseudonym "Epaminondas." He was appointed one of the first federal judges in the newly formed Michigan Territory in 1805, and prepared a plan for the city of Detroit (which had burned in that year), based upon L'Enfant's Washington. *See Dictionary of American Biography* 506-07 (D. Malone ed. 1936).

new city of Washington petitioned Congress for a charter, which allowed them to elect a city council, putting the city on a par with the District's other cities, Georgetown and Alexandria.[27] The City's mayor, however, was to be appointed by the President.[28] Within seven months, the citizens of Washington began agitating for a territorial form of government. The possibility of retroceding the District's territory back to Maryland and Virginia was, for the first time, raised. The proposal, however, was dropped when several members of Congress, tired of living in an uncomfortable backwater, suggested that the capital be moved back to Philadelphia.[29] As the City's leading biographer points out:

> Whether, in the interest of reclaiming full political rights, a Washingtonian had ever stood ready to risk loss of the capital is doubtful. Men had invested in property in the city because here was to be the seat of government. Stripped of that privilege, Washington would wither.[30]

The District's predicament, however, was not forgotten. Citizens complained that Congress was unconcerned with their problems. Said one in the second decade of the Nineteenth Century, "'[i]f a national bank is created, the head is fixed elsewhere. If a military school is to be founded, some other situation is sought. If a national university [to be located in the District] is proposed, the earnest recommendation of every successive president in its favour . . . is disregarded . . . . Every member [of Congress] takes care of the needs of his constituents, but we are the constituents of no one.'"[31]

Throughout its early period, the District, under the supreme authority of Congress, was governed by five separate jurisdictions: the city of Washington; the city of Georgetown (incorporated in 1789), governed by its own city council, alderman and mayor; the city of Alexandria (incorporated in 1790), with its municipal government; and

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[27] *See* Green, *supra* note 9, at 29.

[28] Act of May 15, 1802, 3 Stat. 583. After 1820 the mayor was popularly elected. *See Representation in Congress for the District of Columbia: Hearings on S.J. Res. 76 Before the Subcomm. on Const. Amendments of the Senate Comm. on the Judiciary*, 93rd Cong., 1st Sess. 38-39 (1973) [hereinafter 1973 Senate Hearings].

[29] *See* Green, *supra* note 9, at 29-30.

[30] *Id.* at 30.

[31] *Id.* at 66.

the unincorporated areas of Washington and Alexandria counties, each governed by their respective county governments.[32] Between the establishment of the capital and the, end of the Civil War, there were few changes in the governance of the District. In 1846 Alexandria County was returned to Virginia at the request of its inhabitants,[33] and in 1861 the "Metropolitan Police District of the District of Columbia" was created, the first step toward a unitary government for the District.

The next significant change in the nature of District government came in 1871. On June 1, 1871, a territorial government was established.[34] The city charters of Washington and Georgetown were repealed, and the other governing bodies were abolished. A single government was created for the entire District, allowing for a governor appointed by the President (with the advice and consent of the Senate) and an assembly, the upper house of which was appointed by the President (again with the advice and consent of the Senate), and the lower house of which was elected by popular vote. As with other territories, a non-voting delegate from the District was seated in the House of Representatives.[35]

Three and a half years later, hopelessly in debt, the bankrupt territorial government was abolished by Congress without debate.[36] By this act, of June 20, 1874, the President was empowered to appoint three commissioners to administer the District, and its non-voting seat in the House of Representatives was abolished.[37] Four years later, a permanent commission form of government was adopted. Two of the three commissioners provided for were to be appointed by the President (with the advice and consent of the Senate) from the civil service, each to serve

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[32] *See Voting Representation in Congress for the District of Columbia: Hearings on H.J. Res. 46; H.J. Res. 253; H.J. Res. 374; H.J. Res. 470 Before Subcommittee No. 1 of the House Committee on the Judiciary*, 92d Cong., 1st Sess. 232, 234-35 (1971) (statement of Carl L. Shipley, District of Columbia Republican National Committeeman) [hereinafter *1971 House Hearings*].

[33] As will be discussed later, the constitutionality of the 1846 retrocession is open to some question. *See infra* pp. 16-23.

[34] Act of February 21, 1871, 16 Stat. 419.

[35] *1971 House Hearings, supra* note 32, at 210-211 (statement of F. Elwood Davis, Chairman, Citizens' Joint Committee on National Representation for the District of Columbia).

[36] Green, *supra* note 9, at 360.

[37] Act of June 20, 1874, 18 Stat. 116.

three years. The third commissioner was to be selected by the President from the Army Corps of Engineers.[38] This remained the District's form of government until 1967.

Under the District of Columbia Reorganization Plan No. 3 of 1967, the executive and administrative authority which had been vested in the commissioners was transferred to a mayor, and a nine-member city council was given certain legislative and regulatory powers. The mayor, deputy-mayor and council members were to be presidential appointees.[39] District residents were once again allowed to elect a non-voting delegate to the House of Representatives beginning in 1971.[40]

The District of Columbia was granted full "Home Rule" in 1973. Under The District of Columbia Self-Government and Governmental Reorganization Act,[41] the capital is now governed by a mayor and a thirteen member city council both elected by popular vote. Extensive legislative power over the District's affairs is invested in this government, although Congress retains significant oversight authority.[42]

Between 1878 and 1973 clearly the most significant change in the voting rights of District residents was the Twenty-third Amendment, which provides that:

> The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:
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> 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

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[38] Act of June 11, 1878, 20 Stat. 102. *See 1971 House Hearings, supra* note 32, at 235 (statement of Carl L. Shipley, District of Columbia Republican National Committeeman).

[39] *Id.* at 235-36.

[40] Act of April 19, 1971, 84 Stat. 848.

[41] Pub. L. No. 93-198, 87 Stat. 774 (1973).

[42] The Congress retains substantial veto power. Many regulatory functions are still subject to congressional authority. For example, final approval of the District's budget is reserved to Congress. In addition, the President is responsible for the appointment of local judges and may sustain a veto of an act of the City Council passed over the mayor's veto. *See e.g., id.* at §§ 404, 434, 446, 601, 603.

State, but in no event more than the least populous state . . . .[43]

This amendment was ratified on March 29, 1961, after only 9 months.[44] Proposals to give the District direct voting representation in the Congress, however, have not fared so well. Since the territorial government was abolished in 1878, no fewer than 150 plans have been introduced in the Congress to provide direct voting representation for the District. Hearings have been held more than twenty different times.[45] The District's first champion, Augustus B. Woodward, proposed an amendment which would have granted the District one senator and representation in the House commensurate with its population (and corresponding presidential electors) in a series of articles published shortly after the federal government took up residence.[46] Woodward was not, however, a member of Congress and the proposed amendment was never introduced.[47]

In 1888, a proposal much like Woodward's, which would have granted the District one senator, representatives in the House according to its population, and participation in the electoral college, was introduced. No further action, however, was taken.[48] In 1922, the Senate District of Columbia Committee favorably reported a resolution which would have allowed, but not required, the Congress to "'admit to the status of citizens of a State the residents of . . . the seat of the Government of the United States . . . for the purposes of representation in Congress.' *Senate District of Columbia Comm., Report on S.J. Res. 75.*"[49] Again, no further action was taken.

In fact, it is only in the past two decades that direct representation for the District of Columbia has sustained significant congressional interest. In both 1967 and 1972 proposals to give the District representa-

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[43] U.S. Const. amend. XXIII, § 1.

[44] J. Best, *National Representation for the District of Columbia* 1 (1984) [hereinafter Best].

[45] Hatch, *Should the Capital Vote in Congress? A Critical Analysis of the Proposed D.C. Representation Amendment*, 7 Fordham U.L.J. 479, 495-96 & n.69 (1978-79) [hereinafter Hatch].

[46] *Id.* at 495 n.68. *See also* Noyes, *supra* note 25, at 204.

[47] *See* Noyes, *supra* note 25, at 204.

[48] *See* Hatch, *supra* note 45, at 496-97.

[49] *Id.* at 497 n.74.

tion were reported out of House committees. Early 1976 saw the defeat of a House resolution giving the District full representation in both houses.[50] Two years later, the proposed D.C. Representation Amendment was narrowly approved by a two-thirds majority in both houses of Congress. This amendment would have granted "nominal statehood" to the District, treating it "as though it were a state" for purposes of representation in both House and Senate. The District would also have been given the rights of a state to participate in the amendment process, and the right to participate in the Electoral College on an equal footing with the states. The Twenty-third amendment, thus rendered unnecessary, was to be repealed. Seven years were allowed for ratification of the proposed amendment, by August 22, 1985. In that time, it was ratified by only sixteen states.[51]

## III. Proposals for Giving Representation in Congress to the District of Columbia

The numerous schemes proposed over the last two hundred years to give the residents of the federal district some sort of direct voting representation in Congress may be distilled into five basic proposals: (1) legislation to allow the District a voting member in the House of Representatives alone; (2) retrocession of the District of Columbia to Maryland, retaining a truncated federal district; (3) allowing District residents to vote as residents of Maryland in national elections; (4) an amendment to the Constitution to give the District full representation in both House and Senate as if it were a state; and (5) full statehood. None of these proposals offers a sound policy solution, and several appear to be fatally flawed when exposed to constitutional scrutiny.

### A. Voting Member in the House of Representatives

From time to time it has been suggested that the District be granted, by simple legislation, a voting member in the House of Representatives. This proposal, however, runs into significant constitutional difficulties.

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[50] H.J. Res. 280, 94th Cong., 2d Sess. (1976). *See* Hatch, *supra* note 45, at 498.

[51] *See supra* p. 1, n.1. At least ten states rejected the proposal, and four of these felt compelled to pass resolutions affirmatively condemning the measure. *See* Best, *supra* note 44, at 1. For two exhaustive critical analyses of this proposal, *see* Best, *supra* note 44, and Hatch, *supra* note 45.

Those sections of the Constitution which define the political structure of the federal government speak uniformly in terms of the states and their citizens. Article I, section 2 provides that, "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States .... No person shall be a Representative ... who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."[52] Article I, section 3 provides that, "[t]he Senate of the United States shall be composed of two Senators from each State .... No Person shall be a Senator ... who shall not, when elected, be an Inhabitant of that State for which he shall be chosen."[53] With respect to the election of the President, Article II, section 1 provides that, "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress."[54] The Seventeenth Amendment directs that "[t]he Senate of the United States shall be composed of two Senators from each State, elected by the people thereof."[55] In short, "[d]irect representation in the Congress by a voting member has never been a right of United States citizenship. Instead, the right to be so represented has been a right of the citizens of the States."[56]

The word "state" as used in Article I may not be interpreted to include the District of Columbia, even though as a "distinct political society" it might qualify under a more general definition of that term. Consistent with the intent of the Framers, such arguments were properly dismissed long ago by Chief Justice Marshall in *Hepburn v. Ellzey*.[57] In that case, plaintiffs, residents of the District, claimed that they were citizens of a state for purposes of diversity jurisdiction in the federal courts. The Court rejected this position. Marshall reasoned that Congress had adopted the definition of "state" as found in the Constitution in the act providing for diversity jurisdiction, and that the capital could not

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[52] U.S. Const. art. I, § 2.

[53] U.S. Const. art. I, § 3.

[54] U.S. Const. art. II, § 1, cl. 2. The people of the District of Columbia may vote for President only because of the Twenty-third Amendment, which specifically grants them that right.

[55] U.S. Const. amend. XVII.

[56] *1973 Senate Hearings*, *supra* note 28, at 67 (minority views of Rep. Edward Hutchinson).

[57] 6 U.S. (2 Cranch) 445 (1805).

be considered such a "state". Citing Article I, sections 2 and 3, and Article II, section 1, he concluded that "the members of the American confederacy only are the states contemplated."[58] "These clauses show that the word state is used in the constitution as designating a member of the union, and excludes from the term the significance attached to it by writers on the law of nations."[59] Congress, to be sure, has often treated

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[58] *Id.* at 452.

[59] *Id.* at 452-53. The Judiciary Act has since been amended to extend the diversity jurisdiction of the federal courts to include District residents. *See* Act of April 20, 1940, Ch. 117, 54 Stat. 143.

A deeply divided Supreme Court upheld this extension of federal court jurisdiction in *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949). Five justices agreed that the statute was constitutional, although they divided over the grounds upon which to rest their finding. Two justices concurred in Justice Jackson's plurality opinion, which followed Marshall's lead in concluding that the District cannot be considered a "state" for Article III purposes, but held that Congress' authority under the District Clause was sufficient to support a grant of diversity jurisdiction over District residents to the federal courts. In Article III, Justice Jackson wrote, the Drafters were referring to "those concrete organized societies which were thereby contributing to the federation by delegating some part of their sovereign powers . . . . They obviously did not contemplate unorganized and dependent spaces as states." *Id.* at 588.

Two justices concurred in this result, creating a bare majority, but rejected Jackson's reasoning. They would have overruled *Hepburn*, noting that Marshall had supported his decision in that case by referring to "provisions relating to the organization and structure of the political departments of the government, not to the civil rights of citizens as such." *Id.* at 619. Article III could not, in their view, be fairly compared with Articles I and II with respect to the word "state". They did not, however, question Marshall's interpretation of the word as it was used in the first two articles.

Justices Frankfurter and Reed dissented, arguing that Article III's grant of jurisdiction to the federal courts could not be enlarged beyond its original scope by simple statute. *Id.* at 655. The word "state" in Article III, they concluded, did not "cover the district which was to become 'the Seat of the Government of the United States,' nor the 'territory' belonging to the United States, both of which the Constitution dealt with in differentiation from the States." *Id.* at 653.

Chief Justice Vinson, joined by Justice Douglas, also would have invalidated the statute, based upon Marshall's *Hepburn* reasoning. He concluded that the Framers clearly did not intend to extend diversity jurisdiction to citizens of the District of Columbia, as Marshall, "[o]ne well versed in that subject, writing for the Court within a few years of adoption of the Constitution, so held." *Id.* at 645. Thus, while the statute withstood constitutional challenge, seven of nine justices agreed with Marshall that the word "state" could not be interpreted to include the District of Columbia in this instance. All agreed that "state" as used in the "political" articles of the Constitution did not include the District.

the District of Columbia as a state for purposes of statutory benefit programs. It is customarily included in the major federal grant programs by the well-worn phrase "for purposes of this legislation, the term 'State' shall include the District of Columbia."[60] The courts, also, have occasionally interpreted the word "state" to include the District of Columbia. However, the District has never been automatically included under the term "state" even in federal statutes. In *District of Columbia v. Carter*,[61] the Supreme Court held that it was not a "State or Territory" under 42 U.S.C. § 1983, which creates a federal cause of action for civil rights violations under color of state law. Under the test articulated by Justice Brennan in that case, "[w]hether 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."[62] In any event, allowing the District to participate on an equal footing with the states in federal statutory programs is different in kind from reading the language of the Constitution itself in such a way as to allow alteration of the very composition of the Congress by legislative fiat.

The Constitutional mandate is clear. Only United States citizens who are also citizens of a state are entitled to elect members of Congress. This is hardly a novel proposition. There are many different levels of rights recognized in our system. Aliens, for instance, enjoy certain basic rights,[63] including the benefit of the Equal Protection Clause,[64] but are not citizens of the United States and have no vote. The residents of United States possessions overseas also enjoy the protection of the Constitution, but may not vote in federal elections. Many of them are United States citizens -- the residents of Puerto Rico and Guam, for instance, fit this category. Like the residents of the District of Columbia,

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[60] *See Representation in Congress for the District of Columbia: Hearings on S.J. Res. 76 Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary*, 93d Cong., 1st Sess. 6 (1974) (statement of Sen. Kennedy).

[61] 409 U.S. 418 (1973).

[62] *Id.* at 420. Section 1983 has since been amended to expressly include the District of Columbia. *See* Pub. L. No. 96-170, § 1, 93 Stat. 1284 (1979).

[63] *See e.g.*, *Landon v. Plasencia*, 459 U.S. 21, 33 (1982) ("Our cases have frequently suggested that a continuously present resident alien is entitled to a fair hearing when threatened with deportation."); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (due process clause of Fifth Amendment applicable to aliens).

[64] *See e.g.*, *Yick Wo v. Hopkins* , 118 U.S. 356 (1886) (aliens entitled to equal protection under the Fourteenth Amendment).

American citizens who are not also citizens of a state do not participate in congressional elections, and they never have enjoyed such participation.[65] The residents of the District of Columbia may not participate directly in congressional elections without becoming citizens of a state, or without an amendment to the Constitution.

**B. Retrocession of the District to Maryland**

The original District of Columbia was an area ten miles square composed of territory ceded to the national government by the states of Virginia and Maryland. Of this 100 square miles, approximately 30 square miles came from Virginia (Alexandria County) and 70 from Maryland (Washington County). In 1846, at the earnest request of the residents of Alexandria County, Congress enacted legislation retroceding it to the Commonwealth.[66] Therefore, what is thought of as the District of Columbia today includes only territory that was once part of Maryland.

A favored alternative of some is to retrocede the District to Maryland. A reduced federal enclave, they say, could be preserved, generally including the areas immediately surrounding the Capitol, Supreme Court, and Library of Congress, the museums and federal office buildings adjacent to the Capitol Mall, the Jefferson, Lincoln and Vietnam Memorials, the Washington Monument, and the White House

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[65] Indeed, "[a]ll during the 19th century and into the 20th, American citizens left their States of residence and migrated into new lands, which were subject to the jurisdiction of the United States but were in no State. As migration into those areas increased they were organized into territories but at no time did those American citizens elect voting Members of Congress. Not until their territory was admitted as a State did they have that representation .... There was no widespread belief that the people in the territories were discriminated against because they had no direct voting representation in Congress." *1973 Senate Hearings, supra* note 28, at 66-67 (minority views of Rep. Edward Hutchinson).

[66] *See* Act of July 19, 1846, Ch. 35, 9 Stat. 35. Alexandria's pleas for retrocession began early in the Nineteenth Century, as the city's prosperity declined. In 1840 certain Alexandria residents began to seek support for a retrocession and, after several years, succeeded in obtaining the approval of the Virginia General Assembly. In an act passed on February 3, 1846, the Assembly agreed to accept the county of Alexandria back into the Old Dominion upon the approval of Congress. *See* Virginia Act of February 3, 1846, Ch. 64. Five months later Congress passed an act retroceding the area to Virginia, provided that a majority of the electorate of the county accepted the provisions of the act. 763 residents of Alexandria County voted to rejoin Virginia and 222 voted to remain in the District. *See* Green, *supra* note 9, at 173-74.

with its attendant executive office buildings.[67] Current residents of the District would become citizens of Maryland, and would then vote for Senators and Representatives from that state. This resolution, argue its supporters, would allow District residents a full and equal voice in national affairs, and would preserve the constitutional mandate of the District Clause that the seat of government remain under the exclusive jurisdiction of Congress -- a "constitutionally elegant solution" for which there is already a precedent.[68]

Theoretically, it is argued, retrocession could be accomplished without an amendment to the Constitution,[69] as was the retrocession in 1846 of part of the original District to Virginia. Since Virginia's consent was secured in 1846, it is assumed that Maryland's agreement would be necessary today. In the event that Maryland lacked enthusiasm for the scheme, an amendment could still conceivably be adopted, because Maryland would not have to be among the three-fourths of the states ratifying the measure.[70]

The advantages of retrocession, however, are more apparent than real. Whether or not Maryland's consent would be legally required, as a practical political matter her agreement to any such plan would be needed. Moreover, such a scheme would not pass constitutional muster in the absence of an amendment to the Constitution. This is because (1) it is not at all clear that Congress has the power to relinquish its authority over the District, even if a "national capital service area" were retained; and, (2) we believe that the passage of the Twenty-third Amendment has given additional constitutional recognition to the District of Columbia.

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[67] This has generally been the area reserved as a "national capital service area" in both retrocession and District statehood plans. *See District of Columbia Representation in Congress: Hearings on S.J. 65 Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary*, 95th Cong., 2d Sess. 211 (1978) [hereinafter *1978 Senate Hearings*]; H.R. 51, 99th Cong., 1st Sess. (1986) (A Bill to Provide for the Admission of the State of New Columbia into the Union).

[68] *See* Best, *supra* note 44, at 77.

[69] *Representation for the District of Columbia: Hearings on Proposed Constitutional Amendment to Provide for Full Congressional Representation for the District of Columbia Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary*, 95th Cong., 1st Sess. 37 (1977) (statement of Rep. Thornton) [hereinafter *1977 House Hearings*].

[70] *See* Best, *supra* note 44, at 79-80.

1. *The District Clause Appears to Provide No Authority for Retrocession*

Retrocession is grounded upon the assumption that Congress may relinquish its authority over part of the federal district, retaining for itself only the major federal monuments and buildings, and the surrounding parkland, consistent with the District Clause. It is not at all clear, however, that the Constitution allows Congress that power. Article I, section 8, clause 17 provides that Congress shall have the power:

> To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may by Cession of Particular States and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.[71]

Congress is here given exclusive jurisdiction over the district which was to "become the seat of government of the United States," not merely over the seat of government, wherever that might happen to be. Clearly, the district chosen could not exceed ten miles square,[72] but, under the language of the clause, once the cession was made and this "district" became the seat of government, the authority of Congress over its size and location seems to have been exhausted. The district which became

[71] U.S. Const. art. I, § 8, cl. 17.

[72] The phrase "not exceeding ten Miles square" has been cited as giving Congress the authority to alter the size of the District at will, or even to change the site of the seat of government. *See 1978 Senate Hearings, supra* note 67, at 191 (views of Hilda M. Mason, District of Columbia councilmember-at-large). However, as found in the text, this language was merely a limit upon the size of the original cession. Many feared that, since it would be under the jurisdiction of no state, the District might become a haven for miscreants or the recruiting ground whence federal armies could be raised to subdue the states and put an end to republican liberty. During the debates over the Constitution's ratification, one Georgian argued that the district should be confined to five miles square, as "a larger extent might be made a nursery out of which legions may be dragged to subject us to unlimited Slavery, like ancient Rome." *Ratification Documents - Del. N.J., Ga. & Conn., supra* note 13, at 240. Congress chose to exercise its authority under the District Clause to the fullest extent, and accepted the full ten miles square. Once the cession was made, the site accepted by Congress, and the permanent seat of government established, it appears that the boundaries of the District were finally fixed.

the seat of government is the District of Columbia. The Constitution appears to leave Congress no authority to redefine the District's boundaries, absent an amendment granting it that power.[73] As Attorney General Robert F. Kennedy stated in 1963, commenting on a bill that would have retroceded the District to Maryland, "[w]hile Congress' power to legislate for the District is a continuing power, its power to create the District by acceptance of cession contemplates a single act. The Constitution makes no provision for revocation of the act of acceptance, or for retrocession. In this respect the provisions of Art. I, Sec. 3, cl. 17 are comparable to the provisions of Art. IV, Sec. 3 which empower Congress to admit new states but make no provision for the secession or expulsion of a state."[74] It follows that, an amendment to the Constitution would be needed before any part of the District of Columbia could be returned irrevocably to Maryland.

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[73] While it has occasionally been assumed that Congress could remove the seat of government if it chose, this does not seem to be the import of the constitutional language. Undoubtedly Congress could, should circumstances require, convene elsewhere on a temporary basis. (Even so, at the two points in our history when such a removal might have been justified on the grounds of military necessity, at the beginning of the Civil War and after the city was burned by the British in 1814, Congress stayed put.) However, this is very different from removing the permanent seat of the national government. The District of Columbia, for better or worse, is the permanent seat of the Government of the United States. Short of an amendment to the Constitution, its character as a federal enclave under the exclusive jurisdiction of Congress may not be altered, or the permanent seat of government removed.

Indeed, the Carter Justice Department took the position that an amendment would be needed to effect retrocession. As Assistant Attorney General Patricia Wald stated while testifying in 1977 before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, "[t]his option [retrocession of the District to Maryland] would also require a constitutional amendment, in our view, in view of the exclusive legislation clause." *See 1977 House Hearings, supra* note 69, at 127 (testimony of Patricia M. Wald, Assistant Attorney General, Office of Legislative Affairs), Appendix E.

[74] Letter and Memorandum of Attorney General Robert F. Kennedy to Hon. Basil Whitener, House Committee on the District of Columbia, Dec. 13, 1963, *reprinted in Home Rule, Hearings on H.R. 141 Before Subcommittee No. 6 of the House Committee on the District of Columbia*, 88th Cong., 1st Sess. 341, 345 (1964) [hereinafter *Kennedy Memorandum*]. See Appendix 3.

Retrocession was, in fact, debated in Congress shortly after the seat of government was moved to the District. As Rep. Dennis of Maryland noted, "[t]he provision of the Constitution is imperative, and it is impossible by any act of ours to divest ourselves of the ultimate jurisdiction over the Territory." *See* 12 Annals of Cong. 490 (1803).

The retrocession of former Alexandria County (present day Arlington County and much of the city of Alexandria) to Virginia some one-hundred and forty-one years ago does not provide constitutional support for the principle of retrocession. In fact, the constitutionality of retrocession has never been ruled on. Alexandria's return to Virginia was not challenged until almost thirty years after the fact. In 1846, "the war with Mexico was a far more engrossing matter."[75] It was not until 1875, when a disgruntled Virginia taxpayer challenged a levy on his property, arguing that it was properly located in the District of Columbia, that the 1846 retrocession was brought into question. However, in that case, styled *Phillips v. Payne*,[76] the Supreme Court dodged the issue, reviewing the dire consequences that would follow a declaration that the retrocession was unconstitutional: "all laws of the State passed since the retrocession, as regards the county of Alexandria, were void; taxes have been illegally assessed and collected; the election of public officers, and the payment of their salaries, were without warrant of law; public accounts have been improperly settled; all sentences, judgments, and decrees of the courts were nullities, and those who carried them into execution are liable civilly, and perhaps criminally, according to the nature of what they have severally done."[77] The Court noted that Virginia was *de facto* in possession of the territory, and that the United States, and the English Common Law before it, had always recognized the doctrine of *de facto* rights in international and domestic public law. It concluded that plaintiff was "estopped" to "vicariously raise a question, nor force upon the parties to the compact an issue which neither of them desires to make. In this litigation we are constrained to regard the *de facto* condition of things which exists with reference to the county of Alexandria as conclusive of the rights of the parties before us."[78]

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[75] Green, *supra* note 9, at 174.

[76] 92 U.S. 130 (1875).

[77] *Id.* at 133.

[78] *Id.* at 134. In 1910, Hannis Taylor, author of "The Origin and Growth of the English Constitution," as well as several other works on constitutional law, challenged the validity of the 1846 retrocession. He argued that, once the Maryland and Virginia cessions were accepted by Congress, its power to alter the size of the District was exhausted. He also maintained that the grants from Virginia, Maryland, and the local landowners to Congress were part of one transaction or compact, and that the act of retrocession among two of the parties, the United States and Virginia, had impaired the contract in violation of the Contract Clause. *See* R.P. Franchino, *The Constitutionality of Home Rule & National Representation for the District of Columbia*, 46 Geo. L.J. 207 (1958), *reprinted in 1973 Senate Hearings*, *supra* note 28, at 81.

The validity of Alexandria's return to Virginia need not be questioned. Neither Virginia nor the federal government has raised the issue. However, the Alexandria retrocession of 1846 should not be used as precedent for a further retrocession of the District of Columbia to Maryland today. The Court has yet to pass upon the constitutionality of retrocession as a principle, and its reluctance to face the question (first presented nearly 30 years after the fact), based more upon a parade of horribles than any constitutional analysis, indicates just how suspect is the proposition.

2. *The Twenty-third Amendment was Adopted With Reference to the District of Columbia*

The Twenty-third Amendment, adopted in 1961, gave additional constitutional recognition to the District of Columbia. This amendment provides that the "District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct" electors to participate in the Electoral College. The district referred to by this amendment is the District of Columbia as established pursuant to Article I, section 8, clause 17. Indeed, the committee report noted that the amendment "would ... perpetuate recognition of the unique status of the District as the seat of Federal Government under the exclusive legislative control of Congress."[79] Its avowed purpose was to provide these voting rights to "the citizens of the District of Columbia." This, also, supports the conclusion that the District, once created, became a permanent juridical entity under the Constitution.

In the alternative, the "District constituting the seat of Government" may refer to the District of Columbia as it existed at the amendment's ratification, in 1961. At that time Title 4 of the United States Code provided that, "[a]ll that part of the territory of the United States included within the present limits of the District of Columbia shall be the permanent seat of government of the United States."[80] In either

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Indeed, in 1867 the House of Representatives passed a bill, by a vote of 111-28, repealing the 1846 Act on the stated ground that it was unconstitutional. The bill, however, was never reported out of the Senate Judiciary Committee. *See* 77 Cong. Globe 26, 32 (1867).

[79] *Granting Representation in the Electoral College to the District of Columbia*, H.R. Rep. No. 1698, 86th Cong., 2d Sess. 1, 3 (1960) [hereinafter *House Report No. 1698*]. *See* Appendix H.

[80] Act of July 30, 1947, ch. 389, § 1, 61 Stat. 641, 4 U.S.C. § 71 (1982).

case, Congress' alteration of the size of the District either by retrocession or admission as a state would contradict the premise of the amendment -- the existence of the District of Columbia as the constitutional seat of government. The House Report accompanying the amendment confirms this understanding, casting doubt upon any proposed retrocession plan, or plan to admit the District to the Union as a state. The Report states in pertinent part:

> It was suggested that, instead of a constitutional amendment to secure voting rights, the District be made either into a separate State or its land retroceded to the State of Maryland. Apart from the serious constitutional question which would be involved in the first part of this argument, any attempted divestiture by Congress of its exclusive authority over the District of Columbia by invocation of its powers to create new States would do violence to the basic constitutional principle which was adopted by the framers of the Constitution in 1787 when they made provision for carving out the "seat of Government" from the States and set it aside as a permanent Federal district. They considered it imperative that the seat of Government be removed from any possible control by any State and the Constitution in Article I, section 8, clause 17 specifically directs that the seat of Government remain under the exclusive legislative power of the Congress. This same reasoning applies to the argument that the land on which the District is now located be retroceded to the State of Maryland.[81]

Thus, the framers of the Twenty-third Amendment specifically considered and rejected as unconstitutional any attempt to retrocede the District of Columbia to Maryland, or to grant it statehood.

For these reasons, we believe that a constitutional amendment would be needed to extinguish the Constitution's permanent grant to Congress of exclusive legislative authority over the District of Columbia, whether through retroceding any portion of the District to Maryland or attempting to admit any part of the District as a state.

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[81] *House Report No. 1698, supra* note 79, at 2-3.

Finally, retroceding the District to Maryland, or admitting it as a state via statute (assuming the foregoing constitutional obstacles could be overcome), would dramatically alter the effect of the Twenty-third Amendment. All agree that a district of some size must be retained as the seat of the federal government. However, retaining a truncated federal enclave as the capital would lead to the absurd spectacle of a few hundred, perhaps a few dozen, people (including at least, the incumbent President and First Family) selecting three presidential electors, the same number each of six states is currently entitled to choose. As Attorney General Kennedy noted in his 1963 memorandum, "[i]t is inconceivable that Congress would have proposed, or the States would have ratified, a constitutional amendment which would confer three electoral votes on a District of Columbia which had a population of 75 families or which had no population at all."[82]

3. *A Greatly Truncated Federal District Would be Unwise and Contrary to the Reasons Leading to the Creation of the District of Columbia*

For the foregoing reasons, a constitutional amendment would be required before retrocession could be accomplished. Such an amendment, however, would be unwise. The historical reasons that led the Founders to create a federal district could not be more clear, and a truncated federal enclave as the seat of government would hardly be adequate to the task they assigned to the District of Columbia. The phrase "such District ... as may ... become the Seat of the Government of the United States," contemplates more than a cluster of buildings, however grand, and their surrounding parks and gardens. Had this been the intent, compounds could have been constructed to house the Congress, over which it would have had exclusive authority, in any one of the Nation's major cities. Indeed, at the time New York rebuilt its city hall in the hope and expectation that Congress would settle there. Like arrangements could have been made in Philadelphia, Princeton, Annapolis, Boston or Charleston. As Attorney General Kennedy stated in his 1963 submission, commenting on a bill that would have retroceded the District to Maryland, retaining a small federal enclave "comprised primarily of parks and Federal buildings," "[s]uch a small enclave clearly does not meet the concept of the 'permanent seat of government' which

[82] *See Kennedy Memorandum, supra* note 74, at 350.

the framers held. Rather, they contemplated a Federal city, of substantial population and area, which would be the capital and a showplace of the new Nation."[83]

The Drafters, in fact, exhibited a clear understanding of the difference between public installations belonging to the United States and the seat of government. Had the Framers intended the seat of government to be merely another federal installation, the grant of exclusive legislative authority over the federal district would have been unnecessary. The grant of authority over "Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings," would have sufficed. As Assistant Attorney General Patricia M. Wald observed while testifying on the proposed 1978 District amendment, "we believe the syntax of the constitutional provision is such that the drafters meant for the District not to be located within the borders of any State. It would seem at odds with that intent to treat the seat of Government just like any other Federal facility in a State."[84] In short, the creation of a new "federal town" was intended. As Senator Bayh pointed out in the debates on H.J. Res. 554, which became the proposed 1978 Amendment, "when our Founding Fathers established this as a capital city . . . they did not just establish a place that should be the Federal city and say this is where the Federal buildings are. But they envisioned this as a viable city, a capital city with people who work, have businesses, and have transportation lines, and homes. The essential establishment of the Nation's Capital was not an establishment of the Nation's Federal buildings but the Nation's city."[85]

Indeed, the minuscule federal service area generally allowed in proposals to retrocede the District's territory to Maryland, or to grant it statehood, would be completely inadequate to meet the needs of the federal government. As Attorney General Kennedy noted in his 1963 letter, with reference to a bill retroceding the District to Maryland, retaining a reduced federal enclave as the seat of government:

> The inadequacy, of the small area proposed to be retained by H.R. 5564, to meet the objectives of the framers and the inherent needs of our Federal system, is apparent. Thus, if

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[83] *Id.* at 347.

[84] *See 1977 House Hearings, supra* note 69, at 126.

[85] 124 Cong. Rec. 26,383 (1978). *See* Appendix F.

> H.R. 5564 were adopted, the Members of Congress, the heads of executive departments, and the employees of the legislative and executive branches, would have no alternative but to reside in the States of Maryland or Virginia [or the State of Columbia if statehood were granted]. They would be dependent on one or the other State for the means of transportation to and from their Federal offices. Even transportation between Federal offices would probably be controlled by Maryland [or Columbia], since separate taxicab and bus service for the new District of Columbia would probably not be physically or economically feasible. All the foreign embassies would be located in Maryland [Columbia], dependent on it for police protection, and subject to its zoning and other requirements .... The total inconsistency is evident between such a situation and the intention of the framers.[86]

An autonomous federal enclave was settled upon to assure Congress of authority over its immediate surroundings, to forever secure the independence of the federal government, avoiding the overweening influence of any one state, as well as to avoid interstate and sectional rivalries. All of these reasons are as valid today as they were in 1787. If the District were retroceded to Maryland, even though the major monuments remained under federal control, the capital city of the United States would be in a state. The intent of the Framers would be flouted and their wisdom ignored.

### C. Allowing the Residents of the District of Columbia to Vote in Maryland

The third proposal suggests that the residents of the District of Columbia be allowed to vote in Maryland. They would vote in Maryland congressional elections, but would not become citizens of Maryland. The borders of the District of Columbia would remain intact. Rep. Ray Thornton of Arkansas advanced this proposal in 1977, as a means by which District residents could participate in congressional elections without the need of an amendment to the Constitution, and which would "not result in a loss of the special character of Washington, D.C., as our Nation's Federal City."[87]

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[86] *See Kennedy Memorandum, supra* note 74, at 348.

[87] *1977 House Hearings, supra* note 69, at 36 (statement of Rep. Thornton).

Rep. Thornton argued that the Constitution does not specifically forbid voting representation in the Congress to District residents, but merely reserves such representation to the citizens of the states. Indeed, he pointed out, District residents voted in the Maryland congressional elections of 1800, before Congress took up residence in the District. Under this proposal, District residents could vote in congressional elections and be counted as Maryland residents for apportionment purposes. This solution would preserve the District as a federal enclave, but would allow its citizens voting representation in Congress, and, Rep. Thornton believed, could be achieved without the need of an amendment.[88] Following the 1846 precedent, he argued, this "partial retrocession" could be accomplished by mere statute. The residents of other federal enclaves covered by Article I, section 8, clause 17, he pointed out, "may vote in the States where those reservations are located, and the constitutional provision being identical, there is no reason why District residents should not be accorded the same privilege."[89]

If this proposal were feasible, the District would indeed be preserved, and its residents would be able to participate in congressional elections. Maryland might not be enthusiastic, but her objections would be tempered with the gain of the District's population for apportionment purposes, without the corresponding problems of an urban area the size of the city of Washington. At the present time, she could expect one addition to her delegation in the House of Representatives, from eight to nine. The Congress would, more or less, maintain its exclusive authority over the District, and the intent of the Founders would be, more or less, preserved. There are, however, several practical and legal problems with this proposition which cast doubt on the ability of Congress to implement such a proposal by mere legislation.

It is true that residents of federal enclaves are generally entitled to vote in elections held in the states where the installation is located. The Supreme Court affirmed this right in *Evans v. Cornman*.[90] However, much more than a statute retroceding the "voting rights" of District residents to Maryland would be needed before they could vote in that state. The Court's decision in *Evans* was grounded in the premise that the residents of federal enclaves may be, in practice, residents of the states in

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[88] *Id.* at 37.

[89] *Id.*

[90] 398 U.S. 419 (1970).

which the enclaves are located. In *Evans*, the residents of the National Institutes of Health ("NIH"), located in Montgomery County, Maryland, challenged a decision to strike them from the county voting rolls. The NIH had originally been a federal installation not covered by the Article I, section 8, clause 17 grant of exclusive legislative authority. It was not until 1953 that Maryland agreed to cede exclusive jurisdiction over the enclave to the federal government. Accordingly, before that cession, residents of NIH had voted in Maryland elections, both state and national. They were indisputably citizens of Maryland. They continued to enjoy those rights after the cession until the mid-1960s. In 1963 the Maryland Court of Appeals, in *Royer v. Board of Election Supervisors*,[91] ruled that residents of federal enclaves were not "residents of the State" under the Maryland Constitution, and therefore were not entitled to vote as Maryland citizens. NIH residents were dropped from the rolls based upon this decision.

The *Evans* Court, however, took a different view. It noted that the NIH was within the geographical borders of Maryland, and that its residents were treated as residents of Maryland for census and congressional apportionment purposes. Relying on its previous decision in *Howard v. Commissioners of Louisville*,[92] the Court held that the NIH did not cease to be a part of Maryland when exclusive jurisdiction was ceded to the federal government. Those living on the NIH grounds were, thus, still residents of Maryland. Accordingly, to deprive NIH residents of the voting rights enjoyed by other Maryland residents violated the Equal Protection Clause of the Fourteenth Amendment. Maryland's contention, that NIH residents were not "primarily and substantially included in or affected by electoral decisions" in Maryland because of the federal government's exclusive jurisdiction was rejected. The Court reasoned that NIH residents were not "sufficiently disinterested" to justify their disenfranchisement. It pointed out that Maryland law applied to the NIH grounds (although the criminal offenses defined by that law were prosecuted by federal authorities in federal courts), and that Congress has allowed Maryland, and the other states, to "levy and collect their income, gasoline, sales and use taxes -- the major sources of

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[91] 231 Md. 561, 191 A.2d 446 (1963).

[92] 344 U.S. 624, 626-27 (1953). Here, the Court held that a federal enclave does not cease to be a part of the state where it is located when exclusive jurisdiction is ceded to the federal government.

State revenues -- on federal enclaves. *See* 4 U.S.C. §§ 104-110."[93] Maryland's unemployment, workman's compensation and auto licensing laws all applied to NIH residents, who were also "subject to the process and jurisdiction of [Maryland] state courts."[94] The children of NIH residents attended Maryland schools. In effect, the Court concluded that NIH residents were treated as citizens of Maryland in most other respects by that state and could not, therefore, be constitutionally deprived of the vote. They participated in the polity that is Maryland, shouldering the obligations, and could not, therefore, be deprived of the corresponding rights.

This participation is lacking in the case of District residents. Article I, sections 2 and 3, limit membership in the House and Senate to individuals elected by the people of the several states. The residents of NIH were found to be residents of Maryland, and could not be deprived of their right to vote merely because their homes were on a federal enclave; such was found to be a deprivation of equal protection. While it is true that District residents once voted in Maryland elections (until 1800), they cannot now fairly be described as residents of Maryland. The District, since its establishment, has not in any sense been a part of Maryland. The residents of the District of Columbia do not send their taxes to Annapolis, do not send their children to Maryland schools, and are not subject to the laws of Maryland within the District. They are not, as were NIH residents, "as concerned with State spending and taxing decisions as other Maryland residents."[95] The *Evans* Court did not decide that residents of federal enclaves are entitled to vote as citizens of the state in which the enclave is located, but that those individuals who could fairly be characterized as residents of the state, part of the state polity -- citizens -- could not be denied the vote consistent with the Equal Protection Clause. In doing so, it allowed for the possibility that residents of enclaves who could not fairly be characterized as citizens of the state, could be denied the vote. The Court noted that, "[w]hile it is true that federal enclaves are still subject to exclusive federal jurisdiction and Congress could restrict as well as extend the powers of the States within their bounds [citation omitted] whether appellees are sufficiently disinterested in electoral decisions that they may be denied the vote depends on their actual interest today, not on what it may be sometime in the future."[96]

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[93] *Evans*, 398 U.S. at 424.

[94] *Id.*

[95] *Id.*

[96] *Id.*

Thus, under *Evans*, it seems clear that District residents could constitutionally be *denied* voting rights in Maryland, as is now the case. *Evans*, of course, does not speak to the converse question -- when residents of federal enclaves may not constitutionally be *permitted* voting rights in a state. Its reasoning, however, may be instructive. Because District residents neither pay taxes in Maryland nor receive services from the state, their affiliation with Maryland may be constitutionally insufficient to support the exercise of voting rights in that state.

The proposal also raises questions with respect to the Twenty-third Amendment. Under the Constitution, each state selects a number of presidential electors equal to the number of senators and representatives to which it is entitled. If District residents are allowed to vote in Maryland congressional elections, then Maryland's House delegation, and its corresponding strength in the Electoral College, would reflect the combined population of Maryland and the District of Columbia. Voting in presidential elections is here directly tied to voting in congressional elections. Under the Twenty-third Amendment, however, District residents are entitled to select their own presidential electors. They could hardly expect to be counted in determining the number of Maryland's presidential electors, as well as forming the basis for the District's electors under the Twenty-third Amendment. Indeed, the creation of a separate voting arrangement for District residents by the Twenty-third Amendment is a constitutional recognition that they are not part of the body politic of Maryland. Permitting the residents of the District of Columbia to vote as residents of Maryland would conflict with the Twenty-third Amendment and, thus, should be accomplished, if at all, by an amendment to the Constitution. Moreover, as a practical matter, in the absence of a constitutional amendment, District residents would be ineligible to run for congressional office. Under this arrangement, District residents would be able to vote in Maryland, but would not be Maryland residents. Article I, section 2, clause 2 and section 3, clause 3, however, require that Senators and Representatives must "when elected, be an Inhabitant of that State for which [they] shall be chosen."

However, whatever its legal and logistical defects, a constitutional amendment allowing District residents to participate in Maryland elections at least would have the practical virtue of avoiding many of the critical problems that militate against retrocession of the District itself to Maryland, or of granting the District statehood. Congress would keep control over the basic services needed to ensure the smooth operation of the federal government, and the residents of the District would be

included, at least for voting purposes, in what one scholar terms a "proper Madisonian society."

### D. Treating the District "As if It Were a State"

Recognizing the serious constitutional questions involved in granting the District of Columbia direct participation in congressional elections under the Constitution as it now stands, the 95th Congress adopted an amendment which would have treated the District "as if it were a state" for purposes of representation in the House of Representatives and the Senate, as well as for participation in presidential elections and the constitutional amendment process. The Twenty-third Amendment would have been repealed. While this proposal was overwhelmingly rejected by the states, it did raise a potential question under Article V of the Constitution regarding the number of states needed for ratification of any such amendment.[97]

Article V details the procedures that must be followed in amending the Constitution, and provides that, in the normal case, a proposal must pass both houses of Congress by a two-thirds majority and be ratified by three-fourths of the states. Article V, however, contains the following proviso: "no State, without its Consent, shall be deprived of its equal

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[97]The proposal read:

> That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:
>
> Article
>
> Sec. 1. For purposes 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.
>
> Sec. 2. The exercise of the rights and powers conferred under this article shall be by the people of the District constituting the seat of government, and as shall be provided by the Congress.
>
> Sec. 3. The twenty-third article of amendment to the Constitution of the United States is hereby repealed.
>
> Sec. 4. This article shall be inoperative, unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

H.J. Res. 554, 95th Cong., 1st Sess. (1977).

Suffrage in the Senate."[98] Any state that had not voted to ratify the proposed 1978 Amendment would have been able to challenge the validity of the Amendment on the theory that the addition of two Senators from the District of Columbia, a non-state, could be said to deprive each state of its equal suffrage.

This argument has been dismissed as an unimportant inconvenience by the supporters of direct District participation in congressional elections.[99] The addition of two senators from the District, they say, would no more deprive the states of their equal suffrage than the admission of any new state over the past two centuries has done. Originally, each state had two out of twenty-six votes in the Senate. Today, each state has merely two votes out of one hundred, but none has been deprived of its equal suffrage. The position was summed up by Senator Kennedy in his testimony before the Senate Judiciary Committee in 1973: "The meaning of Article V is clear -- no single state may be given a larger number of Senators than any other State .... So long as the District of Columbia is represented in the Senate no more advantageously than any State, it cannot be said that representation for the District deprives any State of its equal suffrage in the Senate."[100]

The Senator's argument, while valid when applied to the admission of a new state, does not take account of the fact that the District of Columbia is not a state. Article I, section 3 provides that "[t]he Senate of the United States shall be composed of two Senators from each State ... and each Senator shall have one vote."[101] The creation of an upper house in which the states would be equally represented, as opposed to the lower where seats were to be apportioned on the basis of population, was the result of the Great (Connecticut) Compromise. Each state, regardless of

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[98] Article V also provides that no amendment prior to the year 1808 could have altered Article I, section 9, clause 1, forbidding congressional regulation of the slave trade before that year, and Article I, section 9, clause 4, forbidding direct taxes unless in proportion to the census. These restrictions on the amendment process have, of course, long since expired. Indeed, in 1913 the Sixteenth Amendment was ratified, amending Article I, section 9, clause 4, and allowing Congress to tax incomes without regard to any apportionment among the states or the census.

[99] *See, e.g., 1973 Senate Hearings, supra* note 28, at 13-14 (statement of Sen. Kennedy). *See also* Berns, *Rome on the Potomac*, Harpers, Jan. 1979, at 31-33.

[100] *Id.*

[101] U.S. Const. art. I, § 3.

its size, was assured of an equal voice in the senior chamber. As the *Federalist* explains:

> The equality of representation in the senate is another point, which, being evidently the result of compromise between the opposite pretensions of the large and the small states, does not call for much discussion. If indeed it be right that among a people thoroughly incorporated into one nation, every district ought to have a *proportional* share in the government; and that among independent and sovereign states bound together by a simple league, the parties however unequal in size, ought to have an *equal* share in the common councils, it does not appear to be without some reason, that in a compound republic partaking both of the national and federal character, the government ought to be founded on a mixture of the principles of proportional and equal representation.[102]

Thus, "the equal vote allowed to each state, is at once a constitutional recognition of the portion of sovereignty remaining in the individual states, and an instrument for preserving that residuary sovereignty."[103] Federalism was here preserved. This compromise "made possible the Constitution of the United States and the establishment of a powerful American Union. Without [it] the [Constitutional] Convention, its nerves already strained to the breaking point, would have dissolved."[104]

The Founders, however, realized that later generations might tamper with their handiwork, and that the Compromise might be undone. At the Convention, Roger Sherman of Connecticut "expressed his fears that three fourths of the States might be brought to do things fatal to particular States, as abolishing them altogether or depriving them of their equality in the Senate."[105] As a remedy, he suggested the following addition to Article V: "that no State shall without its consent be affected in its internal police, or deprived of its equality in the Senate."[106] When his motion was voted down, Sherman moved that

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[102]The Federalist No. 62, 416 (J. Madison) (J. Cooke ed. 1961).

[103]*Id.* at 417.

[104]B. Hendrick, *Bulwark of the Republic: A Biography of the Constitution* 84 (1937).

[105]*Notes on the Federal Conventian, supra* note 14, at 648.

[106]*Id.* at 649-650.

Article V be deleted altogether. This motion was also defeated, but Gouverneur Morris immediately proposed that the language, "that no State, without its consent shall be deprived of its equal suffrage in the Senate," be added. This motion, according to Madison, "being dictated by the circulating murmurs of the small States was agreed to without debate, no one opposing it, or on the question, saying no."[107] Thus, the Senate was to be the guarantor of federalism, and Article V the guarantor of the Senate. Accordingly, the Senate is the only branch of government whose composition is protected by extraordinary constitutional amendment procedures. "The very fact that all of these other institutions and relationships [in the Constitution] can unquestionably be affected by ordinary constitutional amendments should lead us to take the Article V proviso *very* seriously."[108]

Although the District would have no more votes in the Senate than any other state, the problem is that the District of Columbia would be accorded representation in that body at all. Under Article I, section 3, only *states* may be represented in the Senate and the District of Columbia is not a state. Although Article V on its face does not appear to forbid amendment of Article I, section 3 by normal process, opponents could argue that an amendment to admit the District to the Senate violates the Article V proviso. The purpose of the last sentence of Article V is to ensure that the Senate remains as the guarantor of federalism, absent extraordinary constitutional amendment. Thus, states not consenting to an amendment allowing the District representation in the Senate could have argued that the amendment "necessarily dilut[ed] the influence of the states considered in the aggregate, in the Senate. The 'equal suffrage' of the accumulated states would be reduced by the proportion that non-states are represented in that body. As this occurs, 'equal suffrage' of the individual state must also be reduced."[109] In short, instead of 100/100ths of the total representation in the Senate, the several states' share would be reduced to 100/102nd. While we are not prepared to express an opinion on the ultimate success of such an argument, we believe that it must be taken seriously.

Several other problems were identified with the proposed amendment, the most basic being that exclusive congressional authority over

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[107] *Id.* at 650.

[108] *Best*, *supra* note 44, at 48.

[109] Hatch, *supra* note 45, at 517.

the District would have led to problematic and unintended results if it were treated as a state. Article V, for instance, requires that as part of the amending process three-fourths of the state legislatures (or conventions in three-fourths of the states called by Congress), must ratify any proposed amendment before it becomes part of the Constitution. Congress, however, is the District's ultimate legislature. The 1978 Amendment did not purport to change the language of the District Clause, which grants to Congress the power to "exercise exclusive Legislation in all Cases whatsoever" over the District.[110] Congress would, therefore, have been allowed direct participation in the ratification of proposed amendments. Article V, however, restricts the role of Congress in the amending process to proposing amendments, and to determining whether they shall be transmitted to the state legislatures or to ratification conventions in each of the states.

Congress could, of course, have attempted to delegate this authority to a District council of some sort, but any such body would still have been ultimately answerable to Congress, not to the people of the District. The residents of the District of Columbia, therefore, would not have had an equal voice in the amendment process, a process in which Congress would have been awarded a new and entirely unintended role.[111] Treating the District as a state for purposes of Article V would simply not solve this problem.

Finally, it was pointed out that the proposed amendment might have been interpreted to grant to District residents rights superior to those enjoyed by the citizens of the states. The proposal provided that the rights conferred by the amendment would be exercised "by the people of the District constituting the seat of government."[112] In allowing the direct election of members of the House of Representatives and of the Senate, the identical language is used in the Constitution. Article I, section 2 provides that members of the House shall be "chosen every second Year by the People of the several States." The Seventeenth Amendment provides that the Senate "shall be composed of two Senators

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[110] U.S. Const. art. I, § 8, cl. 17. Indeed, the Twenty-third Amendment reinforces this role for Congress in granting that body the authority to direct the manner in which District presidential electors are appointed. This is a responsibility reserved by Article II to the state legislatures. *See* U.S. Const. art. II, § 1, cl. 2.; Best, *supra* note 44, at 27.

[111] *See* Best, *supra* note 44, at 27-28.

[112] H.J. Res. 554, 95th Cong., 1st Sess. (1977). *See supra* p. 30 n.97.

from each state elected by the people thereof." The use of the phrase, "by the people," in the 1978 Amendment could, thus, have been construed to give District residents the right to vote directly on the ratification of amendments to the Constitution. The citizens of none of the states enjoy such a direct voice in this process, since Article V requires that proposed amendments be passed upon by the state legislatures, or by special ratifying conventions.[113] Like questions were raised regarding the proposal's effect upon the presidential selection process, and the possibility that it could be construed to give District residents the right to vote directly for President, and not through the Electoral College.[114]

## IV. Statehood for the District of Columbia

Since little enthusiasm has been shown for making the District into a quasi-state in the state houses, efforts have now shifted towards granting the District full statehood. Statehood proponents are quick to assert that this expedient would not require an amendment. The District, they say, could be admitted to the Union by simple statute as other states have been. Article IV, section 3 merely states that "[n]ew states may be admitted by the Congress into this Union."[115] By this device, the District of Columbia would be entitled to a delegation in the Congress without the permission heretofore withheld by the several states.

It is true that, in the past, states have been admitted to the Union through the device of simple legislation. Ordinarily, statehood has been achieved through a progression of territorial status, referendum or other means to determine if the population desires statehood, and then the passing of an enabling act or acts allowing the proposed state to draft a constitution to be submitted for congressional approval. Once the proposed state constitution is approved by both Congress and the territorial residents, the territory is declared a state by statute or joint resolution, signed by the President.[116]

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[113] *See Hawke v. Smith*, 253 U.S. 221 (1920) (popular vote referendum procedure adopted in state constitution may not be applied to the ratification of amendments to the federal Constitution, which is limited to state legislatures or ratifying conventions).

[114] *See* Best, *supra* note 44, at 39.

[115] U.S. Const. art. IV, § 3, cl. 1.

[116] *See* P. Sheridan, *The Library of Congress, Congressional Research Service - Policy Issues in the Admission of Certain States into the Union: A Brief Analysis, reprinted in 1978 Senate Hearings, supra* note 67, at 386 [hereinafter Sheridan].

This process has, of course, varied considerably over the years. Not all states have been admitted through the device of an enabling act. In several cases, a mere act of admission has been employed. In seven instances the so called "Tennessee Plan" was adopted. Under this program the territory seeking statehood, following the lead of the Volunteer State, drafted a constitution, elected senators and representatives, and sent them to Washington. These delegations have never been seated in the Congress before actual statehood, but it is thought that this procedure has considerably expedited admission.[117]

However, for reasons that will be set forth below, statehood for the District of Columbia cannot be so easily achieved. A constitutional amendment would be required.

As discussed above (pp. 18-25), Congress does not appear to have the power to relinquish the plenary legislative authority granted it by Article I over the district which has become the seat of government. The provision requiring that the District be no more than ten miles square was merely a limit on the size of the original cession from the states. It does not purport to grant Congress the authority to reduce the size of the area constituting the seat of government at will. Moreover, the Twenty-third Amendment recognized that the District of Columbia is a unique juridical entity in the American commonwealth. Therefore, even if a smaller federal district were retained by Congress, the Constitution would have to be amended before the District of Columbia can be admitted as a state.

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[117] *Id.* The admission of new states has almost always been a politically sensitive issue. Prior to the Civil War the precarious balance between the Northern and Southern states was maintained by a tacit policy of dual admissions -- one slave and one free state at a time. Later in the century, other reasons were advanced in opposition to the admission of new states. Statehood for Wyoming was opposed because, among other things, the state provided political equality to women. The admission of Utah was delayed because of the practice of polygamy by members of the Mormon Church, and because the territory lacked a genuine two party system. New Mexico's admission was opposed because its character was perceived to be insufficiently American, based upon its Hispanic heritage and the widespread use of the Spanish language. Hawaiian statehood was opposed by some because its residents were largely of Asian extraction, and because of widespread communist influence perceived in the territory's largest union, the International Longshoreman's and Warehouseman's Union. At the time Hawaii was also predominantly Republican and "the Democrats refused to vote for its admission unless Alaska, a Democratic stronghold, was granted statehood also." *Id.* at 386-90.

The Department of Justice has long taken the position that an amendment is necessary to grant statehood to the District of Columbia. In 1978 Assistant Attorney General John M. Harmon spoke to this very issue while testifying on behalf of the Carter Administration. He noted that:

> If admitted to the Union as a State, the District of Columbia would be on an equal footing with the other States with respect to matters of local government.
>
> We do not believe that the power of Congress vested by Article I, section 8, clause 17 of the Constitution to exercise plenary legislative jurisdiction over the District could be thus permanently abrogated by a simple majority vote of both Houses of Congress. That could only be accomplished, in our view, by a constitutional amendment.[118]

He concluded that, "it was the intent of the Framers that the actual seat of the Federal Government, as opposed to its other installations, be outside any State and independent of the cooperation and consent of the State authorities .... If these reasons have lost validity, the appropriate response would be to provide statehood for the District by constitutional amendment rather than to ignore the Framers' intentions."[119]

As discussed above in connection with retrocession plans (pp. 21-23), granting statehood to the District by legislation alone also raises serious questions with respect to the Twenty-third Amendment.

The serious constitutional questions raised by District statehood proposals have been recognized by many others over the years. Members of both parties, conservatives and liberals, politicians and academicians, have opposed the measure. In 1978, for instance, Senator Edward Kennedy dismissed what he called "the statehood fallacy," and categorically stated that, "[t]he District is neither a city nor a State. In fact, statehood may well be an impossible alternative, given the practical and constitutional questions involved in changing the historical status of the

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[118] *1978 Senate Hearings, supra* note 67, at 17 (statement of Assistant Attorney General John M. Harmon, Office of Legal Counsel). *See* Appendix D.

[119] *Id.* at 18.

Nation's Capital."[120] A pamphlet entitled "Democracy Denied", circulated in support of the 1978 Amendment (and fully endorsed by District Delegate Walter E. Fauntroy), plainly acknowledged that granting statehood to the District of Columbia "would defeat the purpose of having a federal city, i.e., the creation of a district over which the Congress would have exclusive control. (Article I, Section 8, clause 17 of the Constitution.)"[121] That pamphlet also recognized that statehood "presents a troublesome problem with the 23rd Amendment if the federal district were to be wiped out by legislation."[122] Indeed, Delegate Fauntroy has opposed statehood for the District in the past, correctly pointing out that "this would be in direct defiance of the prescriptions of the Founding Fathers."[123]

As the House Committee Report on the joint resolution that ultimately became the Twenty-third Amendment stated:

> Apart from the serious constitutional question which would be involved . . . any attempted divestiture by the Congress of its exclusive authority over the District of Columbia by invocation of its powers to create new States would do violence to the basic constitutional principle which was adopted by the framers of the Constitution in 1787 when they made provision

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[120] *Id.* at 8-9 (testimony of Sen. Kennedy). *See* Appendix C. As Senator Mathias of Maryland stated, "[i]t is not a State; it will not be a State; it should not be a State." *Id.* at 41 (testimony of Sen. Mathias).

[121] *A Simple Case of Democracy Denied: A Statement of Why it is Undemocratic and Contrary to the Intent of the Constitution for the Residents of the District of Columbia to Remain Disenfranchised, reprinted in 1978 Senate Hearings, supra* note 67, at 113 [hereinafter *Democracy Denied*]. *See* Appendix A.

[122] *Id.* at 114.

[123] W. Fauntroy, *Viewpoints: Voting Rights for D.C.*, Board of Trade News, Jan., 1978, *reprinted in 1978 Senate Hearings, supra* note 67, at 189. *See* Appendix B. *See also 1977 House Hearings, supra* note 69, at 122 (statement of Professor Stephen A. Saltzburg) ("Keeping the Capital a federal enclave preserves something important to our government. The number of federal installations in the District, the location of the Congress and the White House, and the very idea of a 'center' for the nation suggest that it would be wrong to entrust complete power over the District to any State, whether it be Maryland by retrocession or a new State called 'Columbia' or something like it by amendment. No State should have responsibility for and control over the critical parts of the Federal power structure.").

> for carving out the "seat of government" from the States and set it aside as a permanent Federal district.[124]

Even apart from the numerous constitutional problems with District statehood, there remain virtually insurmountable practical problems. The operations of the federal government sprawl over the District of Columbia. Relatively few of those installations are located along the Capitol Mall, the area casually proposed as a reduced federal enclave. As Assistant Attorney General Harmon pointed out in 1978, in actuality, "[a]ny concentrated 'Federal enclave' would be very difficult to circumscribe and would have to be geographically fragmented. This would give rise to complex arrangements for sewers, police and fire protection, and other services."[125] Reserving these areas to the federal government would, thus, create monumental practical problems with respect to basic services and, "it is questionable whether such a geographical entity could fairly be characterized as a single District at all."[126]

At the same time, the new "state" would be honeycombed with federal installations, its territory fragmented by competing jurisdictions. As Assistant Attorney General Wald asked while testifying on the proposed 1978 District amendment, "[w]ould the remaining non-Federal area constitute in any real sense a geographically homogeneous entity that justifies statehood?"[127] While not directly responding, she noted that, "legitimate questions might be raised as to the political wisdom and sincerity of a Congressional enactment which attempted in effect to Balkanize the District so as to create a new State by building it around Federal land and installations."[128]

It was for these very reasons that former Mayor Washington expressed doubts about statehood for the District. In 1975 he commented that the city of Washington is "so physically, and economically and

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[124] *See House Report 1698*, *supra* note 79, at 2.

[125] *1978 Senate Hearings*, *supra* note 67, at 17 (testimony of Assistant Attorney General John M. Harmon), Appendix D. *See also 1977 House Hearings*, *supra* note 69, at 126 (testimony of Assistant Attorney General Patricia M. Wald), Appendix E.

[126] *1978 Senate Hearings*, *supra* note 67, at 17-18 (testimony of Assistant Attorney General John M. Harmon).

[127] *1977 House Hearings*, *supra* note 69, at 126 (testimony of Assistant Attorney General Patricia M. Wald).

[128] *Id.*

socially bound together that I would have problems with statehood in terms of exacting from it some enclaves, or little enclaves all around the city. Ultimately, it seems to me, that would erode the very fabric of the city itself, and the viability of the city."[129]

Thus, we believe that, before the District of Columbia may be admitted to the Union as a state, an amendment to the Constitution would be necessary. Even that step, however, would be undesirable, unwise, and insufficient to create a workable arrangement for District statehood. The defects in District statehood plans recognized and articulated in 1978 have not changed. The fact that the states have rejected the District voting amendment offers no sound reason to now grant statehood to the Nation's capital. The measure is no more desirable, nor less constitutionally suspect, today than it was a decade ago.

### A. Common Arguments in Favor of Statehood

The common arguments in favor of statehood for the District of Columbia can be grouped into three basic categories: (1) District disenfranchisement is inconsistent with majoritarian democracy; (2) the size of the District's population and their contributions to the Nation justify national representation; and (3) all other nations grant the residents of their capital cities the right to vote. None of these arguments offer a compelling reason to grant statehood to the District of Columbia.

#### 1. *Disenfranchisement*

The most obvious argument in favor of statehood for the District of Columbia is that the present system is "a simple case of democracy denied." The residents of the District of Columbia are citizens of the United States, they "are taxed and carry the same burdens of citizenship as all other Americans, yet they have no representation whatsoever in the Senate, and one 'non-voting' delegate in the House of Representatives."[130] This circumstance, it is argued, is inconsistent with majoritarian democracy. The United States, however, is not a pure majoritarian

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[129] *Representation of the District of Columbia in Congress: Hearings on H.J. Res. 280 Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary*, 94th Cong., 1st Sess. 29 (1975) (testimony of Mayor Walter E. Washington) [hereinafter *1975 House Hearings*]. *See* Appendix G.

[130] *See Democracy Denied, supra* note 121, at 97.

democracy; it is a federal democratic republic. The Founders consciously rejected majoritarian democracy. Pure democracy, as Madison wrote:

> can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert results from the form of Government itself; and there is nothing to check the inducements to sacrifice the weaker party, or an obnoxious individual. Hence it is, that such Democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security, or the rights of property; and have in general been as short in their lives, as they have been violent in their deaths.[131]

To avoid these results, a federal system was adopted. Power was dispersed among competing sovereignties and the functions of government were divided under our Constitution. While ultimately drawn from the people, power was placed in the hands of various representative bodies and individuals with the expectation that each would restrain the others. In short, the federal system was a compromise between the principles of pure democracy and the absolute need to secure individual liberties and minority rights. The District of Columbia is an integral part of this compromise, designed to safeguard the independence of the rival sovereignties.

Concomitantly, there are many different levels of rights in our society. Residents of U.S. possessions abroad enjoy the protections of their civil rights under the Constitution -- the residents of Puerto Rico and Guam are, in fact, U.S. citizens -- but they have no vote in federal elections. Aliens, again, have basic civil rights, but not all -- for instance, they may not vote. Indeed, the residents of every state, other than the original thirteen, were unable to vote in national elections until their territory was admitted to the Union as a state. The Founders of our republic saw fit to require United States citizenship *and* state citizenship, full responsibility in both of the competing sovereignties, before the complete panoply of rights available under our Constitution may be enjoyed.

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[131] The Federalist No. 10, 61 (J. Madison) (J. Cooke ed. 1961).

The residents of the District enjoy all of the rights of other citizens, save the right to vote for an individual delegation in Congress. In exchange for the benefits of living in the "metropolis of a great and noble republic" they have given up this right.[132] Instead, they are represented by the entire Congress, "their rights [are] under the immediate protection of the representatives of the whole Union."[133]

The disenfranchisement of District residents was not, as some would have it, an oversight.[134] The Founders knew what they were about, and, in fact, not all agreed that the residents of the seat of government should be disenfranchised. At the New York ratifying convention Thomas Tredwell complained that, "[t]he 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."[135] Direct congressional representation for District residents was actually proposed at that convention by no less than Alexander Hamilton. He suggested that the District Clause be amended to provide:

> 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 ____ such District shall cease to be parcel of the State granting the Same, and

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[132] Such trade-offs are well accepted under our system of government. For instance, as the price of federal employment, federal civil servants must surrender many of their basic political rights under the Hatch Act. Act of Aug. 2, 1939, 53 Stat. 1147. With a few exceptions, for example, employees of the executive branch may not take an active role in partisan political campaigns. *See* 5 U.S.C. § 7324(a) (1982).

[133] 3 J. Story, *Commentaries on the Constitution* §§ 1212-22 (1833), *reprinted in* 3 *The Founder's Constitution* 236 (P. Kurland & R. Lerner eds. 1987) [hereinafter Story].

[134] *See Statehood for the District of Columbia: Hearings on H.R. 3861 Before the Subcommittee on Fiscal Affairs & Health of the House Committee on the District of Columbia*, 98th Cong., 2d Sess. 28 (1984) (statement of Del. Fauntroy) [hereinafter *1984 House Hearings*].

[135] 2 *Elliot's Debates in the Several State Conventions on the Adoption of the Constitution* 402, *reprinted in* 3 *The Founder's Constitution* 225 (P. Kurland & R. Lerner eds. 1987) [hereinafter *Elliot's Debates*].

> Provision shall be made by Congress for their having a District Representation in that Body.[136]

Hamilton's motion, however, was rejected.[137]

Madison responded to criticism such as Tredwell's in Federalist No. 43. He wrote that:

> The extent of this federal district is sufficiently circumscribed to satisfy every jealousy of an opposite nature. And as it is to be appropriated to this use with the consent of the State ceding it; as the State will no doubt provide in the compact for the rights, and the consent of the citizens inhabiting it; 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. (Emphasis added.)[138]

The meaning of Federalist No. 43 has long been debated. Proponents of direct participation in congressional elections for the District of Columbia point to the language "as they will have had their voice in the election of the Government which is to exercise authority over them" in support of their case.[139] Madison, they say, could not have meant that only the first generation of District residents will have had a vote with respect to their destiny. However, this is the plain meaning of the language Madison uses. Madison speaks in the past tense, "they will have *had* their voice." If he meant that District residents would have a continuing voice in the national government, the proper language would

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[136] 5 *The Papers of Alexander Hamilton* 189-90 (H. Syrett ed. 1962) [hereinafter *Hamilton Papers*].

[137] *Id.*

[138] The Federalist No. 43, 289 (J. Madison) (J. Cooke ed. 1961) [hereinafter Federalist No. 43].

[139] *See Democracy Denied, supra* note 121, at 104-05; *1977 House Hearings, supra* note 69, at 105 (statement of Sen. Kennedy).

have been "they will have their voice."[140] The principle that the acts of one generation may bind another was well known to the Drafters. It was consistent with the Seventeenth and Eighteenth Century social contract theories with which they were imbued. Madison clearly expressed his thoughts on the subject in a letter to Jefferson, rebutting Jefferson's "the Earth belongs to the living" precept. He wrote that:

> If the earth be the gift of nature to the living their title can extend to the earth in its natural State only. The *improvements* made by the dead form a charge against the living who take the benefit of them. This charge can no otherwise be satisfyed than by executing the will of the dead accompanying the improvements.[141]

District residents, as Madison wrote, had their voice in the creation of the government that was to rule them at the time of the ratification of the Constitution, and the cession of the territory, through their elected representatives.[142] The acts of these representatives are binding upon District residents so long as they wish to enjoy the "improvements" bequeathed them by that generation -- the national capital.

It is also argued, based on Federalist No. 43, that the Founders assumed that the ceding states would provide for the rights of the citizens to be transferred from their jurisdiction to that of the national government, but that the states failed in this obligation. Congress would, according to this theory, be justified in now correcting this supposed dereliction. In fact, both Virginia and Maryland took care in their respective acts of cession to secure those rights they perceived to be endangered by the cession. The Virginia act of cession provides that "nothing herein contained, shall be construed to vest in the United

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[140] Best, *supra* note 44, at 19-20.

[141] 13 *Madison Papers*, *supra* note 8, at 19.

[142] As early as 1813 the Virginia Supreme Court adopted a representational rationale, in *Custis v. Lane*, 17 Va. (3 Munf.) 579 (1813). There, the Court declined to extend voting privileges in Virginia to an individual who resided in then Alexandria County. It recited the various acts by which the area was ceded to the federal government by Virginia and concluded that, "[t]o all these acts the appellant, by his representatives, was a party. He has therefore, no reason to complain that he has been cut off from the dominion of *Virginia*, in consideration of, perhaps, adequate advantages. That he is no longer within the jurisdiction of the commonwealth of Virginia, is manifest from this consideration, that Congress are vested, by the constitution, with exclusive power of legislation over the territory in question." *Id.* at 591.

2. *Population and Contribution to the Nation*

It is often asserted that the District of Columbia has a population larger than that of several states, and that because residents of the District pay their taxes, obey the laws, and go to war at the behest of the federal government, they have the right to a direct participation in congressional elections. However, population alone is not, and has never been, the only criteria for statehood. There has always, effectively, been a minimum population required before statehood may be considered (a territory must have sufficient resources both to support a state government and bear its fair share of the federal burden), but population alone has never been sufficient. If population were the criteria, then there are fifteen other cities with a better claim to statehood than Washington.[152] New York, Los Angeles and Chicago with their millions certainly have a more compelling case than the District of Columbia. While these urban giants are currently represented in the House, they must share their Senators with out-state areas whose interests, needs and sympathies are often vastly different, and even diametrically opposed, to their own. Conversely, there are many regions of the nation which, to some extent justifiably, feel that they are not fully represented in the Congress because they must share their delegations with much more powerful metropolitan areas. Witness upstate New York and downstate Illinois.

The District's cry of "no taxation without representation" is also unpersuasive. The District is hardly in the position of the American Colonies two-hundred years ago. Its residents pay only those taxes paid by all other citizens of the United States. They are not the victims of a far off imperial power, imposing taxes selectively as a means of economic exploitation.[153] In return, the District receives five and one-half times the national average in per capita federal aid.[154] Annually, the District of

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within the same general environment. Because most of them anticipate stays of substantial duration in the Washington, D.C., area, it is not surprising that the vast majority of senators and congressmen should be genuinely concerned about the welfare of the District." *Id.* at 521-522.

[152] Washington is, in fact, only the sixteenth largest city in the United States -- smaller, for instance, than Indianapolis, San Jose and Baltimore. *See* U.S. Bureau of the Census, *Statistical Abstract of the United States: 1986* 18 (106th ed. 1985) [hereinafter *Statistical Abstract*].

[153] Hatch, *supra* note 45, at 524.

[154] *See infra* p. 61.

Columbia government receives a special congressional grant of over one-half billion dollars, which no state receives. In addition, it participates with the states on an equal basis in the grant-in-aid and entitlement programs adopted by the federal government. This is in addition to the numerous parks, monuments, museums and other civic facilities provided by the federal government and enjoyed by District residents. Far from being oppressed colonials, the residents of the District of Columbia receive a heavy return from the federal coffers in exchange for the taxes they pay. And, there have always been exceptions to the basic principle of "no taxation without representation" tolerated in the United States. For example, most states and many major cities tax commuters who work within their borders but live elsewhere. These individuals, however, are given no voice in the manner in which their taxes are spent, or in how the state or city they support is to be run.

Finally, the fact that District residents fight in the Nation's wars and contribute to the national community in other ways does not entitle them to an individual delegation in Congress. Political representation in our system is not, should not be, and has never been, tied to the extent of an individual's civic contribution. The number of votes a citizen may cast, for instance, is not linked to the amount of taxes he pays. The residents of the District are entitled to all of the basic civil rights to which every citizen of the United States is entitled. They are not entitled to vote in congressional elections because this right is reserved to the citizens of the states. District residents are not deprived of the right to participate in congressional elections because of who they are, but because of where they have chosen to live. They have exchanged their vote for the privilege of living in the Nation's capital. To reclaim it, they need only move across the District line.

3. *The Practice of Foreign States*

A favored argument of many statehood supporters is that the United States is the only nation on earth which denies residents of its capital city representation in the national legislature.[155] "Thus, the

[155] Indeed, in 1978 proponents of the 1978 Amendment invited John Knight, a member of Australia's national legislature from that nation's federal enclave, to testify before the Senate Judiciary Committee and help make their case. *See 1978 Senate Hearings, supra* note 67, at 76-88, 127-129 (testimony and statement of Sen. John Knight of the Australian Capital Territory).

citizens of London have voting representation in the British Parliament, and the citizens of Paris have voting representation in the National Assembly of France."[156]

This argument is baseless. Ours is a unique form of government. Our Constitution provides for "a compound republic partaking both of the national and federal character,"[157] the result of a unique history and development. It cannot fairly be compared with other governments which do not benefit from the same history or constitutional structure. Our system has not cost us the respect of others in the world community once its intricate structure and purpose are understood.

4. *Miscellaneous Arguments*

There are many other arguments that have occasionally been advanced in the ongoing controversy over whether the residents of the District of Columbia should be granted statehood and/or some other form of direct voting representation in Congress. Three of these arguments merit brief discussion. First, it is has been stated that opposition to District statehood/representation is merely veiled racism,[158] since a majority of the residents of the District are black. This

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[156] Letter of Delegate Walter E. Fauntroy of the District of Columbia to Members of the Congress (May 22, 1985), *reprinted in District of Columbia -- Statehood: Hearings Before the Subcommittee on Fiscal Affairs and Health of the House Committee on the District of Columbia*, 99th Cong., 1st Sess. 39-42 (1985) [hereinafter *1985 House Hearings*]. In pointing out that the city of London is represented in Parliament, Delegate Fauntroy stumbled upon the very concern expressed by Congressman White so long ago. *See supra* p. 6. Further, neither Britain nor France may be fairly compared with the United States, even though they are two of the world's leading democracies. Britain, while encompassing four ancient states (England, Scotland, Wales and Ulster), is not a federal union, but a kingdom united under the British Crown, subject to the unitary sovereignty of the British Parliament. France has been one of the most unitary states in Europe since at least the ministry of Cardinal Richelieu, during reign of Louis XIII, 1610-1643. The independence of its great medieval provinces had all but disappeared a century before with the triumph of the French Crown over the Dukes of Burgundy.

[157] The Federalist No. 62, 416 (J. Madison) (J. Cooke ed. 1961).

[158] Senator Kennedy, for example, alleged in 1970 that opposition to congressional representation for the District was based upon the conviction that it is "too liberal, too urban, too black and too Democratic." *Voting Representation for the District of Columbia: Hearings Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary*, 91st Cong., 2d Sess. 8 (1970) (statement of Sen. Kennedy). Three years later, however, Senator Kennedy recognized that opposition to

myth is based more on political posturing than on fact; it is readily exploded by a review of the historical record. Agitation for District representation began in 1801, with Judge Woodward's essays, and has continued in one form or another ever since. Throughout most of this period the majority of the District's residents were white. Indeed, since the only persons generally eligible to vote in 1800 were white male property owners, only they were disenfranchised. Statehood for the District of Columbia is not a racial issue. It is not a civil rights issue. It is a constitutional issue that goes to the very foundation of our federal union. A change in the status of the District of Columbia would signal a substantial change in our form of federalism. The issue should be dealt with on that level, and not on the level of racial politics.

Second, there is some speculation that the majority of Americans are unaware that the residents of the District of Columbia may not vote for direct representation in the Congress, that the American people "are generally in a state of disbelief about this issue."[159] However, no evidence stronger than supposition has been offered to support this assertion.[160] In any case, the cure for ignorance is education, not a radical change in the Nation's constitutional structure. Once the constitutional necessity of a federal district, free of the influence of the states and controlled by the federal government, is explained, there is no reason to believe that the popular sentiment today would be different from that of 1787, as expressed in the Constitution. If popular sentiment has changed, the people can amend the Constitution granting statehood to the District of Columbia if they wish.

Finally, it is often maintained that direct voting representation in the Congress for the District of Columbia is merely the final step in that progression, over the past two centuries, which has systematically extended the franchise in the United States. The Fifteenth Amendment,

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direct District congressional representation began long before a majority of the District's residents were black. In complaining of the "paternalistic attitude" that allows members of Congress elected from the states to make "vital decisions affecting" District residents he noted that, "[i]ndeed, 85 years ago when the city's population was overwhelmingly white, that arrogant attitude was as prevalent as it is today, when black people make up a majority of the city's population." *See 1973 Senate Hearings*, *supra* note 28, at 4-5 (statement of Sen. Kennedy).

[159] *1978 Senate Hearings*, *supra* note 67, at 12 (statement of Sen. Kennedy).

[160] In response to questioning, Senator Kennedy admitted that "I have no statistics . . . nor do I know of any polls that would reflect on [the attitude of the general public]." *Id.*

("[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude"), and the Nineteenth Amendment, ("[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex"), can be cited as examples.[161] Under this theory, granting statehood and/or full congressional representation to the District is merely "unfinished business," in the words of Delegate Fauntroy. In each of the cases referred to, however, the individuals involved were denied the vote because of who they were, because they were black, because they were women. These groups were each granted the vote because there was no sound, reasoned basis for their disenfranchisement.

The case of the residents of the District of Columbia is very different. They are not excluded from participation in congressional elections because of the color of their skin, or their sex, but because they have chosen to live outside of the boundaries of any state. Any adult resident of the District may participate in congressional elections by the simple expedient of moving across the District line. District residents, whether they are black or white, male or female, influential Washington attorneys or street vendors, are treated identically. They lack a direct voice in the selection of members of Congress for sound reasons, which are the result of the scheme of government chosen by the people for this Nation. Their situation cannot, in short, fairly be compared with that of those groups who have been deprived of the vote in the past because of who they were, factors beyond their control.

The Twenty-third amendment, granting the District the right to participate in the Electoral College, does not militate in favor of a different result. The President has a national constituency. The residents of the District of Columbia, as citizens of the United States, are part of that constituency. Granting them a voice in the selection of the President is, therefore, entirely appropriate.[162] The Congress, however, is a body which represents both the states and the citizens of the states. Accordingly, only the citizens of the states are entitled to select the members of that body.

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[161] *1978 Senate Hearings, supra* note 67, at 71-72 (testimony of Del. Fauntroy).

[162] Such a scheme would, of course, have been unconstitutional in the absence of an amendment since Article II, section 1 directs that the states appoint the electors to the Electoral College. *See* U.S. Const. art. II, § 1, cl. 2.

## B. Arguments Against Statehood

### 1. *Historical Reasons for Disenfranchising the District of Columbia*

It has become fashionable, unfortunately, to state that the disenfranchisement of District residents was a mere oversight by the Founders,[163] the result of indifference,[164] or a lack of foresight,[165] and to assume that the reasons which prompted them to establish a federal district as the seat of government have disappeared.[166] The Drafters of our Constitution, it is said, cannot have meant that the people who would inhabit the district comprising the seat of government would be reduced to a state of second class citizenship, deprived of the very rights of self-determination so recently won from Great Britain. The disenfranchisement of District residents, however, was neither a mistake nor an oversight, but an integral part of the original Constitutional plan.[167] As noted above, the subject of District voting rights was considered at the time. As an example, both Alexander Hamilton and Thomas Tredwell raised the question at the New York ratifying convention.[168] Their arguments, however, were rejected.

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[163] P. Raven-Hansen, *Congressional Representation for the District of Columbia: A Constitutional Analysis*, 12 Harv. J. on Legis. 167, 172 (1975).

[164] *See* Hatch, *supra* note 45, at 488. The fact that, in 1801, there were only 14,000 District residents is advanced as a reason why they were not granted direct voting representation in the Congress. As Senator Bayh remarked in 1977, "su '. a small population could be easily overlooked." *1977 House Hearings*, *supra* note 69, at 14 (statement of Sen. Bayh). As noted above, Hamilton proposed that District residents be given representation in the House of Representatives when its population reached a sufficient level, but the proposition was rejected. *See supra* p. 42-43.

[165] *See 1984 House Hearings*, *supra* note 134, at 28 (statement of Del. Fauntroy). In fact, it was widely anticipated that a great commercial center would develop at the site of the federal city. *See* Green, *supra* note 9, at 7. L'Enfant's original plan was for a city of 800,000 souls, the size of Paris at that time. *See Kennedy Memorandum*, *supra* note 74, at 347.

[166] *See* Best, *supra* note 44, at 25.

[167] Senator Bayh, a stalwart supporter of District voting rights, apparently reached a like conclusion. In his opening statement at the 1978 Senate hearings he noted that "[f]or many of the Founding Fathers, national representation for the District would necessarily have precluded the establishment of exclusive Federal control over the capital site." *1978 Senate Hearings*, *supra* note 67, at 2 (statement of Sen. Bayh).

[168] *See supra* pp. 42-43.

A separate and independent enclave to accommodate the fledgling federal government was proposed and adopted to secure the independence of the federal government, providing a place of refuge (where it and not the states would control basic services and security), and avoiding the specter of a competing sovereignty in the national capital as well as the undue influence of the city and state chosen as the site. In explaining the genesis of the District reference is inevitably made to the Philadelphia Mutiny which took place in June of 1783. Accordingly, the events of that summer merit close examination.

On Thursday, June 19, 1783, Congress received information from Pennsylvania's executive (at the time an executive Council of State) that some 80 Continental soldiers, despite the "expostulations of their officers," had left their barracks at Lancaster and were approaching the city. The troops, unpaid, declared that they would "proceed to the seat of Congress and demand justice."[169] Alexander Hamilton, Oliver Ellsworth, and Richard Peters were charged with conferring with the Pennsylvania Council and "taking such measures as they should find necessary."[170] They were politely informed that the Pennsylvania militia would probably not be disposed to take action against the mutineers unless and until "their resentments should be provoked by some actual outrage."[171]

The disgruntled soldiers arrived the next day professing "to have no other object than to obtain a settlement of Accounts."[172] On Saturday, the soldiers drew up before Independence Hall, where Congress was in session. A request for aid was again made to the Pennsylvania Council of State, which was at the time sitting upstairs. The Congress was once more informed that without some actual outrage to persons or property the militia could not be relied upon. The members then agreed to remain until the "usual hour of adjournment," but without conducting further business. As the nervous congressmen paced about inside, the Continentals remained in position "occasionally uttering offensive words and wantonly point[ing] their Muskets to the Windows of the Hall of Congress."[173] At three, the usual hour, Congress adjourned. The

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[169] 25 Journals of the Continental Congress 971 (G. Hunt ed. GPO 1922).

[170] *Id.*

[171] *Id.*

[172] *Id.*

[173] *Id.* at 973.

members were allowed to pass through the soldiers' line, although, "in some instances," mock obstructions were offered. For the next two days Congress negotiated with the Pennsylvania Council while reports circulated that the mutineers were planning to kidnap the members, or to raid the bank. On Tuesday, at about 2 o'clock, Congress was finally adjourned and summoned to meet at Princeton.[174] The members quietly scuttled out of town.

Unquestionably, this incident made a deep impression on the members, several of whom attended the Convention in 1787. The Philadelphia revolt of 1783 impressed upon the Congress the need for control of its immediate surroundings, for its own protection. Within weeks James Madison was appointed to chair a committee to investigate a permanent seat for the national government, where it would not have to rely upon the goodwill of its host state. The committee reported in September and recommended that the Congress be granted exclusive jurisdiction over an area no less than three, nor more than six, miles square for the purpose of a permanent seat of government.[175]

In Madison's view, a federal enclave where Congress could exercise complete authority, insulating itself from insult and securing its deliberations from interruption, was an "indispensible necessity."[176]It is argued, however, that today the federal government "[is] well beyond the point of requiring a special sanctuary to protect its authority and to secure its general proceedings."[177] As a result, some assert that "the federal district is not indispensable, it is a mere tradition."[178] This argument states too much. It assumes that the District was created merely as a response to the Philadelphia Mutiny, and that since the government is no longer in danger of being seized by a handful of disgruntled soldiers, the District is no longer necessary.[179]The purpose of the District, however, was more subtle than merely to protect the persons of the Members of Congress

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[174] *Id.* at 973-74.

[175] *See* Caemmerer, *supra* note 3, at 5.

[176] Federalist No. 43, *supra* note 138, at 288.

[177] Best, *supra* note 44, at 64.

[178] *Id.*

[179] "The Founders' judgment that a special district, a sanctuary, was necessary to protect a fledgling government finds support in the early history of the regime. The struggles of the new regime to secure its position, to gain the respect of nations abroad and its people at home, are well documented in any basic American history text. But the

from physical violence. Pennsylvania's failure to act against the mutineers in 1783 was but one manifestation of the problem of competing sovereignties inherent in our federal system. The location of the national government in a federal town, outside of the jurisdiction of any state, was meant to remove it from dependence upon the states, and from the unequal influence of any one of the states. As Madison wrote, "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."[180] As a leading scholar observed, in the Founders' view, "to place a permanent capital within the jurisdiction of one state was to imperil the influence of every other. The surest way of avoiding that risk was to vest in Congress rights of 'exclusive legislation' over the capital and a small area about it."[181]

Thus, a federal enclave was created to ensure the independence of the new government, to avoid, in George Mason's words, "a provincial tincture to ye Natl. deliberations."[182] The basic concern 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, is as valid today as it was two hundred years ago at the Convention. Ours is a union of states of almost infinite diversity. Our common heritage, self interest, and the Constitution bind us together, but the states are as proud, diverse, and often quarrelsome, as they were at the Founding. The federal government, in some sense, is the supreme arbiter. It cannot be dependent upon any one of the states to ensure its smooth operation. Further, no one state is entitled to a greater voice in the national councils than any other. Each is represented in the Congress, regardless of its population, economic power and importance by only two Senators. None has a just claim to be the seat of the national government over another.

Were the District elevated to statehood, it would be granted that to which each of the other states have an equal claim. The location of the national capital was a source of great controversy during the Republic's

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regime is now mature, and the independence of the national government does not rest on its refuge in the District of Columbia." *See* Best, *supra* note 44, at 17.

[180] Federalist No. 43, *supra* note 138, at 289.

[181] Green, *supra* note 9, at 9.

[182] *Notes on the Federal Convention*, *supra* note 14, at 378.

early years. Farsighted men understood the vast benefits to be gained by a region from the location of the national capital there, and that the location of the capital in a particular state would cause jealousy and division.[183] Madison recognized the new capital's potential in 1789 when, as a member of the 1st Congress, he said, "[t]he seat of government is of great importance; if you consider the diffusion of wealth, that proceeds from this source. I presume that the expenditures which will take place, where the Government will be established, by those who are immediately concerned in its administration, and by others who may resort to it, will not be less than a half a million dollars a year."[184] (Today, these expenditures are rather more.) He also recognized the potential divisiveness of this issue. At the Virginia ratifying convention he noted, "I believe that, whatever state may become the seat of the general government, it will become the object of the jealousy and envy of the other states."[185]

If the capital is now to be in a state, each state has as good a claim to the location, and consequent benefits, of the federal government as does the State of Columbia. (Certainly the convenience of the District's location, as more or less in the center of the Nation, has long since disappeared.) The federal district was created to solve this very dilemma. If the District of Columbia is now to be a state, with all of the attendant benefits, then there is no just reason why it should remain the seat of the Nation's government. Indeed, the priceless national treasure to be accumulated in the capital city was foreseen by the Founders, and was considered to be too important a charge to be left in the hands of any one

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[183] Even the location of the temporary seat of the federal government was fought over; it was suspected and feared that Congress would, when actually faced with the prospect of moving to the new federal city, decide to remain where it was then meeting. In August, 1788, Alexander Hamilton wrote to Governor William Livingston of New Jersey, encouraging New Jersey to vote for New York as the meeting place of the 1st Congress (instead of Philadelphia) as, "[t]he Northern States do not wish to increase Pennsylvania by an accession of all the wealth and population of the Foederal City." 5 *Hamilton Papers*, *supra* note 136, at 209.

[184] 1 Annals of Cong. 862 (1789). The Founders understood, as Mr. Justice Story wrote a few years later, that locating the capital within the borders of one of the states, "might subject the favoured state to the most unrelenting jealousy of the other states, and introduce earnest controversies from time to time respecting the removal of the seat of government." Story, *supra* note 133, at 1213 *reprinted in* 3 *The Founders' Constitution* 236 (P. Kurland & R. Lerner eds. 1987).

[185] 3 *Elliot's Debates*, *supra* note 135, *reprinted in* 3 *The Founder's Constitution* 222-23 (P. Kurland & R. Lerner eds. 1987).

state. As Madison wrote, "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."[186]

Further, the growth of federal power has not extinguished the immediate concern revealed to Congress by the Philadelphia Mutiny. Unquestionably, "[t]he Army of the United States ... is not only powerful enough to secure the independent operations of the national government, it now secures the operations of the state governments as well."[187] This was also true in 1783. With the withdrawal of British troops at the end of the War for Independence, the victorious Continental Army was left as the most powerful armed force in the former Colonies. It was as capable of securing the operations of the national government as are the Armed Forces of today. The problem in 1783 was that the mutineers were closer to the seat of Congress than were General Washington's loyal troops. In fact, word was dispatched to the Commander-in-Chief, who was directed "to march a detachment of troops towards the city."[188]

The District was not an expedient adopted until such time as the federal government would be militarily powerful enough to defend itself. Congress was granted exclusive legislative authority over the district that would be the seat of government so that it would ultimately control the basic services needed by the national government. The passing years have, if anything, increased the need for ultimate congressional control of the federal city. Today, the federal government depends upon a much more complex array of services, utilities, transportation facilities, and communication networks, than it did at the Founding. The District is an integral part of the operations of the Nation's government. As a practical matter it would be impossible to separate all of the support services necessary for the smooth operation of the federal government. If the District were to become a state, all of the basic services needed by the federal government would be affected. The financial problems, labor troubles, and other concerns of the District would still effect the government's operations, but it would be deprived of a direct, controlling voice in the resolution of such problems. In a very real sense, the federal government would be largely dependent upon the State of Columbia for

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[186] Federalist No. 43, *supra* note 138, at 289.

[187] Best, *supra* note 44, at 64.

[188] 24 Journals of the Continental Congress 419 (G. Hunt ed. GPO 1922).

its day to day existence. In the event of any civil disturbance, and the history of the last two decades certainly shows that civil disorder is still a possibility today, federal authority over local police agencies must be paramount to ensure that the operations of the federal government are not interrupted.[189] In short, if the District were granted statehood, or indeed retroceded to Maryland, the Congress would lose control over the immediate services necessary to the government's smooth day to day operation. The national government would again be dependent upon the goodwill of another sovereign body.

2. *The Terms of the Maryland Cession*

There is also a substantial question whether, before the District could be admitted to the Union as a state, the permission of Maryland would have to be secured. The cession of the territory now comprising the District of Columbia was for the specific purpose of the establishment of a seat for the national government, not for the creation of a new state. The initial act gave the Maryland delegation in the House of Representatives authority "to cede to the congress of the United States, any district in this state, not exceeding ten miles square, which the congress may fix upon and accept for the seat of government of the United States."[190] If the district were to be granted statehood, the specific terms of Maryland's cession would be violated, and the cession's continuing validity put in question. Further, unless Maryland's permission were secured, admitting the District into the Union would appear to conflict with Article IV, section 3 of the Constitution, which provides that "no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress."[191] Thus, unless Maryland

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[189] As an example, in the much more common occurrence of demonstrations before foreign embassies (virtually all located outside of the proposed "national capital service area"), Columbia state police would be primarily responsible for embassy security and crowd control. The federal government, however, is responsible to the foreign states involved. Here, because it is the federal capital, the state of Columbia would, to some extent, be in a position to pursue its own foreign policy.

[190] An Act to Cede to Congress a District of Ten Miles Square in this State for the Seat of Government of the United States, 2 Kilty Laws of Md. Ch. 46 (1788).

[191] U.S. Const. art. IV, § 3, cl. 1. In 1977, Assistant Attorney General Wald also questioned whether the District could be admitted as a state without the consent of Maryland. She noted that, "[i]t is at least questionable -- I don't suggest that we know

consented to erecting the District into a state, this provision would also have to be amended.

3. *The District of Columbia Lacks the Fundamental Requisites of a State of the American Union*

The Constitution should not be amended to grant statehood to the District of Columbia because it effectively lacks the minimum requirements to become a state. The Constitution does not itself articulate the prerequisites for statehood, but merely provides that "[n]ew States may be admitted by the Congress into this Union."[192] There are, however, certain effective minimum requirements defining a "state" eligible for admission to the Union, which are not found in the Constitution. Over time, three in particular have been articulated. In its report on Alaskan statehood, the House Committee on Interior and Insular Affairs identified them as: (1) the residents of the new state must be "imbued with and sympathetic toward the principles of democracy as exemplified in the American form of government;" (2) the majority of the electorate must desire statehood; and (3) the new state must have "sufficient population and resources to support a State government and to provide its share of the cost of the Federal Government."[193]

While there is little question that District residents meet the first criteria, and assuming that a majority of them desire statehood (a question to be decided by the electorate), the District of Columbia simply lacks the resources both to support a state government and to provide its fair share of the cost of the federal government. The District contains barely 63 square miles of land area. Rhode Island, the smallest state, encompasses some 1,212 square miles, 19 times as large. In land area, the District of Columbia is the tiniest federal possession by a wide margin. Only the minute island of Guam, with 77 square miles, comes close. Puerto Rico has 3,515 square miles, the Virgin Islands have 132, the

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the definitive answer -- whether a new State could be created from that land [the Maryland Cession] even after the ensuing passage of all of this time without the consent of the Maryland State government." *1977 House Hearings*, *supra* note 69, at 127.

[192] *Id.*

[193] *See Providing for the Admission of the State of Alaska into the Union*, H.R. Rep. 624, 85th Cong., 1st Sess. 11 (1957). In 1957, for instance, the House Committee on Interior and Insular Affairs found the Territory of Alaska "ready and qualified" for statehood by "each of these historic standards." *See also* Sheridan, *supra* note 116, at 386; Best, *supra* note 44, at 71-72.

Pacific Trust Territories have 533, and the Northern Marianas are 184 square miles.[194] Further, the population of the District, a principal tax base, is declining. It peaked in the years following the end of the Second World War; 802,000 persons lived in the District in 1950. By 1960 that number had declined to 764,000. In 1970 it was 757,000, and in 1980 the District's population had dwindled to 638,000.[195] The Census Bureau estimates that, in 1986, only 626,000 people called the District their home.[196] Thus, a significant part of the tax base from which the District must support a state government, *and* contribute to the national government, is rapidly eroding. Today, according to Census Bureau estimates, Delaware has moved ahead of the District, and its population is greater than only three states, Vermont (541,000), Alaska (534,000), and Wyoming (507,000).[197] In the 1970s, while the District lost some 118,000 residents (15.6 percent of its 1970 population), each of these states reported significant gains.[198] Between 1980 and 1986, while the District's population continued to fall, Alaska's population rose by 32.8 percent, Wyoming's rose by 8.0 percent, and Vermont's population grew by 5.8 percent.[199] If current trends continue, the District of Columbia may have a population smaller than any of the states as early as the next

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[194] *Statistical Abstract, supra* note 152, at 194. There are, in fact, many national parks and recreation areas which cover more territory than the District of Columbia. Examples in the Washington, D.C. region include the Blue Ridge Parkway (128 square miles), and the Shenandoah National Park (304 square miles). This is to say nothing of giants such as Yellowstone (3,469 square miles), Yosemite (1,189 square miles), and the Grand Canyon (1,903 square miles). *Id.* at 224.

[195] *Id.* at 10-11.

[196] *See The Big Shift*, National Journal, Feb. 7, 1987, at 321 [hereinafter *The Big Shift*].

[197] *Id.*

[198] *Almanac of the 50 States* 422 (A. Gardiner ed. 1986) [hereinafter *Almanac*]. During this period the population of these three states increased as follows:

| *State* | *1970* | *1980* |
|---|---|---|
| Vermont | 444,732 | 511,456 |
| Wyoming | 322,416 | 469,557 |
| Alaska | 302,583 | 401,851 |

*Id.* Between 1970 and 1980 the District of Columbia, on the other hand, reported the largest percentage of population loss in the nation, 15.6 percent. *Id.* at 423.

[199] *See The Big Shift, supra* note 196, at 321.

reapportionment in 1990.[200] As the District's population shrinks, it will be even less able to support a state government, and contribute to the national government, without federal assistance. In fact, the District's population is only some 0.27 percent of the nation's population as a whole. This number has not changed significantly since 1800, when District residents made up only 0.26 percent of the population.[201]

Economically, the District of Columbia is dependent upon the support of the federal government. Annually, in addition to all other federal aid programs, the District receives a direct payment from the federal treasury of a half billion dollars; some $522 million was budgeted for the District in Fiscal 1987, $445 million in the form of a direct payment to the District local government.[202] District residents outstrip the residents of the states in per capita federal aid by a wide margin. The District, in 1983, received $2,177 per capita in federal aid. The next closest was Alaska, which received $1,129 per capita. States with populations comparable to that of the District received barely a quarter as much federal money.[203] The national average was only $384 federal dollars per capita. Thus, the District of Columbia received five and one-half times the national average in federal funds.[204]

Quite clearly, in the absence of massive federal assistance and the continuing presence of the national government, the District is not a viable economic unit. It lacks any significant industry, farming or natural resources. Only 0.09 percent of the nation's manufacturing jobs are located in the District. In 1982 the District was dead last in terms of the value of its manufacturing shipments.[205] As Senator S. I. Hayakawa pointed out during the hearings on the 1978 Amendment, because it is the capital:

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[200] *See Almanac*, *supra* note 198, at 424.

[201] Best, *supra* note 44, at 4.

[202] Office of Management and Budget, *The Budget of the United States Fiscal Year 1987* 5-151 (GPO 1986).

[203] In 1983, South Dakota, with 690,768 people, received only $516 per capita; North Dakota, with 652,717 people, received $547 for each; Delaware, with 594,338 residents, received $507 per capita from the federal treasury; and Vermont, with 511,456 people, received $594 per capita. *See Almanac*, *supra* note 198, at 436.

[204] *Id.*

[205] *Id.* at 446.

> The economics of Washington, D.C., make it a unique place. There is no seaport, no industry, no agriculture. There are no major money-making businesses, only one money-spending one -- the federal government. A majority of those working in the District of Columbia work for the federal government, or the closely related service industry, whose workers service those who work for the government. Add to that all of the lobby groups and law firms who are here because the federal government is here, and one begins to understand what is meant by the term "federal city."[206]

Not surprisingly, Washington Mayor Marion Barry has plainly stated that the District would still "require the support of the Federal Government" if statehood were granted.[207] The continuation of federal support is ordinarily justified because of the percentage of federal land in the District of Columbia which cannot be taxed by the local government. However, the federal payment is not recompense from the federal government to the District of Columbia, but the amount Congress chooses to add to the funds collected by the District to support the local government. It is a grant in the truest sense. Moreover, the federal government owns only 32.2 percent of the District's land. It owns a greater percentage of the land area of 10 states -- Alaska (88.0%), Nevada (85.5%), Idaho (65.1%), Utah (63.3%), Oregon (52.3%), Wyoming (49.3%), California (45.8%), Arizona (44.1%), Colorado (36.0%) and New Mexico (33.3%),[208] each of which bears the full burdens of statehood without the sort of massive federal support which would be needed by the State of Columbia. If the District aspires to statehood, it must be prepared to give up the special federal payment, to stand as an equal with the other states in its fiscal affairs.

There is a further requirement for statehood, unarticulated but just as binding, that the District fails to meet; every state has satisfied it. To be a member of the American Union an area must be more than a geographic and/or political entity, it must be what has been termed "a proper Madisonian society,"[209] that is, a society composed of a "diversity

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[206] *1978 Senate Hearings*, *supra* note 67, at 150 (statement of Sen. S. I. Hayakawa).

[207] *See 1985 House Hearings*, *supra* note 156, at 59 (testimony of Hon. Marion Barry, Mayor, Washington, D.C.).

[208] *See Almanac*, *supra* note 198, at 421.

[209] Best, *supra* note 44, at 78.

of interests and financial independence."[210] The hallmark of each of the several states is diversity and fierce independence. Even the smallest has a broad base of diverse industries and interests. It is this diversity of competing interests which guards the liberty of the individual and the rights of minorities. As Madison wrote:

> Whilst all authority in [the federal republic] will be derived from and dependent upon the society, the society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals or of the minority, will be in little danger from interested combinations of the majority. In a free government, the security for civil rights must be the same as for religious rights. It consists in the one case in the *multiplicity of interests*, and in the other, in the *multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects; and this may be presumed to depend on the extent of country and number of people comprehended under the same government.* (Emphasis added.)[211]

The District of Columbia lacks this essential political requisite for statehood. It has only one "industry", government. As a result, the District has only one substantial interest group, government workers. Historically, the national government is, of course, the City's only reason for being. It is not a crossroad of commerce or the center for the development of vast natural resources. It is not naturally situated astride any important trade routes or port, as are the other great capitals of the world. This city was an artificial political creation, and has remained a political creature, as it was intended to be. Close to two-thirds of the District's workforce is employed either directly or indirectly in the business of the federal government.[212] To again quote Senator Hayakawa:

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[210] *Id.* at 72.

[211] The Federalist No. 51, 351-52 (J. Madison) (J. Cooke ed. 1961) [hereinafter Federalist No. 51].

[212] Best, *supra* note 44, at 74. A full 36.2 percent of the District's wage and salary employment is directly by the federal government. *See* U.S. Bureau of the Census, *Statistical Abstract Supplement: State & Metropolitan Data Book - 1986* 536. Indeed, in 1982, Mayor Barry maintained that, in the Washington Metropolitan area, for every federal worker laid off as a result of government reductions in force, one person would be thrown out of work in the private sector. *See Reduction in Force: Oversight Hearing Before the House Committee on the District of Columbia*, 97th Cong., 1st Sess. 58

> The people in the states of the union work to make money, a certain amount of which they send in the form of taxes to Washington, D.C., for us to spend. Our [the District's] major economic concern, then, is not how much wheat we can grow, or chickens we can hatch, or shoes we can manufacture, but rather how much money we can get the wealth-creators of the 50 states to send us. We live and work here only on the strength of other people's taxes. If there were to be voting Representatives from the District of Columbia in Congress, they would then be in the position of representing the interests of the federal government to the federal government.[213]

It is sometimes argued that because federal workers living in the Washington suburbs enjoy full voting rights, federal workers who make their home in the District should also be allowed full participation in congressional elections. Federal employees living in Maryland and Virginia, however, have chosen to live in a state. They accept the responsibilities of state citizenship, and concomitantly enjoy the full rights attached to it under the Constitution. Further, these employees do not elect their senators alone. They are but one of a multitude of interests represented by the Senators from those states. For example, while a Senator from Virginia may be impelled to support a massive federal spending program in the interests of his Northern Virginia constituents, he must also consider the interests, and reaction, of his constituents living in the Tidewater, along the Blue Ridge and in the Shenandoah Valley. A greater balancing of interests is involved. The Senators from the District of Columbia would have no such competing concerns to temper their judgment.

The federal system is based upon the presumption that the states and the federal government are independent and competing sovereignties. The states are independent of the federal government, as it is of the states. In this manner the power of government is dispersed and the

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(1982) (statement of Ivanhoe Donaldson, Acting Director, D.C. Dept. of Employment Services) Appendix I.

[213] *1978 Senate Hearings, supra* note 67, at 150 (statement of Sen. S. I. Hayakawa). Senator Stennis of Mississippi was addressing this concern during the Senate debate on the 1978 Amendment when he asked of the proposed Senators from the District, "How do they stand on soybeans?" 124 Cong. Rec. 27,209 (1978).

liberty of the individual preserved.[214] It is this very factor that distinguishes our federal republic. As Madison wrote, "[i]n the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will controul each other; at the same time that each will be controuled by itself."[215] Were the District to become a state it would not be independent of the federal government. It is dependent on the federal government for much of its revenue and the majority of its jobs. In short, the District of Columbia, "is a Federal City. Its interests, its economics, its future are tied to the Federal Government. It has none of the characteristics of a State. It is not a State, nor was it ever meant to be."[216]

The Supreme Court has recently decided that this delicate balance between state and federal authority is to be guarded primarily by the intrinsic role the states play in the structure of the national government. In *Garcia v. San Antonio Metropolitan Transit Authority*,[217] the Court overturned its decision in *National League of Cities v. Usery*,[218] and upheld the application of federal minimum wage laws to state transit authority workers. In doing so it noted that:

> Of course, we continue to recognize that the states occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position. But the principal and basic limit on the federal commerce power is that inherent in all congressional action -- the built-in restraints that our system provides through state participation in federal government

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[214] Hamilton writes, "the General Government will at all times stand ready to check the usurpations of the state governments; and these will have the same disposition towards the General Government." The Federalist No. 28, 179 (A. Hamilton) (J. Cooke ed. 1961).

[215] Federalist No. 51, *supra* note 211, at 351.

[216] 124 Cong. Rec. 27,100 (1978) (remarks of Sen. Harry F. Byrd, Jr.). This point was also made by Senator Bayh when he noted that, "[t]he District of Columbia, very clearly, is a local government. It is a city. It has a city structure." *Id.* at 27,101.

[217] 469 U.S. 528 (1985).

[218] 426 U.S. 833 (1976).

> action. The political process ensures that laws that unduly burden the states will not be promulgated.[219]

The congressional delegation from the District of Columbia, however, would have little interest in preserving the balance between federal and state authority entrusted to it by *Garcia*. The continued centralization of power in the hands of the national government, and the expansion of its operations, would be to the direct benefit of their state and constituents. The system of competing sovereignties designed to preserve our fundamental liberties would be compromised.

Further, as the states are independent of the federal government, so the federal government must be independent of the states. The Founders settled upon the device of a federal district as the means by which the federal government might remain independent of the influence of any single state. If the District of Columbia were now admitted to statehood, it would not be one state among many. Because the federal government is located there it would be *primus inter pares*, first among equals. The "State of Columbia ... could come perilously close to being the state whose sole business is to govern, to control all the other states. It would be the imperial state; it would be 'Rome on the Potomac.'"[220]

The influence that would be enjoyed by the State of Columbia should not be underestimated. In the area of federal judicial selection, for example, Columbia would wield far more power than its sister states. Traditionally, a state's senators are consulted on the nominations of federal judges who will sit within its boundaries.[221] As a matter of "senatorial courtesy," a nominee opposed by the senators from the state where he will sit stands little chance of confirmation by their fellows. The senators from Columbia could expect like deference. However, two of the nation's most influential courts, the United States District Court for the District of Columbia, and the United States Court of Appeals for the District of Columbia Circuit, are located in the District. Because they are located in the capital, with jurisdiction over federal agencies, as well as exclusive jurisdiction granted by Congress in many other areas, these two courts have an unusual influence over the determination and development of federal law. "Unique among the lower federal courts, the

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[219] *Garcia*, 469 U.S. at 556.

[220] Best, *supra* note 44, at 77.

[221] Hatch, *supra* note 45, at 530.

decisions of these courts routinely have had broad national impact."[222] Under the current system, if it were granted statehood, "the senators from the District will be in a position to exert an unprecedented degree of influence over national regulatory policies," merely because they represent the capital.[223] This is illustrative of the point that the District of Columbia, were it granted statehood, would automatically obtain more influence in the federal government than any other state, merely because it is the site of the national capital.

As it is, the problems of the District, though its population is smaller than that of 47 states, occupy the attention of one congressional committee, and three subcommittees.[224] This preoccupation with the problems and welfare of the city of Washington does not arise merely because Congress has exclusive legislative authority over the District, but because the national capital is located there. *A priori*, Washington's problems are the Nation's problems. If the District were to become a state these problems would remain the Nation's problems, but Congress would be denied a direct voice in their resolution.

Finally, in a very real sense the District belongs not only to those who reside within its borders, but to the Nation as a whole. Because of this unique status it receives far more from the bounty of the fifty states than merely the annual payment needed to keep the city afloat.[225] In addition to tens of thousands of recession-proof jobs (the per capita personal income of District residents in 1983 was $16,409, second only to Alaska, and $4,700 above the national average),[226] the District and its

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[222] *Id.* at 530-31.

[223] *Id.* at 531. Another interesting question is how nominations to the United States Claims Court and the United States Court of Appeals for the Federal Circuit would be treated. Both courts are based in the District of Columbia, but have a national jurisdiction. The senators from Columbia could hardly expect deference respecting nominations to these courts.

The status of the D.C. Circuit would also be called into question if the District were granted statehood. No one state has a circuit court of its own. The State of Columbia would more properly be placed within the jurisdiction of the Court of Appeals for the Fourth Circuit, which currently covers Maryland, Virginia, West Virginia, and the Carolinas.

[224] *See supra* p. 45.

[225] It should be remembered that no other state, even though the land in many is largely owned by the federal government, receives such lavish support. *See supra* p. 62.

[226] *See Almanac, supra* note 198, at 442.

residents benefit from all of the monumental federal building projects which, over the past hundred and ninety years, have made Washington one of the most attractive cities in the world. It enjoys a mass transit system to be envied by every other American city, and which was, in large part, paid for by the federal government.[227] District residents daily enjoy numerous federal parks and facilities which belong to every citizen of the United States. This concern prompted former Senator Birch Bayh, an otherwise ardent proponent of direct congressional representation for District residents, to oppose statehood for the District of Columbia. During the debates on H.J. Res. 554 he eloquently summed up the objection: "I guess as a Senator from Indiana I hate to see us taking the Nation's Capital from [5,000,000] Hoosiers. It is part ours. I do not see why the District should be a State because it is, indeed, the Nation's Capital."[228]

## Conclusion

The District of Columbia should not be admitted to the Union as a state. It is an integral part of the federal government and lacks the basic independence that is a fundamental characteristic of each of the states. Under our system of federalism, the states and the national government were designed as independent and competing sovereignties. Self-government, individual liberty, and the rights of minorities were all secured by dispersing power in this manner. This system would be fundamentally altered by the admission of a state which is dependent upon the federal government.

The District of Columbia simply lacks the resources to function as a state, independent of the national government. Its total land area is smaller than any other federal territory or commonwealth; it is in fact smaller than many national parks. Its economy is dependent upon the federal government, and its local government survives only with annual infusions of massive federal aid. The city of Washington could not

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[227] Best, *supra* note 44, at 76-77. According to Department of Transportation figures, the federal government contributed some $4.8 billion to the construction of the Washington Metrorail system. The District's contribution was only an estimated $360 million. Amounts were also contributed by Virginia and Maryland. Telephone interview with Jerry Fisher, Regional Desk Officer, Urban Mass Transportation, Department Head of Allocation Department, Washington Metropolitan Transit Authority (February 19, 1987).

[228] 124 Cong. Rec. 27,101 (1978). *See* Appendix F.

support a state government and shoulder its fair share of the national burden. If it were granted statehood, it would be the first state dependent on the federal government for its very support.

Not only is the District government financially dependent upon the federal government, but so are a majority of its residents. Close to two thirds of the District's workforce is employed either directly or indirectly in the business of the federal government. Because it is the federal city, Washington lacks not only the economic, but also the political independence and diversity which characterize the states. There would be no diverse interests competing for the attention of the senators and representative from the District of Columbia. They would represent the federal government to the federal government. This would further threaten the balance between federal and state authority.

The District of Columbia, however, was created specifically to secure this balance between the federal government and the several states. Congress was granted the authority to control its immediate surroundings in order to ensure the independence of the federal government. The Founders deliberately avoided placing the national capital in one of the states, which would have compromised this independence and awarded one state more influence in the national deliberations than the others. There is no sound reason why the District of Columbia should now be made a state and allowed those privileges which the other states were intentionally denied. This would serve to undermine the federal system which has successfully guarded our liberties now for two hundred years.

In any case, while the constitutional issues raised by proposals to grant statehood to the national capital are difficult, our considered opinion is that amendment of the Constitution would be required before the District of Columbia can be admitted to the Union as a state. The clause creating the District of Columbia gives Congress exclusive legislative authority over the district that was to become the seat of the federal government, not merely over the seat of government. The authority of Congress, thus, extends over that entire district -- the District of Columbia. Further, the ratification of the Twenty-third Amendment in 1961 gave the District additional constitutional recognition as a unique juridical entity. Accordingly, it does not appear that Congress has the power to abdicate its exclusive authority over any part of this district, absent an amendment to the Constitution. This objection cannot be answered by retaining a truncated federal district as the seat of

government. Such would contravene the language of the Constitution as well as the intentions of the Founders.

The proposals for allowing District residents to participate in congressional elections, other than statehood, do not appear to offer viable alternatives. Granting the District representation in the House of Representatives would require a constitutional amendment. Retroceding the District to Maryland would work a basic change in our federal structure. Retrocession would compromise the independence of the federal government, as would admitting the District to the Union as a state. In addition, retrocession to Maryland would require Congress to relinquish its exclusive legislative power over the district which became the seat of the federal government. For this a constitutional amendment is needed.

The third alternative, an amendment granting the District representation as if it were a state, has been soundly rejected by the states. Proposed in 1978, in seven years this amendment was adopted by only sixteen states, less than half the number needed for ratification. Moreover, the amendment would have altered the character and composition of the Senate, allowing representation in that body to a non-state, possibly requiring the unanimous consent of the states. Under Article V no state may be deprived of its equal suffrage in the Senate without its consent. Granting representation in the Senate to an entity which is not a state could be said to deprive each state of its equal vote, since senatorial representation would then be shared between the states and a non-state. While a more carefully drafted amendment might answer some of the objections raised to this measure, any plan to give the District of Columbia representation in the Senate, short of statehood, would still be subject to this "equal suffrage" challenge.

The fourth alternative suggests that the District remain intact, under federal control, but that its residents be allowed to participate in Maryland congressional elections. Proponents suggest that this could be accomplished by a complex set of arrangements between Maryland and the Congress. After all, they argue, the residents of other federal enclaves enjoy such voting privileges in the states where those enclaves are located. However, a constitutional amendment might be necessary to adopt this alternative as well. Although not precisely on point, the leading Supreme Court decision, allowing the residents of other federal enclaves to vote in federal and state elections, does not appear to establish

the ability of Congress to allow District of Columbia residents to vote in Maryland congressional elections.

Aside from the truly byzantine, and most likely impractical, arrangements that would have to be made to achieve this result, this approach would contradict the terms of the Twenty-third Amendment by entitling District residents to vote for presidential electors from Maryland, rather than in accordance with that amendment. In creating a separate voting procedure for District residents, the Twenty-third Amendment demonstrates that they are not and cannot be considered part of the Maryland body politic. Therefore, an amendment would most likely be necessary even to effect this assignment of voting rights.

Lastly, the Constitution might be amended to grant statehood to the District of Columbia. This approach would avoid the very serious constitutional questions raised by plans to grant the District statehood by statute alone. However, the policy reasons that led the Founders to create the District of Columbia as the seat of the national capital in the first place argue strongly against such a measure. If the federal system is to continue to ensure our fundamental liberties, as it has for the past two centuries, then the federal government must remain independent of the states, and each state must remain independent of the federal government. Only then can each act as a check upon the other. Admitting a state as dependent upon the federal government as is the District of Columbia would compromise this essential independence. It could not act as a check upon the federal government since it would be largely a federal dependency. At the same time, because the national capital is located in the District of Columbia, as a state it would be in a position to exercise far more influence over the federal government than any state has ever enjoyed in the past.

In all, the issues presented by plans to give the residents of the District of Columbia direct participation in congressional elections, and in particular by proposals to grant the District statehood, are complex and the answers are far from clear-cut. Scholars can, and do, disagree over the answers to these questions. What is clear, however, is that the constitutional and policy questions raised are fundamental questions about the nature of our national government and the federal structure. Before any action is taken, these issues must be fully and carefully explored.

However, it appears that the sensible course is to accept the wisdom of the Founders and to maintain the status quo. While Washingtonians may not vote in congressional elections, they have in exchange for this right received the multifold benefits of living in the national capital. Because of thousands of recession-proof jobs, unequalled public facilities of all sorts, and per capita federal aid equaling five and one-half times the national average, the residents of Washington, D.C., enjoy a quality of life to be envied by other Americans. In exchange for these benefits, District residents have adopted the entire Congress as their representatives.

## Appendix

A. Excerpts from *A Simple Case of Democracy Denied: A Statement of Why it is Undemocratic and Contrary to the Intent of the Constitution for the Residents of the District of Columbia to Remain Disenfranchised, reprinted in District of Columbia Representation in Congress: Hearings on S.J. 65 Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary*, 95th Cong., 2d Sess. 211 (1978).

B. Excerpts from W. Fauntroy, *Viewpoints: Voting Rights for D.C.*, Board of Trade News, Jan., 1978, *reprinted in District of Columbia Representation in Congress: Hearings on S.J. 65 Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary*, 95th Cong., 2d Sess. 211 (1978).

C. Excerpts from *District of Columbia Representation in Congress: Hearings on S.J. 65 Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary*, 95th Cong., 2d Sess. 211 (1978) (statement of Sen. Edward M. Kennedy).

D. Excerpts from *District of Columbia Representation in Congress: Hearings on S.J. 65 Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary*, 95th Cong., 2d Sess. 211 (1978) (statement of Assistant Attorney General John M. Harmon, Office of Legal Counsel).

E. Excerpts from *District of Columbia Representation in Congress: Hearings on S.J. 65 Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary*, 95th Cong., 2d Sess. 211 (1978) (statement of Assistant Attorney General Patricia M. Wald, Office of Legislative Affairs).

F. Excerpts from *Statements of Sen. Birch Bayh During the Senate Debates on H.J. Res. 554*, 124 Cong. Rec. 26,382-26,383; 27,101-27,102 (1978).

G. Excerpts from *Representation of the District of Columbia in Congress: Hearings on H.J. Res. 280 Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary*, 94th Cong., 1st Sess. 29 (1975) (testimony of Mayor Walter E. Washington).

H. Excerpts from *Granting Representation in the Electoral College to the District of Columbia*, H.R. Rep. No. 1698, 86th Cong., 2d Sess. 1 (1960).

I. Excerpts from *Reduction in Force: Oversight Hearing Before the House Committee on the District of Columbia*, 97th Cong., 1st Sess. 58 (1982) (statement of Ivanhoe Donaldson, Acting Director, D.C. Dept. of Employment Services).

J. Letter and Memorandum of Attorney General Robert F. Kennedy to Hon. Basil Whitener, House Committee on the District of Columbia, Dec. 13, 1963, *reprinted in Home Rule, Hearings on H.R. 141 Before Subcommittee No. 6 of the House Committee on the District of Columbia*, 88th Cong., 1st Sess. 341, 345 (1964).

Appendix A

# DISTRICT OF COLUMBIA REPRESENTATION IN CONGRESS

## HEARINGS

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-FIFTH CONGRESS

SECOND SESSION

ON

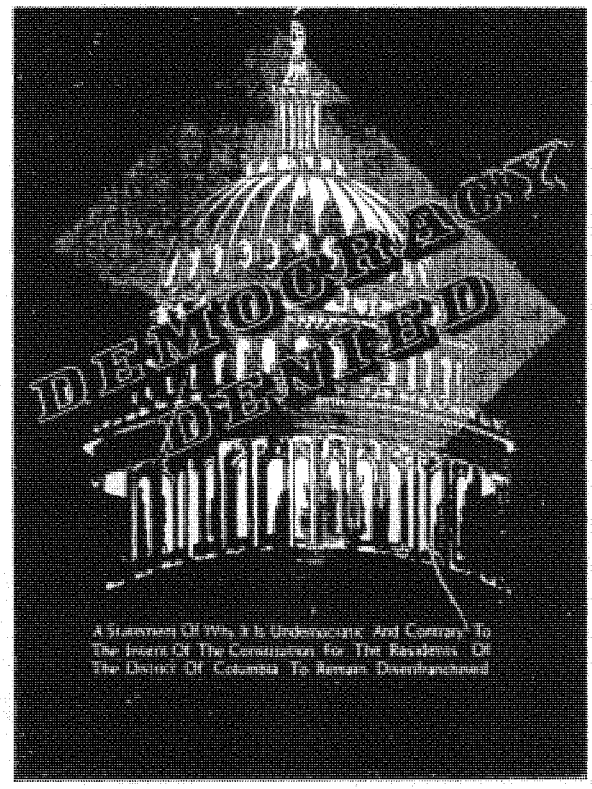
**S.J. Res. 65**

JOINT RESOLUTION TO AMEND THE CONSTITUTION TO PROVIDE FOR REPRESENTATION OF THE DISTRICT OF COLUMBIA IN THE CONGRESS

APRIL 17, 27, AND 28, 1978

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
29-287 O WASHINGTON : 1978


DEMOCRACY
DENIED
A Statement Of Why It Is Undemocratic And Contrary To
The Intent Of The Constitution For The Residents Of
The District Of Columbia To Remain Disenfranchised

## INTRODUCTION

*. . . governments are instituted among men, deriving their just powers from the consent of the governed.*

Declaration of Independence

America has made great strides in its development as a premier democracy, based on the enduring principles of the Founding Fathers. It, therefore, seems astonishing that the birthright of the American people—that of electing Members of Congress and enjoying representation by them—a right normally taken for granted—is denied to three-quarters of a million Americans residing at the very seat of the government. Residents of the District of Columbia are relegated to the status of second-class citizens. According them full voting representation in the Congress is a glaring piece of unfinished business that would finally mend the crack in the Liberty Bell.

Is it really possible that the Founding Fathers, who fought so desperately to win independence from "taxation without representation," would turn around and purposefully disenfranchise a segment of the population? The evidence certainly does not support such a contention. Oversight by the Continental Congress, pressed with the creation of the laws of a new nation, seems clearly to have accounted for the inadvertent disenfranchisement.

Throughout history our government has espoused the virtues of democracy to the world. Unfortunately, for 700,000 residents, and for the nation as a whole, that democracy comes to a halt at the borders of the District. The gates to equality are closed within view of the Washington Monument.

House Joint Resolution 554, which passed the House on March 2, 1978, by an overwhelming vote of 289-127, proposes an amendment to the Constitution which would enable District of Columbia residents to elect two voting Senators, as well as the number of voting representatives to which they would be entitled if the District were a state. H.J. Res. 554 *is not* a statehood bill. It would simply complete the rights of the Twenty-Third Amendment—enacted in 1961, which enabled District residents to vote for the President and Vice President—to include representation in Congress.

The Constitution of the United States does not expressly deny Congressional representation to District residents. However, the principles of democracy—the essence of our Constitution, laboriously etched by the blood and sacrifice of Americans throughout the years—demand that we extend, during the 95th Congress, full voting representation to the people of the District of Columbia. To further delay this fundamental right is to deny democracy. I ask for your support in this effort.

WALTER E. FAUNTROY
Member of Congress

Allowing the District to participate in the ratification of proposed constitutional amendments is sound policy—well grounded in logic and fundamentally fair.

The process of amending the Constitution involves a series of succeeding steps, as set forth in Article V. Members of Congress submit a proposed amendment to the states for their approval, the states ratify and within a reasonable time the Congress then determines the efficacy of those ratifications.

H.J. Res. 554 would permit the District to participate in every step of the ratification process. This full participation does not present a Constitutional issue. It is a policy judgment that the District should participate in the entire ratification process. There is no justification for less than full participation.

ISSUE: Is it proper to repeal the 23rd Amendment and allow the District electors based upon its Congressional representation?

ANSWER: *This is a matter of policy and not a constitutional issue.*

The number of electors to be chosen by the District is limited by the 23rd Amendment to the number to which the least populous state is entitled (three). If the District is granted a total of four representatives in Congress—two senators and two representatives—then the District would, if it were a state, be entitled to four electors. There is no reasonable basis for denying the residents of the federal district their full entitlement to participation in the choice of the President.

Further, the wording of H.J. Res. 554 is sufficiently flexible to provide full District participation in presidential elections regardless of what may be the future of the electoral college. The resolution simply states that "for purposes of . . . election of the President and Vice President . . . the District constituting the seat of government of the United States shall be treated as though it were a state." Thus, so long as there is an electoral college, the District will take part in its deliberations on the same basis as if it were actually a state. If the electoral college is abolished, the District will participate on an equal basis in whatever system is established in its place.

ISSUE: Is statehood a preferred method of providing full voting representation to residents of the federal district?

ANSWER: *Statehood for the District would defeat the purpose of having a federal city, i.e., the creation of a District over which the Congress would have exclusive control. (Article I, Section 8, clause 17 of the Constitution.)*

As a state,. the District would receive its proportionate share of representation in Congress. This conflicts, however, with the intent of Article I, Section 8, clause 17 to establish a federal district under the exclusive control of the Congress.

The statehood alternative is frequently suggested because presumably it could be effected by legislation rather than a constitutional amendment. It is not clear, however, whether Article I is an obstacle to a decision by Congress to convert the District to a state. This difficulty might be overcome by carving out a federal enclave, but this raises substantial practical problems.

No state should have responsibility for and control over the critical parts of the federal power structure. Preserving a federal triangle or federal territories separate from, but located in a state would pose enormous problems. Rather than statehood, the constitutional amendment to allow voting representation in the Congress seems to be a perfect compromise. It recognizes that citizens throughout the country should have a voice in what happens in the District of Columbia but that citizens of the District of Columbia should also have a voice in federal programs that have as much impact in the District as in any state.

It should be emphasized that it would be unfair to say that the District is seeking the benefits but not the burdens of statehood. The District bears unique burdens and receives special benefits. It is different from a state; but no difference justifies the denial to District citizens of the fundamental right of voting representation in Congress.

Moreover, the precedent that was set when a portion of the District was ceded back to Virginia in 1846 (the Virginia legislature passed an act consenting to the retrocession) as well as the implications of Article IV, Section 3 of the Constitution (which states in pertinent part, ". . . no new state shall be formed or erected within the jurisdiction of any other state) strongly suggests that the consent of Maryland would be required. This point is buttressed by the language of the Maryland Act of Cession which gave the land to the United States for the sole purpose of creating a federal district.

Statehood also presents a troublesome problem with the 23rd Amendment if the federal district were to be wiped out by legislation.

ISSUE: Is full retrocession—ceding the District back to the state of Maryland—a viable alternative for gaining full voting rights?

ANSWER: *Full retrocession is not a viable alternative. First, it would destroy the unique character of the District which was contemplated by the Framers and which has been accepted*

Appendix B

# DISTRICT OF COLUMBIA REPRESENTATION IN CONGRESS

## HEARINGS

BEFORE THE

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The split in opinion was reported in the American University Poll, which was released yesterday and directed by Robert Hitlin, associate professor of government at AU.

According to the poll there is a noticable split in opinion between blacks and whites over the issue of statehood for DC. Blacks in each area are more in favor of statehood for the district than whites, the poll showed.

In the District "there is considerable racial difference on this issue," Hitlin said. Blacks are in favor of statehood, by 59 per cent to 22 per cent. (20 per cent not sure). The white vote on the issue was somewhat closer, with 35 per cent in favor of the move and 46 per cent against (19 per cent not sure).

There are also political divisions involved in the questions. The poll showed that Democrats in each area were in favor of statehood, while Republicans were opposed to the move. In DC, political opinion on the issue breaks down as follows: Democrats, 55 per cent in favor, 24 per cent opposed; Independents, 50 per cent in favor, 34 per cent opposed; and Republicans 39 per cent in favor, 44 per cent opposed.

The total figures of the poll showed that DC residents favor the statehood proposal by 51 per cent to 28 per cent (21 per cent not sure). Maryland residents were also in favor, but by a closer margin with 41 per cent in favor and 31 per cent against (26 per cent not sure). Virginia was the only area polled that opposed the move, with 31 per cent in favor and 44 per cent against (25 per cent not sure).

The poll was taken between Feb. 23 to 28. The pollsters interviewed 1,126 residents of DC, Montgomery and Prince Georges Counties, Alexandria, Arlington, Fairfax County, Fairfax City and Falls Church. The respondents, all of whom were 18 or older, were selected at random in a size designed to insure accuracy to within four to six per cent. Demographic characteristics were also adjusted to match their respective areas.

In other areas, the poll showed that DC residents were in favor of a tax on commuters by two to one, while Virginia and Maryland residents oppose that tax by five to one. The poll also showed that residents in all of the three areas were strongly in favor of completion of the Metro system, with support from 62 to 72 per cent in favor.

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[From the Board of Trade News, January 1978]

## VIEWPOINTS: VOTING RIGHTS FOR D.C.

### A RESOLUTION TO THE CONSTITUTION WILL GIVE FULL VOTING RIGHTS TO THE DISTRICT

(By WALTER E. FAUNTROY, Congressman (D-D.C.))

The Declaration of Independence—that revolutionary document of human principles—which serves as one of the underpinnings of American society, states: ". . . governmonts are instituted among men, deriving their just powers from the consent of the governed."

That is true for all American citizens except those of us who live in Washington, D.C.—the capital of the U.S. and the "Free World." We are the only citizens in our great country who cannot elect our own voting representatives to the United States House of Representatives or to the United States Senate. It is simply a case of democracy denied.

It is now time to complete the work of our Founding Fathers and provide liberty and justice for three-quarters of a million District of Columbia residents who have no voting voice in Congress. The means of achieving this justice is a Constitutional Amendment/Resolution (H.J. Res. 554) which, if passed, will give the District of Columbia two Senators, the number of House members and presidential electors commensurate with its population, and participation in the ratification of Constitutional Amendments.

#### STATEHOOD NOT RECOMMENDED

This resolution does not recommend statehood for the District of Columbia in order to achieve full voting representation—this would be in direct defiance of the prescriptions of the Founding Fathers. When the capital city was formed, the legislators sought to provide for the creation of a site completely removed from the control of any state. Article I, Section 8, Clause 17 of the Constitution states that Congress would "exercise exclusive legislation in all cases whatsoever over such district."

Nothing about the exclusive jurisdiction of Congress is incompatible with District voting representation. There would be absolutely no threat to continued Congres-

sional authority over the Federal District were an amendment granting such representation adopted. In addition to this fundamental purpose of a neutral Federal City, the convention prescribed that the inhabitants "will have had their own voice in the election of the government which is to exercise authority over them as a municipal legislature for all local purposes, derived from their own suffrages, will, of course, be allowed them. . . ."

Within this unique governmental entity, then, the framers of the Constitution included in their grand design of a democratic government, a federal municipality which would equally reflect the state-federal relationship while carrying out the broader democratic principle of representation for all citizens. The state was set 186 years ago, but the details have yet to be implemented.

In addition to specific Constitutional prescriptions involved, consideration of statehood for the Federal District would require an enormous expenditure of time and effort—Alaska's statehood drive took 24 years; Hawaii's 34 years. A mandate from the District citizens would be the first step in such a process, and this is not evident at present. What is evident, though, is the long-standing mandate from the District citizenry to be granted full representation in the political community.

THE DISTRICT IS TREATED AS A STATE

The District's unique lack of statehood does not warrant its exclusion from Congressional representation. The House and Senate were created to provide a balance of votes between large and small states and entities. The District is a geographical and political entity as are the states and should be represented accordingly. In fact, the long-time inclusion of the District in several governmental contexts normally reserved for the states not only illuminates the similarity between the functions of the District and the states, but also gives precedence for the proposed amendment on voting representation in Congress. Without actually being a state, the District already participates in such statehood activities as paying federal taxes, having the commerce between the District and other states regulated by Congress, and being included in the right to a trial by jury.

The facts are:

The per capita tax payment for District residents is $77 above the nation's average—a payment only exceeded by seven states.

The population of the District of Columbia is larger than that of ten states.

District residents have fought and died in every war since the War for Independence, and, during the Vietnam War, District of Columbia casualties ranked fourth out of 50 states.

Of the 17 Federal Districts in the world community, only two, other than Washington, D.C., are not represented in their national legislatures.

QUESTION OF RETROCESSION

Two other suggestions for District representation, which are not acceptable or practical, concern the retrocession of the original Maryland part of the District back to Maryland or allowing District residents to vote in Maryland.

Although the land which Virginia ceded to the Federal District was subsequently retroceded in 1840, Maryland's ceded land remained to comprise the District. The Maryland Legislature, in the Act of December 19, 1791, concerning the territory of the Columbia and the City of Washington, "Forever ceded and relinquished to the Congress and the Government of the United States, the full and absolute right and exclusive jurisdiction of soil as well as of persons residing or to reside thereon, persuant to the tenor and effect of the eight sections of the First Article of the Constitution of the United States." Since that time, the District has developed a unique character which appropriately reflects the concept of a Federal District. Furthermore, retrocession would seriously dilute this concept as well as destroy a culturally rich and politically unique governmental entity. Retrocession would also sacrifice the autonomy of residents and substantially reduce the federal interest in the planning and development of the Capital City.

In regard to allowing District residents to vote in Maryland, it simply would not be advantageous because it would not give them the representation due them. Under this plan, District residents would be sharing delegates whose constituencies are already suitably apportioned to the optimal number of citizens according to the most recent census data. If this plan were implemented, the affected delegates would have to assume additional burdens of representing citizens who are not Maryland residents, who would not vote in Maryland state elections, and who live in a city unlike any other in the country. Furthermore, the Maryland legislature has expressed strong sentiment against this plan.

The split in opinion was reported in the American University Poll, which was released yesterday and directed by Robert Hitlin, associate professor of government at AU.

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The population of the District of Columbia is larger than that of ten states.

District residents have fought and died in every war since the War for Independence, and, during the Vietnam War, District of Columbia casualties ranked fourth out of 50 states.

Of the 17 Federal Districts in the world community, only two, other than Washington, D.C., are not represented in their national legislatures.

QUESTION OF RETROCESSION

Two other suggestions for District representation, which are not acceptable or practical, concern the retrocession of the original Maryland part of the District back to Maryland or allowing District residents to vote in Maryland.

Although the land which Virginia ceded to the Federal District was subsequently retroceded in 1840, Maryland's ceded land remained to comprise the District. The Maryland Legislature, in the Act of December 19, 1791, concerning the territory of the Columbia and the City of Washington, "Forever ceded and relinquished to the Congress and the Government of the United States, the full and absolute right and exclusive jurisdiction of soil as well as of persons residing or to reside thereon, persuant to the tenor and effect of the eight sections of the First Article of the Constitution of the United States." Since that time, the District has developed a unique character which appropriately reflects the concept of a Federal District. Furthermore, retrocession would seriously dilute this concept as well as destroy a culturally rich and politically unique governmental entity. Retrocession would also sacrifice the autonomy of residents and substantially reduce the federal interest in the planning and development of the Capital City.

In regard to allowing District residents to vote in Maryland, it simply would not be advantageous because it would not give them the representation due them. Under this plan, District residents would be sharing delegates whose constituencies are already suitably apportioned to the optimal number of citizens according to the most recent census data. If this plan were implemented, the affected delegates would have to assume additional burdens of representing citizens who are not Maryland residents, who would not vote in Maryland state elections, and who live in a city unlike any other in the country. Furthermore, the Maryland legislature has expressed strong sentiment against this plan.

EQUAL SUFFRAGE

One last rebuttal to those who are against District representation because it would deprive other states of their "equal suffrage" in the Senate. The Article V provision that "no state, without its consent, shall be deprived of its equal suffrage in the Senate" would not be violated by District representation in that body. "Equal suffrage" simply means that each state is entitled to the same number of Senators. This provision gives balance to the geographical entities' representation and prevents the more populous states from having greater say than the smaller ones. If "equal suffrage" were intended to mean that each state's percentage of the total number of Senators would never decline, then thirty-seven states could not have been admitted to the Union since the Constitution was adopted. In other words, each of the original states had one-thirteenth of the vote in the Senate, while it now has one-fiftieth of that vote.

CONCLUSION

In conclusion, District representation in Congress would swing the suffrage pendulum back to where it was before December 1800 when Congress moved to its Potomac site and inadvertantly disenfranchised District residents. The resolution being considered is in no way incompatible with Congress' continued exclusive jurisdiction over the District. And, most importantly, it would further the principles of democracy that the Founding Fathers intended to have flourish among all citizens and thus give citizens of the nation's capital what their fellow Americans already have—full citizenship.

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STATEHOOD GUARANTEES SELF-GOVERNMENT AS WELL AS FULL VOTING RIGHTS

(By HILDA M. MADON, Councilmember at Large)

The people who live in the District of Columbia are entitled to the same political rights as those possessed by other citizens of the United States. I believe that entering the union as a state is the only way in which District residents can obtain irrevocably and fully those rights. The concept of statehood is not a new or radical concept. There is a well-defined process by which the rest of the states of the union have joined the original thirteen.

The proposed constitutional amendment which would grant the District of Columbia full voting representation in Congress is not self-determination. It would simply add two District of Columbia senators and probably two voting members of the House. It would not change the relationship between the District government and the Congress in any way. Congress would continue to exercise the power to review and disapprove legislation passed by the Council and signed by the Mayor. Congress would continue to have the final say to all District appropriations. Also the procedure for passage of such a constitutional amendment is a long, hazardous and uncertain one requiring a two-thirds vote of each house of Congress and ratification by three-fourths of the states. Statehood is a less cumbersome and less lengthy process requiring a simple majority vote in each house of Congress. And, unlike any form of home-rule, statehood could not be revoked.

PROCEDURE FOR OBTAINING STATEHOOD

Statehood can be made possible by the simple expedient of redefining the size of the district set apart as the seat of the government of the United States. Article I, Section 8, of the Constitution places a top limit on the size of the Federal District set apart as the seat of the government—not to exceed ten miles square—but places no minimum limit on its size. There is ample precedent for redefining the size of the District. In 1846 that portion of the District of Columbia known as the county of Alexandria was retroceeded to Virginia.

Bill 2-1, the "District of Columbia Statehood Act," introduced in the Council by Julius W. Hobson, in January 1977, defines clearly that portion of the District which would remain under federal control. The "Federal District of Columbia" would include the area stretching roughly from the Supreme Court and the Library of Congress to the Lincoln Memorial and would include the White House, Lafayette Square, the U.S. Capitol, the Executive Office Building, etc. The White House is the only building on that strip of land which is used for residential purposes. The remainder of the District of Columbia would be granted statehood.

Naturally, such a change in the status of what is now the District of Columbia has aroused some criticism. One complaint is that statehood would somehow threaten the federal government's security in the nation's capital. However, numerous

Appendix C

# DISTRICT OF COLUMBIA REPRESENTATION IN CONGRESS

## HEARINGS

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-FIFTH CONGRESS

SECOND SESSION

ON

**S.J. Res. 65**

JOINT RESOLUTION TO AMEND THE CONSTITUTION TO PROVIDE FOR REPRESENTATION OF THE DISTRICT OF COLUMBIA IN THE CONGRESS

APRIL 17, 27, AND 28, 1978

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
29-287 O WASHINGTON : 1978

Senator BAYH. We are very fortunate to have here a man who has been fighting diligently for this right for a long period of time. He is a principal author of this measure which is now before us. That is the senior Senator from Massachusetts.

Senator Kennedy, I know how busy you are. I appreciate your being here on the initial day of these hearings.

TESTIMONY OF HON. EDWARD M. KENNEDY, U.S. SENATOR FROM MASSACHUSETTS

Senator KENNEDY. Thank you very much, Mr. Chairman.

I want to join all of my colleagues in commending you for having these hearings and for the work that you have done on this particular issue, and for your constancy in its support.

This is an issue which I think cries for action by the Senate and by the Congress of the United States.

Mr. Chairman, you pointed out the uniqueness of this day and made a very eloquent statement reminding all Americans about taxation without representation. You also pointed out that it is Marathon Day, along with the fact of the long battle that the people of the District of Columbia are faced with in terms of trying to seek full representation.

I would also point out that it is Patriot's Day. In my own State of Massachusetts, this day commemorates the day when Paul Revere sounded the alarm and was memorialized in that magnificent poem.

Perhaps, for all these reasons, coming together on this particular day—whether it be taxation without representation, or the marathon, or sounding the alarm—will magnify the importance of this issue.

So, I am pleased to be here before the Subcommittee on the Constitution to express, once again, my strong support of full representation in Congress for the people of Washington, D.C.

Mr. Chairman, the question is one of simple justice for the 700,000 citizens of the Nation's capital.

For decades, going back to the beginning of the 19th century, ordinary District citizens, concerned local leaders, and many Members of Congress have sought this basic goal. Indeed, the goal is remarkable and unusual only in the sense that it has been so flagrantly denied for so long to so many citizens.

In a Nation that was founded on the principle of representative government and that has prided itself for two centuries on the strength and vitality of its democracy, it is a travesty of history that the District of Columbia has no voice in Congress.

Now, however, the struggle for justice for the District of Columbia has entered a new and important phase. Last year, President Carter warmly endorsed the goal of full voting representation. No other action of the President has so clearly demonstrated the point that the administration's worldwide concern and sensitivity for human rights begins at home.

Last month by an impressive two-thirds vote, the House of Representatives approved a constitutional amendment—House Joint Resolution 554—to provide full voting representation for the District of Columbia in both the House and the Senate—two Senators

and two Members of the House of Representatives on the basis of recent population estimates.

Now, the spotlight is on the Senate. For the first time, we have a realistic opportunity to achieve the goal, and we should not let the opportunity slip away.

Nowhere in America should the principles of democracy be more firmly established than in the Nation's capital. The time has come to remove the cloud of "America's Last Colony" from the District of Columbia.

As a practical matter, the goal will be best achieved by moving the debate out of the cloakrooms of the Senate and into the arena of national debate. In my view, voting representation for the citizens of the District of Columbia deserves a top priority as one of the most important issues of civil rights and human rights in this election year of 1978.

I am here today to speak in support of Senate Joint Resolution 65, the constitutional amendment that I have introduced with the bipartisan support of you, Mr. Chairman; my colleague from Massachusetts, Senator Brooke; Senator Mathias; the late Hubert Humphrey; Senator Javits; Senators Leahy, Matsunaga, Metzenbaum, Riegle, and Weicker.

I also wish to give my equally strong support to House Joint Resolution 554, the companion measure that passed the House of Representatives a month ago.

The House-passed amendment is identical in its basic purpose to the Senate measure we have proposed. The House amendment is not technically before the committee today, because those of us who support it are taking the procedural steps required to place it directly on the Senate calendar.

In this way, the full Senate will have the opportunity to vote on it, regardless of the delaying tactics that have sometimes been used to prevent action on it by this committee.

We also must smoke out the unfair and disgraceful arguments sometimes found lurking in opposition to District of Columbia representation—arguments based on factors such as race, party affiliation, or political philosophy.

There is no justification whatever for denying representation in Congress to the people of the District of Columbia for fear that the new Senators may be liberals or Democrats or blacks. Such arguments cannot stand the light of day. They are unworthy of the Senate or the Nation.

Other opposition to the proposed amendment has usually crystallized around three fallacious arguments that are easily rebutted.

THE STATEHOOD FALLACY

Some opponents of full representation claim that the District is a city, not a State, and that only States are entitled to representation in the House and Senate. They argue that there is no greater reason for this city to be represented in Congress than there is for other larger cities which are also denied this right.

But this argument ignores the obvious fact that other American cities are political subdivisions of the States. They already have

responsible representation in both the Senate and the House, while the citizens of the District have no representation at all.

The most recent population figures show, as you pointed out, Mr. Chairman, that seven States—Alaska, Delaware, Nevada, North and South Dakota, Vermont, and Wyoming—actually have populations smaller than the population of the District.

The citizens of these States are entitled to participate in the selection of the Senators and Representatives who write the Nation's laws. Yet the 700,000 citizens of the District have no such right.

Moreover, for years the District of Columbia has traditionally been treated as a State in virtually every major grant legislation. In program after program, in statute after statute, all of us in Congress are familiar with the well-known clause in legislation, "For the purposes of this legislation, the term 'State' shall include the District of Columbia."

The statehood argument is no more than a thinly veiled excuse to perpetuate the denial of congressional representation to the people of the District.

The District is neither a city nor a State. In fact, statehood may well be an impossible alternative, given the practical and constitutional questions involved in changing the historical status of the Nation's Capital.

But such debate should not be allowed to mask the basic fact that, 200 years after the Nation was founded, the people of Washington are second-class citizens, deprived of the right to participate in the making of the laws by which they are governed.

THE ARTICLE V CONSTITUTIONAL FALLACY

Another occasional objection to District of Columbia representation in Congress rests on the proviso in article V of the Constitution which declares that "no State, without its consent, shall be deprived of its equal suffrage in the Senate."

It is far too late in our history, however, to argue that granting representation in Congress to the District of Columbia would deprive any State of its "equal suffrage in the Senate."

Since the ratification of the Constitution by the original 13 States, 37 additional States have been admitted to the Union. As a result, the suffrage of the original 13 States in the Senate has been "diluted" nearly fourfold, from 2/26 to 2/100. Yet, no one seriously argues that any of the older States has been deprived of its equal suffrage in the Senate by the admission of new States.

The principle is clear. So long as the District of Columbia is represented in the Senate equally with every other State, representation for the District of Columbia will not offend the provisions of article V. Each State will still have two votes in the Senate, and each State will still have the same proportionate vote as every other State.

During extensive hearings by the House Judiciary Subcommittee on Civil and Constitutional Rights, leading constitutional scholars strongly endorsed full voting representation for the District, including representation in the Senate as well as in the House.

Appendix D

# DISTRICT OF COLUMBIA REPRESENTATION IN CONGRESS

## HEARINGS

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-FIFTH CONGRESS

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ON

**S.J. Res. 65**

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U.S. GOVERNMENT PRINTING OFFICE
29-287 O WASHINGTON : 1978

It was certainly not intended by the Senator from Indiana that you should not be allowed to make your statement.

I would point out that although we have differing opinions here on the merits of this legislation, as far as the chairman is concerned, there is no perfidity in his efforts to move this legislation.

Shall we move on?

Our next witness this morning is the Honorable John M. Harmon, Assistant Attorney General of the Office of Legal Counsel, representing the position of the President of the United States.

Mr. Harmon, we appreciate your coming before the committee. You are the President's strong right arm in many instances and have been of great service to the Members of the Senate.

Our committee owes you an apology for the inconvenience you have been put through over this last weekend. I do not know who is responsible for the mail not reaching you before Thursday, but certainly we sent the notice sometime prior to that.

I appreciate that you did not get notice until the 13th, and that has caused you a significant amount of anticipation over this weekend.

TESTIMONY OF JOHN M. HARMON, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE

Mr. HARMON. Mr. Chairman and members of the subcommittee, I am grateful for this opportunity to appear before you for the purpose of presenting the views of this administration on the representation of the District of Columbia in Congress.

I wish to express the strong support of the President and his administration for the principle of full voting representation for the District of Columbia.

As you are well aware, the House of Representatives passed House Joint Resolution 554 on March 2, 1978. That resolution proposes a constitutional amendment which resembles Senate Joint Resolution 65 in its most important features.

The House's action followed the issuance on September 21, 1977, of an announcement by Vice President Mondale of this administration's support for full voting representation for the District. The Vice President made his statement after examining the issues with a task force composed of Members of Congress, including Senators Leahy and Mathias, officials of the District of Columbia Government, and representatives of the executive branch.

Simply stated, the administration supports full voting representation in Congress for the District as a matter of simple justice for the citizens of the District of Columbia.

The administration favors the general approach to representation of the District of Columbia in Congress taken both by Senate Joint Resolution 65 and House Joint Resolution 554. Because these proposals raise many of the same issues, much of my testimony today will parallel statements made by Assistant Attorney General Patricia Wald in her testimony before the House Subcommittee on Civil and Constitutional Rights when it was considering House Joint Resolution 554.

Before discussing the provisions of Senate Joint Resolution 65 in detail, however, I would like to explain why the administration

prefers this approach to other methods of providing representation for the District which have been proposed in the past.

ALTERNATIVE WAYS OF PROVIDING DISTRICT OF COLUMBIA REPRESENTATION IN CONGRESS

One alternative which has been the subject of extensive discussion in the past is the possibility of providing for the District of Columbia to enter the Union as an actual State.

Some of those who favor this option have argued that new States can be admitted to the Union by means of a simple majority vote in both Houses of Congress, thereby avoiding the cumbersome process of amending the Constitution.

We believe, however, that any attempt to make the District a State without an amendment to the Constitution would present both legal and practical problems. See *Coyle* v. *Smith,* 221 U.S. 559, 567, 1911.

Article I, section 8, clause 17 of the Constitution provides that Congress shall have power:

> To exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States. . . .

If admitted to the Union as a State, the District of Columbia would be on an equal footing with the other States with respect to matters of local government.

We do not believe that the power of Congress vested by Article 1, section 8, clause 17 of the Constitution to exercise plenary legislative jurisdiction over the District could be thus permanently abrogated by a simple majority vote of both Houses of Congress. That could only be accomplished, in our view, by a constitutional amendment.

One suggested method of overcoming this difficulty advanced by proponents of statehood would be to carve a "Federal enclave" out of the District, over which the Congress would continue to exercise exclusive legislative jurisdiction.

The creation of such an enclave could presumably take place by one of two methods. First, Congress might, in effect, redraw the map of the Federal District to include only the areas in which Federal installations are located. The remainder of what is now the District could then be admitted as a State.

At this point, a practical problem is presented.

The impact of the Federal presence in the District is far greater than the impact of the Federal presence in any single State. More than half the District's land area is covered by Federal facilities which are scattered throughout the area.

Any concentrated "Federal enclave" would be very difficult to circumscribe and would have to be geographically fragmented. This would give rise to complex arrangements for sewers, police and fire protection, and other services. Moreover, it is questionable whether such a geographical entity could fairly be characterized as a single District at all.

A second method Congress might use would be to leave the present boundaries intact but designate as Federal installations the land and buildings already located there. These would have the

same status as Federal installations in other States, which are also governed under article I, section 8, clause 17.

Although this clause gives Congress the same substantive powers over Federal installations in the States as over the District, the State's consent is a precondition to exclusive jurisdiction.

As in the case of Alaska and Hawaii, a statehood act could condition admission as a State on the consent of the people of the District to the retention of Federal jurisdiction over selected areas. (See Hawaii Statehood Act, §§ 6(b)(3), 16(b), 73 Stat. 4; Alaska Statehood Act, §§ 8(b)(3), 10(b), 11, 72 Stat. 339.)

This would leave the problem of future acquisitions unsettled. Moreover, it was the intent of the Framers that the actual seat of the Federal Government, as opposed to its other installations, be outside any State and independent of the cooperation and consent of the State authorities. (See "the Federalist," No. 43.)

If these reasons have lost validity, the appropriate response would be to provide statehood for the District by constitutional amendment rather than to ignore the framers' intentions.

Conferring statehood on the District without amending the Constitution would also raise questions about the effects upon the 23d amendment. That amendment provides that in choosing the President and Vice President, the District shall be entitled to no more electors than the least populous State; at present it chooses three.

If the District were to become a State, however, it might be entitled at its current population level to four electors under article II, section 1, clause 2.

It has been argued that since the 23d amendment refers by its terms to "the District constituting the seat of Government of the United States" it will simply become a dead letter when a District ceases to exist.

We do not believe, however, that Congress is entitled under the Constitution to take any action which would make part of that document a dead letter, short of amending it according to the processes it provides.

We also note that article IV, section 3, clause 1 states that no new States may "be formed by * * * parts of States, without the consent of the legislatures of the States concerned as well as the Congress."

When Maryland ceded what is now the District to the Federal Government, it consented only to creation of a Federal District, and not to the creation of a new State.

To make the District a State at this time by congressional enactment alone raises serious questions of whether the spirit and perhaps the language—of that clause would be violated.

While it may indeed be in the best interests of the District and the Nation for the District eventually to become a State, the many financial and practical as well as constitutional concerns that would accompany its total divorce from Federal controls would, we feel, delay unduly the rights of the District's citizens to be represented in Congress.

On the other hand, if the District is now given representation in Congress by a constitutional amendment which provides that it shall be treated like a State without actually becoming a State, Congress reserves the right to redefine the scope of home rule in

the future while assuring that District citizens will have an effective voice in any such future decision.

Another suggestion that has been made as a method of bringing the citizens of the District of Columbia into full participation in the Federal political process without the necessity of a constitutional amendment is for Congress to cede the District back to Maryland.

District residents could then participate in the political life of that State, including the election of Senators and Congressmen. However, there are definite problems with this approach.

A substantial question exists as to whether the Maryland legislature would have to vote to accept this cession. Article IV, section 3 of the Constitution appears intended to enunciate the general principle that the borders and land areas of States are not to be changed without their consent.

Thus, in 1846, when the land area that is now Alexandria County was ceded back to Virginia, the Virginia Legislature did vote to accept the territory. We are aware of no substantial sentiment in Maryland favoring the return of the District which would lead that State's legislature to consent to retrocession.

Moreover, there is no indication that the people of the District desire to become citizens of Maryland. The District has become a distinct political entity, with its own leaders, its own political, social, and economic life.

We strongly question the desirability of submerging that identity in a larger political unit such as that of the State of Maryland.

Because of these difficulties, the administration favors the approach taken by S.J. Res. 65: A constitutional amendment to provide in effect that, for purposes of representation in Congress, the District shall be treated as though it were a State.

The residents of the District would thus be empowered to elect two Senators and the number of Representatives to which its population would be entitled.

A constitutional amendment is necessary under this approach because article I, section 2 of the Constitution provides that the House of Representatives "shall be composed of Members chosen by the people of the several States."

The 17th amendment provides that the Senate shall be "composed of two Senators from each State." If the District is not to be a State, then an amendment is required. One of the fundamental purposes of article I is to structure the various levels and forms of government within the United States.

The article very clearly contemplates that there is to be a Congress and there are to be States, with specific powers allocated to each. The article just as clearly contemplates that a third unit of Government—the Federal District—is to exist in a form separate and distinct from that of the States.

Because article I was in part intended precisely to distinguish the Federal District from the States, we do not believe that the word "State" as used in article I can fairly be construed to include the District under any theory of "nominal statehood."

*Cf.* P. Raven-Hansen, "Congressional Representation for the District of Columbia; A Constitutional Analysis," 12 Harv. J. Legis. 167 (1975). If "nominal statehood" is not a viable possibility, then a constitutional amendment is necessary.

In our view, the constitutional amendment is necessary.

Appendix E

# REPRESENTATION FOR THE DISTRICT OF COLUMBIA

## HEARINGS

BEFORE THE

SUBCOMMITTEE ON
CIVIL AND CONSTITUTIONAL RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

NINETY-FIFTH CONGRESS

FIRST SESSION

ON

PROPOSED CONSTITUTIONAL AMENDMENTS (H.J. RES. 139, 142, 392, 554, AND 565) TO PROVIDE FOR FULL CONGRESSIONAL REPRESENTATION FOR THE DISTRICT OF COLUMBIA

AUGUST 3, SEPTEMBER 14, 21, OCTOBER 4 AND 6, 1977

**Serial 35**

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
22-873 WASHINGTON : 1978

But the District would have no voice beyond this. Apparently, there is a good reason for this irony. It is not clear that the elected governing body of the District is the equivalent of a State legislature. Therefore, it is not clear that Congress should trust the elected governing body of the District to ratify in the name of the District a constitutional amendment. Over time more responsibilities may be given to the District government and confidence in its capacity to make decisions may grow. My proposed fifth Section would recognize that Congress should have the power to include the District in the ratification process in a manner that it deems desirable. There is little reason now to shut the door on the possibility that the District can effectively participate in the amendment process in the future. And there is scarcely more reason to undertake a debate now on the current state of local government in the District of Columbia.

One final red herring needs to be disposed of before I conclude. The argument has been made that persons who would vote for members of Congress in the District have roots that do not run deep enough to warrant the same kind of representation given to citizens of the States. In this mobile society it is questionable whether most people have roots that run very deep in the community in which they vote. Assuming, however, that citizens in most States have drawn sustenance from the places in which they vote for a longer period than have District residents, the fact remains those who are in the District, even for a period of only a few years, have an interest in common with those who have been there for a longer period of time. One who resides in the District and can satisfy residency requirements has the same problems as any other District resident and the same stake in voting. What difference does it make whether someone is spending two, three or ten years in the District? Federal legislation that extends beyond the States to reach the District affects people who are in the District even for a short period. And more importantly, the legislation that Congress many enact with specific reference to the District has a particular impact on those who reside there for any length of time. The Supreme Court has made it quite clear that it is permissible for States to attempt to differentiate people who have been present for a short period from those who have been present for a long period when it comes to voting. The Congress paved the way for this view in its voting rights legislation. Those who have sufficient connection with the District qualify as voters and deserve a vote no matter how long or how short a period they have been present.

A carefully conducted census should assure that only those who are permanent residents of the District are counted for apportionment purposes.

Mr. EDWARDS. Thank you very much Professor Saltzburg. Our final panel member is Patricia M. Wald. Ms. Wald is the Assistant Attorney General of the Office of Legislative Affairs and I might add that the subcommittee staff has always found it a privilege to work with Ms. Wald.

We are delighted to have you here and you may proceed.

## TESTIMONY OF PATRICIA M. WALD, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGISLATIVE AFFAIRS

Ms. WALD. Thank you Chairman Edwards, Congressman Butler. If I may, I would like to very briefly summarize some of the points from my longer statement which is in the record.

As the subcommittee knows, a task force consisting of Members of Congress, District of Columbia officials, and administration officials met over a period of several months and arrived at several positions outlined in Vice President Mondale's statement of September 21.

The administration endorsed in that statement "the principle of full voting representation for the citizens of the District." This morning I would like to discuss briefly the administration's thinking as to how best fulfill that goal of full voting representation.

It has been eloquently argued by Professor Miller here that the District could be given by act of Congress instant statehood thereby

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avoiding a more time consuming and relatively cumbersome process of constitutional amendment. Although we are not expressing any opinion on the ultimate desirability of statehood, we cannot agree that it can be achieved without constitutional amendment.

We do see article I, section 8, clause 17, as according Congress the power to exercise exclusive legislation in all cases whatsoever over such District as may become the seat of the Government of the United States as an obstacle to the unilateral decision by Congress to convert the District into a State.

It has, of course, been suggested that a Federal enclave might be carved out of the District to encompass all Federal buildings and land over which Congress would continue to exercise jurisdiction while the rest of the District of Columbia would become a State.

This presents practical and even theoretical problems. More than half of the District's land area is occupied by Federal facilities, but those facilities are scattered throughout the District so as to make any geographically concentrated Federal enclave an impossibility.

Complex arrangements for fire, power, police, and sewer services would be required. I agree with Professor Miller that presumably such arrangements could be arrived at eventually. But we think there is a more basic issue.

Would the remaining non-Federal area constitute in any real sense a geographically homogeneous entity that justifies statehood? We don't suggest an answer in either the affirmative or in the negative for all time, but only that legitimate questions might be raised as to the political wisdom and sincerity of a congressional enactment which attempted in effect to Balkanize the District so as to create a new State by building it around Federal land and installations.

One variation on the statehood proposal is to leave the present District boundaries intact and convert them into a State, then utilize the provisions of article I, section 8, clause 17 pertaining to Federal installations within State boundaries in order to retain congressional control over the Federal property.

There are problems with this approach. First, we believe the consent of the State legislature must, under article I, section 8, clause 17, be obtained to permit the location of such installations. And, second, we believe the syntax of the constitutional provision is such that the drafters meant for the District not to be located within the borders of any State.

It would seem at odds with that intent to treat the seat of Government just like any other Federal facility in a State.

There are, finally, two other objections to conferring statehood upon the District by congressional resolution. The 23d amendment, to which Professor Saltzburg referred, provides that the District shall choose a number of electors for President and Vice President no greater than the number chosen by the least populous State.

If the District became a State it would be entitled to four electors under article II, section 1. Perhaps, as some people have argued, the 23d amendment would simply become a dead letter since it applies to the District which would then cease to exist and become a State.

Still, the question of whether Congress could lawfully make a dead letter out of a constitutional amendment would almost surely be raised and become the subject of litigation.

Article IV, section 3, clause 1, also states that no new State shall be formed by parts of old States without the consent of those States. When Maryland in 1791 ceded land to the Federal Government it was for the creation of a District as a Federal seat, not for a new State.

It is at least questionable—I don't suggest that we know the definitive answer—whether a new State could be created from that land even after the ensuing passage of all of this time without the consent of the Maryland State government.

Aside from constitutional concerns with other alternates, however, there are in our opinion some cogent reasons why we should press now for full congressional representation, leaving the problem of statehood for a later time.

We are afraid that bringing that question to focus now would inevitably involve more delay in working out the financial home rule question.

Another suggestion for solving the problem of full D.C. representation has been to have Congress cede the District back to Maryland thereby allowing D.C. residents to vote as Maryland citizens.

This presents the issue, again, of whether Maryland must itself consent to accept any such retrocession. We think it would have to, under article IV, section 3. We believe more basically that such a course would do injustice to the political, social, and economic life of the District and its inhabitants which has taken its own unique developmental course over the past 200 years.

This option would also require a constitutional amendment, in our view, in view of the exclusive legislation clause.

One last variation on this proposal would be to retain congressional governance of the District but to permit D.C. residents to vote in Maryland.

We believe that this, too, would require a constitutional amendment because, as I believe Professor Saltzburg has pointed out in his statement, there is language in article I, section 2, and in the 17th amendment limiting Members in the House and Senate to those elected by people of the several States.

Under such a plan, too, District residents would not be able to vote for Maryland governors or legislators even though those officials would determine the qualifications of voters for Federal elections and even the places where elections are held as well as the drawing of election districts and the appointment of interim Congressmen.

Thus, it would not only be politically artificial, but it would fall short of giving D.C. residents full representaion.

In sum, we think the most straightforward and direct route to full representation is through a constitutional amendment such as H.J. Res. 554 and 565. Those proposed amendments would treat the District as if it were a State for purposes of electing members to the House and Senate, and for other purposes.

We don't think article V of the Constitution would be violated so as to require assent by all 50 States, since no State would, in effect, be deprived of its equal suffrage in the Senate. The District's position would be no different than that of any of the dozens of new States that have entered the Union.

We don't think any precedent would be set that would affect the very different situation of territories whose inhabitants are not U.S. citizens, many of whom are destined for independence or statehood.

Appendix F

United States of America

# Congressional Record

PROCEEDINGS AND DEBATES OF THE 95th CONGRESS, SECOND SESSION

## SENATE—*Wednesday, August 16, 1978*

*(Legislative day of Wednesday, May 17, 1978)*

The Senate met at 9:30 a.m., on the expiration of the recess, and was called to order by Hon. HARRY F. BYRD, JR., a Senator from the State of Virginia.

### PRAYER

The Chaplain, the Reverend Edward L. R. Elson, D.D., offered the following prayer:

*And above all put on love, which binds everything together in perfect harmony.*—Colossians 3: 14.

Eternal Father, the strength of our lives from generation to generation, our morning prayer ascends from grateful hearts and wistful spirits. Enter Thou our hearts and in this one fleeting moment make us deeply aware of Thy presence. Assure us that with Thy help we are ready for every responsibility this day brings.

Make our hearts Thy dwelling place. Cast out everything which obstructs Thy presence. Fill our hearts with love that there may be no room for hate or jealousy or resentment. Fill our minds with truth that there may be no room for falsehood. May Thy grace so abide in our souls that the time of prayer and the time of work may be indistinguishable.

When the shadows of evening fall upon us, give us a consciousness of work well done for our fellow man.

We pray in His name who went about doing good. Amen.

### APPOINTMENT OF ACTING PRESIDENT PRO TEMPORE

The PRESIDING OFFICER. The clerk will please read a communication to the Senate from the President pro tempore (Mr. EASTLAND).

The assistant legislative clerk read the following letter:

U.S. SENATE,
PRESIDENT PRO TEMPORE,
*Washington, D.C., August 16, 1978.*

*To the Senate:*

Under the provisions of rule I, section 3 of the Standing Rules of the Senate, I hereby appoint the Honorable HARRY F. BYRD, JR., a Senator from the State of Virginia, to perform the duties of the Chair.

JAMES O. EASTLAND,
*President pro tempore.*

Mr. HARRY F. BYRD, JR., thereupon assumed the chair as Acting President pro tempore.

### THE JOURNAL

Mr. MORGAN. Mr. President, I ask unanimous consent that the Journal of yesterday be approved.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

### SPECIAL ORDER

The ACTING PRESIDENT pro tempore. Under the previous order, the Senator from North Carolina (Mr. MORGAN) is recognized for not to exceed 15 minutes.

Mr. ROBERT C. BYRD. Mr. President, will the Senator yield?

Mr. MORGAN. I yield.

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that I may proceed for 1 minute, the time not to be charged against the time of the Senator from North Carolina.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

### ORDER TO CONVENE AT 9:30 A.M. TOMORROW

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that when the Senate convenes tomorrow, it convene at 9:30 a.m.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

### CIVIL SERVICE COMPLIANCE WITH COURT ACTION IN CONNECTION WITH FEDERAL EMPLOYEES

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that the Senate proceed to the consideration of Calendar No. 1006.

The ACTING PRESIDENT pro tempore. The bill will be stated by title.

The assistant legislative clerk read as follows:

A bill (H.R. 8771) to amend title 5, United States Code, to authorize the Civil Service Commission to comply with the terms of a court decree, order, or property settlement in connection with the divorce, annulment, or legal separation of a Federal employee who is under the civil service retirement system, and for other purposes.

The ACTING PRESIDENT pro tempore. Is there objection to the present consideration of the bill?

There being no objection, the Senate proceeded to consider the bill.

Mr. STEVENS. Mr. President, marriage is a partnership in which each spouse makes a unique and vital contribution. Each spouse has a right in the earnings of the other, in the property acquired with those earnings and in the management of such property. This right should be recognized as surviving the marriage in event of its termination by divorce, annulment, or legal separation. Under existing law, payments under the civil service retirement system are not assignable or subject to execution, attachment, or garnishment, except as may be provided by Federal laws. Due to this provision, court orders, decrees or property settlements are not honored by the Civil Service Commission.

I thus support H.R. 8771. This bill will give the Civil Service Commission the authority to comply with the terms of a valid State court decree, order, or property settlement in connection with the divorce, annulment, or legal separation of a Federal employee who is entitled to payments under the civil service retirement system. This bill will not only eliminate the obstacles presented by existing law to the enforcement of State court decrees, but it will reinforce what is already the law in many jurisdictions of this country.

As a future note, I hope that in an upcoming session we will be able to expand on this initiative so that survivor benefits may also be made available to a spouse after a marriage has been dissolved.

H.R. 8771 is a definite beginning step in bringing justice and attention to a group that is often ignored. I commend the chairman of the Subcommittee on Civil Service and General Services, Senator SASSER, for his diligence in pursuing a solution to this problem.

The bill (H.R. 8771) was ordered to a third reading, read a third time, and passed.

Mr. ROBERT C. BYRD. Mr. President, I move to reconsider the vote by which the bill was passed.

Mr. STEVENS. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent to have printed in the RECORD an excerpt from the report (No. 95-1084), explaining the purposes of the measure.

There being no objection, the excerpt

Statements or insertions which are not spoken by the Member on the floor will be identified by the use of a "bullet" symbol, i.e., ●

totally incompatible with, the role the District now plays in the overall structure and functioning of our federal system of government.

Our Constitution provides a framework in which the individual sovereign states would form a more perfect union. At the same time though, the Framers of the Constitution recognized "the indispensable necessity of complete authority at the seat of government," (Madison, Federalist No. 43). Without it they feared that the state encompassing the seat of government might unduly influence the national governing body. They wanted each state to be truly equal with the others, not one state more equal.

From this we clearly see the Founding Fathers' intention to carve out an area of land that was to be unique and special in every respect vis-a-vis any other state of the union. It was not to be a state. It was to be a solely federal district. It was to be responsible only for itself, the seat of the federal government. Unlike a state, the District was to have no legislature and no constitution. Most importantly, its peculiar character would deny it those qualities that make a state, any state, sovereign.

The special nature of the District is illustrated in another way. Every year it receives a direct grant from the federal government that supplements locally generated revenue; something the states do not get. For Fiscal Year 1977 this amounted to $270,357,000. In addition, it can borrow directly from the federal treasury to finance capital projects; something the states can not do. Loans for such outlays in 1977 came to $101,292,000. The District also participates in federal grant programs. In Fiscal Year 1978 it will receive roughly $300 million through such grants.

Appropriately enough, in Fiscal Year 1978, 47% of the total resource available to the District will come from federal sources. And these figures do not even include federal outlays for national parks, the Smithsonian Institution, the Kennedy Center, the National Zoo, St. Elizabeth's Hospital or the benefits the District receives from the large number of tourists brought to the area to see Washington's many federal attractions.

These financial privileges were granted to the District pursuant to the notion, first established by the Framers of the Constitution and later accepted by the several states, that it would be maintained by the Federal Government for the federal government's operations as compensation for its waiver of any claim to the incidents of sovereignty. It seems reasonable to me then that any attempt to remove the special political status of dependency of the District of Columbia must be accompanied by concomitant steps to remove its financial status of dependency. If the District now wishes to take its place among the several states, it should be willing to join a state such as Maryland and forego the federal largesse which has flowed as a result of its very special status.

Under our constitutional scheme of government the several states are to be treated with a modicum of equality. This scheme, in my opinion, cannot tolerate a situation in which one "hybrid state" is more equal than the others. There is, then, a serious question whether, by allowing federal representation of an entity which does not possess the attributes of statehood, we are not in fact treating the states less equally and depriving them of the exercise of their distinct measure of individual sovereignty, in violation of constitutional, as well as historical, mandates.

U.S. Senators and Congressmen from the District would be in the seemingly paradoxical, but at least unique, position of representing the interests of the federal district to the Congress which has the constitutional responsibility for the District, but not the states.

It is true that District residents pay federal taxes. But it is also true that because of the District's special status they enjoy distinct advantages not available to the residents of the sovereign states. Granting full voting representation to the District would in effect simply add another layer of cake to the one its residents already savor. In this instance the blessing of statehood would not be accompanied by the burdens generally associated with it.

In sum, the reasons for maintaining and insisting upon a unique federal district are no less compelling today than they were in 1789. But if we are going to legislate into existence this new "Hybrid state," then at the very least we should demand that its umbilical cord to the federal treasury be severed.

Mr. BARTLETT. Mr. President, I yield the floor.

Several Senators addressed the Chair.

The PRESIDING OFFICER. The Senator from Indiana.

Mr. BAYH. I will be glad to yield to the Senator from Nebraska.

Mr. CURTIS. I wanted the floor in my own right.

Mr. BAYH. I rise to offer my support enthusiastically for House Joint Resolution 554, a constitutional amendment to establish full voting representation for the more than 750,000 citizens of the District of Columbia.

Before I present my substantive argument in support of this resolution, let me ask Joint Resolution 85, a similar measure make it clear that despite the fact that hearings were held in my Subcommittee on the Constitution, on Senate which has been introduced and sponsored by several of us in the Senate, I, nevertheless, feel that the House version is a far better vehicle by which to bring political equity to the citizens of the District of Columbia.

For that reason, I decided not to try to report out Senate Joint Resolution 85, but instead to join my very distinguished colleague (Mr. Kennedy) in getting House Joint Resolution 554 expeditiously passed by the necessary two-thirds vote.

If, indeed, the Members of this body feel there is a substantive and equitable reason behind this effort, it seems to me that we cannot be blind to the procedures of the Senate Judiciary Committee, which would make the movement of the Senate bill through the subcommittee and the Judiciary Committee, for all intents and purposes, impossible, given the time constraints on the Senate at this time in our session.

Mr. President, let me look at the basic reasoning, the substantive reasoning, and suggest that if anyone desires to debate the procedure, I am prepared to do that as well. The substance, it seems to me, is the most important matter to consider in any legislative effort, and we should not let procedural differences stand in our way of accomplishing substantive equity.

Mr. President, it may appear strange to some observers that the senior Senator from Indiana has chosen to champion the cause of citizens living approximately 600 miles from his home State. But I chose to champion this cause out of a grave concern for an injustice that transcends State boundaries. That injustice has to do with a living paradox in the American scheme of government. Right here in the Nation's Capital, which is the seat of the greatest representative democracy the world has ever known, the democratic values and principles that we all cherish and protect are abused. Right here in Washington, D.C., nearly three-quarters of a million citizens are denied the right to representation as it is commonly granted in the 50 States of the Union.

I listened with a degree of understanding and patiently as my colleagues on the other side of this argument expressed their opposition. One can look at all the reasons for not supporting this amendment, but in no way can one deny the fact—that in Washington, D.C., we have nearly three-quarters of a million citizens who are denied the right of full representation as it is commonly granted in the 50 States of the Union. Second-class citizenship exists for three-quarters of a million Americans who live in the District, and there is no way to explain that away.

Residents of the District, though citizens of the United States subject to all obligations of such citizenship, have not had voting representation in Congress since 1800; and only since 1964, and the ratification of the 23d amendment to the Constitution, have District residents been entitled to vote for electors for the offices of President and Vice President of the United States. It was not until April 1971 that they were given the right to elect a nonvoting delegate to the House of Representatives. And let me add that the citizens of the District have been extremely well represented in the person of Delegate Walter Fauntroy for the past 7 years.

I wondered, as I listened to the arguments against giving representation to the citizens of the District, if indeed one is to follow that rationale for denying full citizenship in the congressional branch, that, to be consistent, those same voices should have been raised in opposition to letting the citizens of the District vote for the President; because much of the rationale, to be consistent, would have to apply across the board.

I had the good fortune, as the minority floor leader of the Indiana House, to be the principal sponsor of the ratification petition in the Indiana General Assembly.

It seems to me that we are talking about the rights of citizenship, and they are not visible. They have the right to vote for President but not the right to be heard as to those issues decided in Congress.

But more must be done and it must be done now. No more delays. No more talk of retrocession, or of studies to determine the feasibility of retrocession.

I respect the position of those who might suggest this alternative, but the time has come to act. We must go forward in extending full representation to the citizens of the District. I say this because I firmly believe that the circumstances leading to the disenfranchisement of the District's citizens have drastically changed. Let us look at history and lay it on the facts of life as they exist today.

The Founding Fathers were intent on providing a site over which the Federal Government would exercise exclusive

control. That has been discussed at some length by the opponents to this amendment. The Founding Fathers wanted a separate capital which would not only protect the national image, but which would be immune from both jurisdictional disputes as well as potentially harassing incidents. For many of the Founding Fathers, national representation for the District would necessarily have precluded the establishment of exclusive Federal control over the capital site. As James Madison so eloquently stated in the Federalist Papers, "Complete Federal authority at the seat of government" was necessary to avoid the "dependence of the members of the general government on the State comprehending that seat for protection in the exercise of their duties." Clearly, the founders perceived the need for a strong Federal territory, free of State encroachment, and secure from domestic unrest.

However, it should be noted that while the framers fully intended to establish a separate capital city, they never fully decided to exclude the residents of that city from political representation. As a matter of record, it is important to note that between 1790 and December 1800, residents of the District participated in State and National elections, including the Presidential election of November 1800, by voting in either Maryland or Virginia. However, when Congress finally assumed control of the District late in 1800, the lame-duck administration of John Adams rushed to take over the administration of the District before President-elect Thomas Jefferson's administration came to power. As Pulitzer Prize-winning historian Constance Green points out, the Federalists neglected to give the franchise to District residents when legislating the takeover. After the Federalists left office, attempts were made immediately to rectify the problem. Unfortunately, as the fight to retrieve suffrage for the District residents began in February 1801, the measure was lost in the shuffle of the Jefferson-Burr electoral college deadlock controversy which plagued that particular Congress. Since that time, there have been more than 150 attempts to provide representation for the District. Most of these measures have also been victimized by what was then considered much more pressing business before Congress.

So, Mr. President, it seems to me that we must realize that circumstances have changed. There is no longer the question concerning the harassment by citizens of the Nation's Capital, as was the major reason for the creation and concern for independence of a Capital City, as expressed earlier in my remarks, by President Madison.

Also, I emphasize again that our Founding Fathers did not desire—it was not in their thoughts—that the residents of the Capital City would not have a chance to be heard and represented in the Congress of the United States.

We must not overlook a very basic reason why the District failed to receive representation in the early years of the Republic. Its population was simply too small. In 1801, the District had only 14,000 residents, far fewer than the 50,000 required of territories that wanted to enter the Union at that time. Quite naturally, such a small population could be easily overlooked. Yet, during the 1801 debates on District suffrage, many Members of Congress spoke of providing representation for the District when its population reached the appropriate size.

Today, the population of the District is entirely appropriate for representation. Given its size alone as criterion, representation is essential. The District's present population is larger than 7 of the 50 States in the Union—and larger than that of any of the original 13 States during the first years of the Republic.

Finally, I must state what to me is the most important consideration in this discussion. There is nothing more abhorrent to the American people than the idea of taxation without representation. One of the fundamental principles enunciated by our Founding Fathers was the firm belief that those citizens who contributed to the public coffer should and would have the right to elect their leaders. Over 200 years ago, the injustice of taxation without representation served as one of the major elements which drove our forefathers to revolution. We will fail to be consistent with the dictates of our forefathers if we do not provide representation to a portion of our citizens who are law-abiding taxpayers.

So let us put an end to this glaring contradiction in our philosophical principles. Let us not make a mockery of our democracy. We have the means by which to make the dreams that our forefathers fought and died for a reality. It is a basic premise of our system of government that each deserves a chance to be heard and to express his or her political views through a freely elected representative or representatives. That is all the citizens of the District are asking. The irony of these proceedings is that they have to take place at all. Therefore, it is our responsibility and duty as members of the most democratic governmental unit in the world to correct this wrong, through the immediate passage of House Joint Resolution 554.

Mr. PELL. Mr. President, will the Senator yield for a question?

Mr. BAYH. I yield.

Mr. PELL. I have long been interested in this subject. I notice that originally, a substantial part of what is now Virginia, on one side of the river, and the District of Columbia, on the other, were in a 10-mile square. Then, some years ago, the part that was residential, which was on the other side of the river, was ceded back to Virginia as Arlington County.

I often have had the thought that the Federal Triangle itself obviously should not be under any State's rule—the Federal Triangle being that section bounded by the State Department, the Lincoln Memorial, and the Capitol—but that the rest of the area is really a residential city. It is not much different than the situation between Chevy Chase, Md., and the suburb on this side of the border. If it were part of Maryland, for example, it would then be the largest city, I guess, in Maryland. It would be Washington, Md.

Why was the idea never taken seriously of having it become part of Maryland? With the huge affectionate regard for the proponent of the bill, I am sure he can satisfy my curiosity.

Mr. BAYH. It seems to me, that the most immediate response or direct response is to say that there is no way I think of that we can constitutionally do this without the concurrence of the State of Maryland, and from talking with Members of Congress as well as the State government in Maryland they like things as they are now. They view the District of Columbia as a city within its boundaries and see no reason why they should suddenly have to assume responsibility and consider this as a part of the State of Maryland.

Mr. PELL. Have they ever been directly asked if they are interested in doing this?

Mr. BAYH. They certainly have been indirectly asked, and the response has been as I suggested to my friend from Rhode Island.

Mr. PELL. Will there be an amendment offered to that effect mandating its return it to Maryland as the largest city in Maryland in the course of this debate?

Mr. BAYH. There is nothing to prevent anyone from doing that. I understand that is one of the proposals before us and that such a proposal will be offered. I do not know whether it is possible really to cut the heart out of a body and have much left. It seems to me most of us who have come to this city and many of our constituents who find themselves coming for the first time have come to think of the District of Columbia as more than just a Federal triangle but indeed as a geographical area that incorporates the entire city of Washington, D.C.

Mr. PELL. But what is the difference, for instance, between Wesley Heights, to take a very high income area, and Chevy Chase next door; or on the other side of Maryland between southeast Washington and the line over into the Maryland frontier? Would that not be the same?

Mr. BAYH. I suppose that is the difference between East Chicago, Ind., and Chicago, Ill. There is a boundary line separating it, and that is the distinction that exists right here.

Mr. PELL. It would still leave the Federal triangle. And basically should not the Federal buildings be a separate Federal establishment? And it would give the other people the right of representation. This could be one way to give them representation.

Mr. BAYH. I point out to my friend from Rhode Island when our Founding Fathers established this as a capital city, if one is to look at what happened then, they did not just establish a place that should be the Federal city and say this is where the Federal buildings are. But they envisioned this as a viable city, a capital city with people who work, have businesses, and have transportation lines, and homes. The essential establishment of the Nation's Capital was not an establishment of the Nation's Federal buildings but the Nation's city.

# SENATE—*Monday, August 21, 1978*

*(Legislative day of Wednesday, May 17, 1978)*

The Senate met at 9:30 a.m., on the expiration of the recess, and was called to order by Hon. KANSASTER HODGES, JR., a Senator from the State of Arkansas.

PRAYER

The Reverend Dr. Robert B. Harriman, director, the Presbyterian council for Chaplains and Military Personnel, Washington, D.C., offered the following prayer:

Heavenly Father, we thank Thee for continuingly raising up from among the people those who have dedicated themselves within the halls of government. We pray now for those who serve within this Senate. Grant wisdom to discern Thy will so that they may be wise in all their judgments. Open eyes and minds to see and comprehend that which is right. Grant health and energy for arduous tasks and long hours of deliberation. Give patience and thoroughness in efforts to understand the complex and difficult. Deliver them from words or action which would foster prejudice or encourage division. May desire for the Nation's welfare surpass any self-seeking or narrow-visioned concern for a privileged few. Let no deception destroy trust, but rather may honesty firmly establish confidence. When we are right, keep us from gloating pride. When we are wrong, may our admission be followed by correction.

We pray for all entrusted with the guidance and welfare of the Nation. May those engaged in creating, administering, and judging our laws be so led by Thy wisdom that they shall faithfully lead the people in ways of righteousness and peace. Through Jesus Christ our Lord. Amen.

## APPOINTMENT OF ACTING PRESIDENT PRO TEMPORE

The PRESIDING OFFICER. The clerk will please read a communication to the Senate from the President pro tempore (Mr. EASTLAND).

The assistant legislative clerk read the following letter:

U.S. SENATE,
PRESIDENT PRO TEMPORE,
*Washington, D.C., August 21, 1978.*

*To the Senate:*

Under the provisions of rule I, section 3, of the Standing Rules of the Senate, I hereby appoint the Honorable KANSASTER HODGES, JR., a Senator from the State of Arkansas, to perform the duties of the Chair.

JAMES O. EASTLAND,
*President pro tempore.*

Mr. HODGES thereupon assumed the chair as Acting President pro tempore.

## RECOGNITION OF LEADERSHIP

The ACTING PRESIDENT pro tempore. Under the previous order, the majority leader, the Senator from West Virginia, is recognized.

## THE JOURNAL

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that the Journal of the proceedings be approved to date.

The ACTING PRESIDENT pro tempore. Without objection it is so ordered.

## THE ARGUMENTS AGAINST A DEEP TAX CUT NOW

Mr. ROBERT C. BYRD. Mr. President, the serious problems that could befall the American economy if a very deep tax cut were enacted in fiscal year 1979 were examined in an article by Seymour Zucker which appeared in the August 7, 1978 issue of Business Week. The author provides data suggesting that a tax cut over the next 3 years on the order of $124 billion would not pay for itself through increasing the tax base. To the contrary: The deficit would soar to $100 billion by 1983, according to one study cited by Mr. Zucker. At the same time, the rate of inflation would be almost 2 percentage points higher with such a cut by 1982. The weight of the economic evidence is against a very deep tax cut at this moment in our economic recovery.

Mr. President, I ask unanimous consent that the article, "The Fallacy of Slashing Taxes Without Cutting Spending," be printed in the RECORD.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

THE FALLACY OF SLASHING TAXES WITHOUT CUTTING SPENDING

(By Seymour Zucker)

Arthur B. Laffer first drew the curve on a napkin in a Washington restaurant back in 1974. It popped into his head as he was trying to persuade an aide of former President Ford that U.S. tax rates were so high that they were stifling economic growth. Lower tax rates, he maintained, would send employment and investment soaring to the point where tax revenues would actually rise, despite the lower rates. Laffer has been preaching that gospel ever since. And the Laffer curve—which purports to show the perverse effects of a high tax rate on government revenues—is being advanced as the economic rationale for the Kemp-Roth bill, the biggest tax-cut proposal in history.

Riding in the wake of Proposition 13, which cut California property taxes by 60%, Kemp-Roth is picking up strong support, especially among congressional Republicans. No one expects it to pass this year, but it stands a good chance of becoming the key domestic issue in the Republican congressional campaign in November and could also play a role in the Presidential election in 1980. The bill, introduced by Representative Jack Kemp (R.-N.Y.) and Senator William V. Roth, Jr. (R.-Del.), would reduce everyone's taxes over the next three years by one-third, thus costing about $124 billion in tax revenues. Its sponsors are pushing the Laffer argument that the tax cut will generate an economic boom of such proportions that in a few years the government will recoup all the initial revenue loss and then some. The reason: The huge tax cut will spark the incentive to work and invest, thus increasing the tax base. The effect is to shrink the deficit without cutting government spending by as much as a nickel.

Elementary. Laffer may have sold some politicians, but not his fellow economists. The economics profession—including some leading Republican economists who support Kemp-Roth—thigk Laffer would have done well to leave the napkin behind for the waiter to dispose of. They see huge deficits and a rip-roaring inflation if Kemp-Roth is enacted without offsetting cuts into expenditures. To Harvard's Martin Feldstein, the theoretical principal that at some point reducing rates actually increases tax revenues "is something we teach in the first week of the course in public finance." The critical empirical question is to determine when the tax schedule gets into that range, he notes.

"The Laffer curve is more or less a tautology," says conservative economist George J. Stigler of the University of Chicago, where Laffer taught before going to the University of Southern California in 1976. "It has to be right at some level. If enterprise is not discouraged at 95%, then move it to 105% and Laffer would be right by definition." But in Stigler's view, Laffer has failed to show that the current tax structure—where the highest rate on earned income is 50%—has such an adverse effect on incentives that reducing rates would actually increase revenue. "Laffer is no longer a very serious scholar," says Stigler. "He is playing the role of a propagandist, and as such he is performing some service. But I would not base a $125 billion tax cut on his work."

Feldstein and Stigler are not alone in their criticism of Laffer. Alan Greenspan, chairman of the Council of Economic Advisers under President Ford, favors Kemp-Roth—with some changes—because he holds that the only way to cut the growth of government spending is to cut taxes. So he says: "I'm for cutting taxes, but not for Laffer's reasons. I don't know anyone who seriously believes his argument."

Just how far off base is Laffer on the tax-revenue effects of Kemp-Roth? Otto Eckstein, president of Data Resources Inc., has run the Kemp-Roth proposal through DRI's huge computer forecasting model. Assuming that it takes effect in 1979 and that there are no compensatory spending cuts, the DRI model shows that the deficit will grow progressively worse. By 1983, the red ink in the budget—including additional interest payments—will increase to a mind-numbing $100 billion. So rather than recouping the entire tax cut, as Laffer argues, DRI finds that the Treasury gets only about $25 billion of it.

OVERWHELMING EVIDENCE

To be sure, economists agree that a tax cut would increase total demand and national income and thus partly offset the initial revenue loss. But to offset the effect of lower tax rates fully, total income would have to rise by some four times the original amount of the cut. And the evidence is overwhelming that no cut in taxes could generate a rise in spending and income of that size. A $10 billion tax cut, for example, produces roughly an extra $15 billion of gross national product. The current marginal tax rate against total GNP works out to 25%, so the $15 billion creates $3.75 billion in new taxes—thus recovering barely a third of the initial

Statements or insertions which are not spoken by the Member on the floor will be identified by the use of a "bullet" symbol, i.e., ●

Washington, D.C. is not a State, it is a city. A fine city, but still a city.

There is no diversity of interest, there is no rural population, there are no small towns, there is no agricultural area.

In brief, Washington, D.C., is a densely populated city of 690,000 persons in a 67-square-mile area.

I shall vote against giving two Senators to Washington, D.C., which action would simultaneously distort the Constitution, set a dangerous precedent of city representation, and diminish the influence in the Senate of each of the 50 States.

Mr. President, how much time do I have remaining?

The PRESIDING OFFICER (Mr. HOGGS). The Senator has 2 minutes remaining.

Mr. HARRY F. BYRD, JR. I yield that additional 2 minutes to the Senator from Montana (Mr. METCALF) when his time comes to speak.

Mr. MELCHER. I thank the Senator.

The PRESIDING OFFICER. Under the previous order the Senator from Idaho is recognized to offer his amendment.

UP AMENDMENT NO. 1695

(Purpose: To grant statehood to the District of Columbia)

Mr. McCLURE. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The amendment will be stated.

The assistant legislative clerk read as follows:

The Senator from Idaho (Mr. McCLURE) proposes an unprinted amendment numbered 1695.

On page 2, strike out lines 2 through 10 and insert the following:

"Section 1. The District constituting the seat of government of the United States is hereby admitted into the Union as a State of the United States on an equal footing with the other States in all respects.

"Sec. 2. The Congress shall have power to enforce this article by appropriate legislation.

Mr. McCLURE. Mr. President, during the debate on the previous amendment, which would have retroceded the non-Federal Government in the District to the State of Maryland so that the people of the District might have the opportunity to have full civil rights, it was argued by the distinguished Senator from Massachusetts that we should instead grant them statehood, or at least that that would be more logically consistent.

Without conceding the fact as to where logical consistency might lie as between those two alternatives, certainly the arguments raised by the Senator from Indiana with regard to the difficulties of interpretation and application of voting rights as though they are a State without granting statehood is inherent to the pending resolution granting voting rights without statehood and would be completely solved by granting statehood.

(Mr. SASSER assumed the chair.)

Mr. McCLURE. This, at least, Mr. President, would be logically consistent with the stated thrust and purpose of the sponsors and floor managers of this House Joint Resolution 554.

In my opinion, this is the only way to provide a permanent solution to the issue of extending the full rights of political participation to all citizens of the District and at the same time avoid the insurmountable constitutional objections that mar other proposals, including House Joint Resolution 554.

While statehood is possible by means of a simple majority vote in both Houses of Congress, under article IV, section 3, any attempt to admit the District to the Union as a State without amending the Constitution would pose major legal problems. For one thing, statehood by legislative enactment would abrogate the "exclusive legislation" power of the Congress over the District under article I, section 8, clause 17. Moreover, article IV, section 3, clause 1 makes the consent of the legislatures concerned a prerequisite for forming new States. When Maryland ceded lands to the Federal Government for establishing the District of Columbia, it consented only to the creation of a Federal district, not the creation of a new State. Thus, to make the District by congressional enactment alone would violate that provision of the Constitution.

Under amendment XXIII the District has three votes in the electoral college, that is, no more than the number of electors accorded to the least populous State, however, it could be entitled to as many as four electors, according to the most recent census. Amendment XXIII would become a virtual dead letter since the District would cease to exist. Such a change in the Constitution should be made by amendment, rather than by legislation.

Granting statehood to the District would not only guarantee to D.C. residents voting representation in both Houses of Congress, under article I of the Constitution. They would also be able to participate in the process of ratification of proposed amendments to the Constitution, article V; they would be entitled to as many electors for President and Vice President as they have Senators and Representatives, article 2, section 1; they would be assured of territorial integrity and protection against absorption into other States, article IV, section 3; and they would have complete legislative control over internal matters, free of congressional veto. All congressional authority over the District now provided in article I, section 8, clause 17 would be effectively turned over to the people of the District acting through their elected representatives in a State legislature.

This amendment would not only assure to D.C. residents equal citizenship rights with other Americans; it would grant to the District complete self-government according to the wishes of its own people, without Federal interference. It would free the Federal Government of the responsibilities of providing special treatment for the District at a tremendous expense to other U.S. citizens. The people of the District would not only enjoy the rights and powers of statehood, they would also assume the full burden and responsibilities of citizens of a State of the Union. No longer would District citizens be considered second-class Americans or be victims of "taxation without representation."

Full representation is consistent with the principles of democracy upon which our Nation was founded. Statehood would attest to our commitment to equality and freedom for all American citizens and our concern for human rights thoughout the world.

Mr. President, I reserve the remainder of my time.

Mr. BAYH. Mr. President, I have listened to my good friend and distinguished colleague from Idaho struggling with how this business of representation for the people of the District, some 750,000 of them, can be accomplished. I know he is sincere about this desire. But I say with all respect that it seems to me he is making it an overcomplex issue, a more difficult one to resolve than it really need be.

First of all, those of us who are supporting and have supported for same time the right of representation for the District citizens, have said from the beginning that the District of Columbia is a unique part of the United States of America. It is a unique bit of geography. It is a capital city. For reasons that have already been thoroughly discussed, basically size and security, our Founding Fathers established it to be separate and different from States early on.

Just as this unique characteristic exists, it seems to me that there is no need to go the statehood route in providing representation for the citizens of the District.

As I said earlier, I guess as a Senator from Indiana I hate to see us taking the Nation's Capital from 500,000 Hoosiers. It is part ours. I do not see why the District should be a State because it is, indeed, the Nation's Capital.

As I said earlier, there is no need to go the statehood route in order to resolve the inequities which exist here.

I will not belabor the Senator or the Senate with some of the distinctions between means of approaching statehood and the thrust of the Senator's remarks. The question of statehood is very much up in the air in the District of Columbia.

There is a core of support for statehood here. But nothing approaching the clear majority wishes of the people for representation short of statehood, the majority support for the very resolution which we now have before us.

I say to my good friend from Idaho, it seems to me, if one gets into the whole fundamental study of government, we can see why the approach recommended by the Senator from Massachusetts, the Senator from Indiana and the rest of us in this resolution is more appropriate to the need than statehood.

We have three levels of government, and we are all aware of this, local government, State government, and National Government. The District of Columbia, very clearly, is a local government. It is a city. It has a city structure. Imperfect as it is, it is chosen by the people of this city. The city government controls the confines, the geographic limits of this city, which also happens to be the Nation's Capital.

So there is adequate government, there is representation. Some say it is inadequate, and you could make a good case of that. But at least, there is a participation in the representative process at the local level. I see no reason to have a State government, which would cover the same identical geographic description as the local government. That would be an absolute duplication of governmental responsibilities.

There is no other State in the United States that has a city which covers the total geography of the State; yet we would be establishing one if we went along this particular route.

No, it seems to me that what we are after here is not to create a State level of bureaucracy to deal with problems that are already dealt with by the local government, but to see that the citizens of the District are fully represented at the national Government level. They have the right to vote for the President now, as of the 23d amendment. What we are saying is give the citizens of the District the right to vote for and be represented in this body and our other body, the House of Representatives, to have the chance to affect the outcome of national decisions, national decisions that affect the lives of the people who live here.

Mr. McCLURE addressed the Chair.

Mr. BARTLETT. Will the Senator yield?

Mr. McCLURE. I am happy to yield to the Senator from Oklahoma.

Mr. BARTLETT. Mr. President, I ask unanimous consent that Edward King of my staff may be accorded the privilege of the floor during any vote on this bill and the transportation bill. I further ask that this request not interfere with the dialog that the Senator from Idaho is having.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. McCLURE. Mr. President, I shall be very brief. I suspect we can either terminate the debate at this moment or debate for the next week. We cannot adequately cover the subject in a few brief moments and to attempt to cover it in much less than a week, in all of its ramifications, must be an exercise in frustration.

Let me respond to my friend from Indiana in this way: It seems to me that the arguments that have been used by the Senator in opposition to my amendment are really the arguments that the opponents of the resolution have been using. All of the arguments that have been raised against statehood are equally applicable against House Joint Resolution 554. I do not understand the distinction that says they are to be granted full voting rights without voting responsibilities. The effort to establish in people rights unassociated with responsibilities has been proven to be destructive of individual fiber, and it certainly is destructive of government structure as well.

It seems to me that this is really the crux of part of the dilemma, that there is the effort to invest the District of Columbia with all the rights of statehood with none of the responsibilities of statehood. It seems to me that has led us into the impasse of trying to find a way to give them something without giving them everything. We end up saying we are going to give them full civil rights, but we do not give them full civil rights; we give them some civil rights.

My friend from Indiana has indicated that this would be taking something away from the people of Indiana, because they own this Capital City. There are two answers to that. First of all, we could, by legislation, construct a Federal enclave within the city, which would then be a State, and allow them to have statehood and full rights and responsibilities of citizenship under statehood; at the same time, guaranteeing to the people of Indiana their sole share of the hold on the city as a seat of Government.

At the same time, my friend from Indiana is saying that we must pass the resolution granting representation in order to give them their rights as citizens, but whatever tenuous hold the people of Indiana have on the seat of Government is sufficient reason to deny them full rights as citizens.

I wonder if, really, the people of Indiana want to deny the people of the District of Columbia their right to full citizenship, full participation, full civil rights under the Constitution in exchange for, or as the price of, a tenuous hold on some nebulous concept of the Nation's Capital. I do not think the rights of citizenship are to be sold or bartered for such a small consideration as is implied by that statement.

Mr. President, if the Senator from Indiana is prepared to yield back the remainder of his time, I shall yield back the remainder of my time.

Mr. BAYH. I should like to respond.

Mr. McCLURE. Then I shall reserve the remainder of my time.

Mr. BAYH. I should like to say that, although the Senator from Indiana may not be as articulate as the Senator from Idaho, I should hate to see his argument used as my own argument against the resolution, as a cosponsor of the resolution.

I think what we are trying to do here is to say that whenever there is a process of Government that affects the lives of people, the people affected ought to have a right to have some influence on that process. We have wrangled over several things; some of them have been voted up and some have been voted down here this year.

About all the things we have discussed are going to affect the lives of the citizens of the District, but they will not have any representative here to help resolve that problem. That is what we are after. Inasmuch as there are not State responsibilities as far as the citizens of the District of Columbia are concerned, I do not know that we ought to give them States rights. What we are after is to see that they are represented in this form of Government which affects their lives, as far as taking their sons in war and taking their taxes in times of peace.

Mr. WALLOP. Will the Senator yield for a question?

Mr. BAYH. I am glad to yield. I do not know how much time I have; this is a one-sided apportionment. I am not complaining, but recognizing the facts of life.

Mr. WALLOP. I just have one question, on hearing what he is saying and the Senator from Idaho is saying. How do we square what the senior Senator from Virginia asked rhetorically: What do we now do, granting this on this basis, about the citizens of American Samoa, of Puerto Rico, or the Virgin Islands, who are subject to draft, who have all the other problems, whose sons go to war and other things? How do we now say they are not entitled to voting representation on the same basis that the District is?

I really ask that in all sincerity.

Mr. BAYH. I must say that I have asked myself that same question as the chairman of the committee that handles constitutional questions. I frankly believe, if the Senator from Wyoming is asking the Senator from Indiana, I think they are entitled to have a chance to vote for President. Whether they should be represented in Congress or not depends upon the size of the entity involved and the disposition of the people involved.

The fact of the matter is, we have a distinction here. We do not have any other territory urging to be heard as a State. We have had territories that have asked to be included in this direct popular vote amendment so they will have a chance to vote for President. Frankly, I think they ought to be. From a practical standpoint, I do not think there is any way of including them in there.

If the Senator would address himself to the real distinction, in all but Puerto Rico, there is a real distinction of size. That was one of the distinctions that caused the Founding Fathers to treat the District differently than they did other States.

Another distinction is that they are not a contiguous part of the United States. You could say the same thing about Alaska and Hawaii, but there again, you get into distinct size situation, with the exception of Puerto Rico.

If the time comes when the people of Puerto Rico can, by unanimous vote, decide that issue and then petition us and ask us to accept them, then I think we have a real question that we must deal with. Frankly, I would say we either have to fish or cut bait. I am not for having territories against their will.

Mr. BARTLETT. Will the Senator yield?

Mr. BAYH. Yes.

Mr. BARTLETT. As I understand it, the distinguished Senator from Indiana said that the citizens of the District need representation and need to have a person or two in this body representing them. As I understand it, at the present time, they are represented by all Members of this body and they are represented by specific Senators who serve on the District Committee.

My question is, if this resolution is passed and ratified by the States and becomes part of our Constitution and our basic law, then does it also provide that this extra representation that the Dis-

Appendix G

# REPRESENTATION OF THE DISTRICT OF COLUMBIA IN THE CONGRESS

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## HEARINGS

BEFORE THE

SUBCOMMITTEE ON

CIVIL AND CONSTITUTIONAL RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

NINETY-FOURTH CONGRESS

FIRST SESSION

ON

**H.J. Res. 280**

TO AMEND THE CONSTITUTION TO PROVIDE FOR REPRESENTATION OF THE DISTRICT OF COLUMBIA IN THE CONGRESS

JUNE 17, 23, AND SEPTEMBER 3, 1975

**Serial No. 15**

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

59-152 WASHINGTON : 1976

The committee takes particular pleasure to welcome this morning a resident of the District of Columbia, the District's No. 1 resident, as a matter of fact; its first elected Mayor in over 84 years, Mayor Walter E. Washington.

Mayor Washington certainly is aware of the power of the vote, and what a difference it can make to a community or to an individual. Mayor Washington, we welcome you here this morning, and you may proceed.

## TESTIMONY OF HON. WALTER E. WASHINGTON, MAYOR, WASHINGTON, D.C.

Mayor WASHINGTON. Thank you very much, Mr. Chairman.

Before I proceed, I would, for the benefit of the committee, point out just one or two things that developed in the questioning, and then I'll proceed.

First is the eligible voters—I think Mr. Butler may have asked that question. It is estimated at about 500,000. The registered voters, based on purging the rolls from time to time, range between 250,000 and 300,000. The population is established by the last census, and updated in 1973, is 739,000, which is the basic population figure that would be used by any State or jurisdiction for determining congressional representation. The other figure that may interest you is that we estimated at the time of the home rule, pre-home rule time, that approximately 50,000 persons were residing in the District with registrations in their home States. Now, this is a fluctuating figure and was our best estimate.

Now, I thought in the background of this discussion it might be helpful to give you what our appraisal of the figures is.

Mr. Chairman and members of the committee, I am particularly pleased to appear before the Constitutional Rights Subcommittee of the House Judiciary Committee to support Joint Resolution 280 to amend the Constitution to give the District of Columbia full voting representation in Congress.

It is a simple enough proposition that is presented in this resolution:

> The people of the District constituting the seat of government of the United States shall elect two Senators and the number of Representatives in Congress to which the District would be entitled if it were a State. Each Senator or Representative so elected shall be an inhabitant of the District and shall possess the same qualifications as to age and citizenship and have the same rights, privileges, and obligations as a Senator or Representative from a State.

This is not the first time, as you have pointed out, Mr. Chairman, so eloquently, that any of us have appeared before the Congress on behalf of full enfranchisement of the citizens of Washington, D.C. However, as you pointed out, it is the first time that I have presented this cause as an elected official, and the period is 104 years, not 84; that is the period of time. And it brings another impact, it seems to me, to this hearing in the sense that the District of Columbia is now a self-governing community, like all the other cities of this great land, and this gives added emphasis and meaning to this joint resolution. It would open the doors of the Congress to elected voting Representatives of this city's 740,000 residents. And as the chairman pointed out, as we look back to the experience the Founding Fathers must have had to draw from France, or England, we find London and Paris as Federal cities with the right of representation and the right to vote.

general tendency is to provide for the States and then to have a set-aside for the District of Columbia and for the territories, so that unless you are alert what happens is that you tend to be excluded, rather than tending to be included.

Mayor WASHINGTON. Absolutely right. You are absolutely right, and I know from which you speak. This is a constant vigilance to keep the city in the mainstream of the entire grant process.

Mr. BADILLO. Thank you, Mr. Chairman.

Mr. EDWARDS. Mr. Kindness?

Mr. KINDNESS. Thank you, Mr. Chairman.

Mayor Washington, I have been particularly interested in your statement this morning as a former mayor of a small city. Our problems are very different.

I would like to ask, would you favor full statehood for the District of Columbia?

Mayor WASHINGTON. Well, I think there are problems inherent in that, that I can see at this time. I would be far more favorable, as I have indicated, to this process. I think you've got the Federal presence here, let's deal with that. And, in order to get statehood, you are going to either have to cut out an enclave, or in some way develop a configuration that is going to leave the Federal presence there. And you are going to have all kinds of problems with it because there are many people who think the Federal presence is simply Constitution Avenue, and Pennsylvania Avenue. But, you've got Walter Reed Hospital over here; and Anacostia, Bolling; you've got the forts and there is no way that you can see pulling those elements out that are really all around the city; the new home of the Vice President, the Naval Observatory. The city is basically ringed with old forts from the Civil War, and it's so physically, and economically and socially bound together that I would have problems with statehood in terms of exacting from it some enclaves, or little enclaves all around the city. Ultimately, it seems to me, that would erode the very fabric of the city itself, and the viability of the city. So, that's where I come from.

Mr. KINDNESS. You referred to the horse and buggy concepts being updated. Isn't it sort of a horse and buggy concept, possibly, that we have to deal somehow, constitutionally, with the matter of Federal presence in an area. Throughout the United States we have other Federal facilities that are quite dominant in some communities.

Mayor WASHINGTON. Yes.

Mr. KINDNESS. The Congress has dealt with those problems—perhaps not fully satisfactorily in some cases—but I think, in line with your thinking, we could probably solve those problems with the State of Columbia, or whatever it might be called, if it were a matter of providing full statehood to the District.

I was interested in Mr. Badillo's question about whether the city of Washington received a fair share of funds under Federal programs, and assure you that I harbor the feeling about Ohio, that we do not quite not our fair share. But, do you not agree that there is some advantage, also, to the geographic proximity, or physical presence and acquaintance with officials who deal in the Federal Government with the various programs, whereby you probably have the ultimate in grantsmanship operating in the District of Columbia?

59-152—75——3

Appendix H

86TH CONGRESS : : : : 2D SESSION

JANUARY 6-SEPTEMBER 1, 1960

# HOUSE REPORTS

## VOL. 4

MISCELLANEOUS REPORTS ON
PUBLIC BILLS, IV

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON: 1960

86TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } { No. 1698

# GRANTING REPRESENTATION IN THE ELECTORAL COLLEGE TO THE DISTRICT OF COLUMBIA

MAY 31, 1960.—Referred to the House Calendar and ordered to be printed.

Mr. CELLER, from the Committee on the Judiciary, submitted the following

## REPORT

[To accompany S.J. Res. 39]

The Committee on the Judiciary, to whom was referred the joint resolution (S.J. Res. 39) proposing amendments to the Constitution of the United States to authorize Governors to fill temporary vacancies in the House of Representatives, to abolish tax and property qualifications for electors in Federal elections, and to enfranchise the people of the District of Columbia, having considered the same, reports favorably thereon with amendments and recommends that the joint resolution do pass.

The amendments are as follows:

Amendment No. 1: Page 1, line 3, strike out all the language after the resolving clause and substitute the following:

"That the following article is hereby proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution only if ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"ARTICLE —

"SECTION 1. 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.

"SEC. 2. The Congress shall have power to enforce this article by appropriate legislation."

Amendment No. 2: Amend the title to read:

"A joint resolution proposing an amendment to the Constitution of the United States granting representation in the Electoral College to the District of Columbia."

60014°—60 H. Rept., 86-2, vol. 4——12

## GRANT REPRESENTATION IN ELECTORAL COLLEGE TO D.C.

### EXPLANATION OF AMENDMENTS

The amendments are in the nature of a substitute bill and are explained in the "Section Analysis of Resolution" set out later in this report.

### PURPOSE

The purpose of this proposed constitutional amendment is to provide the citizens of the District of Columbia with appropriate rights of voting in national elections for President and Vice President of the United States. It would permit District citizens to elect Presidential electors [1] who would be in addition to the electors from the States and who would participate in electing the President and Vice President.[2]

The District of Columbia, with more than 800,000 people, has a greater number of persons than the population of each of 13 of our States. District citizens have all the obligations of citizenship, including the payment of Federal taxes, of local taxes, and service in our Armed Forces. They have fought and died in every U.S. war since the District was founded. Yet, they cannot now vote in national elections because the Constitution has restricted that privilege to citizens who reside in States. The resultant constitutional anomaly of imposing all the obligations of citizenship without the most fundamental of its privileges, will be removed by this proposed constitutional amendment.

### NEED FOR CONSTITUTIONAL AMENDMENT

Simply stated, voting rights are denied District citizens because the Constitution provides machinery only through the States for the selection of the President and Vice President (art. II, sec. 1). In fact, all national elections including those for Senators and Representatives are stated in terms of the States.[3] Since the District is not a State or a part of a State, there is no machinery through which its citizens may participate in such matters. It should be noted that, apart from the Thirteen Original States, the only areas which have achieved national voting rights have done so by becoming States as a result of the exercise by the Congress of its powers to create new States pursuant to article IV, section 3, clause 1 of the Constitution.

It was suggested that, instead of a constitutional amendment to secure voting rights, the District be made either into a separate State or its land retroceded to the State of Maryland.[4] Apart from the serious constitutional question which would be involved in the first part of this argument, any attempted divestiture by the Congress of its exclusive authority over the District of Columbia by invocation

[1] The voters in the States do not vote directly for the candidates for President and Vice President. Instead they vote for members of the electoral college, who in turn vote for President and Vice President.

[2] The proposed amendment would give the District the same number of electors which it would have if it were a State but in no event more than the least populous State—probably three depending on the 1960 census and some other factors. There are at present 537 places in the electoral college (equal to the total of Senators and Representatives in Congress from each State). This total, if Congress does not change the present law, will be 535 after the 1960 census—the membership in the House of Representatives has been temporarily increased by two to provide one Representative each for Alaska and Hawaii. In any event, the electors from the District will be in addition to the total number of places reserved to the States.

[3] Members of the House of Representatives and of the Senate are elected by the people of the respective States (art. I, sec. 2; 17th amendment). The electors who cast ballots for President and Vice President in December are elected by the people of their respective States at the preceding November election, this being the method of appointment of electors in each of the States (art. II, sec. 1).

[4] In 1788 and 1789, Maryland and Virginia ceded territory to the Federal Government, and Congress, by acts which were approved on July 16, 1790 (1 Stat. 130) and March 3, 1791 (1 Stat. 214) established the District of Columbia which was finally proclaimed to be the National Capital after the elections of 1800. Jurisdiction over the District vested in the United States on the first Monday of December 1800. (See *U.S. v. Hammond*, Fed. Cas. No. 15293 (1801).) On July 9, 1846, all land ceded by Virginia for the District of Columbia was retroceded to Virginia (9 Stat. 35).

of its powers to create new States would do violence to the basic constitutional principle which was adopted by the framers of the Constitution in 1787 when they made provision for carving out the "seat of Government" from the States and set it aside as a permanent Federal district.[5] They considered it imperative that the seat of Government be removed from possible control by any State [6] and the Constitution in article I, section 8, clause 17 specifically directs that the seat of Government remain under the exclusive legislative power of the Congress.[7] This same reasoning applies to the argument that the land on which the District is now located be retroceded to the State of Maryland.

### MINIMUM IMPACT; PRESERVATION OF ORIGINAL CONCEPT OF CONSTITUTION

The proposed amendment would change the Constitution only to the minimum extent necessary to give the District appropriate participation in national elections. It would not make the District of Columbia a State. It would not give the District of Columbia any other attributes of a State or change the constitutional powers of the Congress to legislate with respect to the District of Columbia and to prescribe its forms of government. It would not authorize the District to have representation in the Senate or the House of Representatives. It would not alter the total number of presidential electors from the States, the total number of Representatives in the House of Representatives, or the apportionment of electors or Representatives among the States. It would, however, perpetuate recognition of the unique status of the District as the seat of Federal Government under the exclusive legislative control of Congress.

### AMENDMENT NOT RELATED TO HOME RULE

This proposed constitutional amendment with respect to voting by citizens of the District in national elections is a matter entirely separate from questions as to possible changes in the form of local government which the Congress might establish for the District. The present constitutional provisions relating to the District already vest plenary power in the Congress to legislate in this respect and the present constitutional powers would not be modified by the amendment here proposed. Questions as to possible changes in the form of local government for the District, including local home-rule proposals and other possible changes in the structure of the District government, are

[5] Art. I, sec. 8, clause 17 provides that 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 Government of the United States * * *".

[6] While the Continental Congress was meeting in Philadelphia on June 20, 1783, soldiers from Lancaster, Pa., veterans of the Revolutionary War, arrived at Philadelphia "to obtain a settlement of accounts." The harassment by the soldiers continued through June 24, 1783, on which date Congress, abandoning hope that State authorities would disperse the soldiers, removed itself from Philadelphia. It met successively in Princeton, Trenton, N.J., Annapolis, Md., and New York City.

While no repetition of the Philadelphia experience came about, the Continental Congress nonetheless did not lightly dismiss this Philadelphia incident and on October 7, 1783, the Continental Congress adopted a resolution providing for buildings and land to be under the exclusive jurisdiction of the United States. Records fail to disclose any action taken to implement this resolution. Probably, when the urgency diminished, the resolution was allowed to expire.

When the present Constitution was being debated in the Constitutional Convention of 1787, it was urged that some provision be made in the Constitution for a seat of government under the exclusive control of the Federal Government and that such seat be at a place away from any State capital because such a situation would tend "to produce disputes concerning jurisdiction" and because the intermixture of the two legislatures would tend to give "a provincial tincture" to the national deliberations. This suggestion was adopted and resulted in Art. I, sec. 8, clause 17 of the Constitution, providing for a permanent seat of government, now known as the District of Columbia (Report of the Interdepartmental Committee for the Study of Jurisdiction over Federal Areas within the States (June 1957), GPO, pt. II, pp. 16–17).

[7] See footnote 5

Appendix I

# REDUCTION IN FORCE

DEPOSITORY

## OVERSIGHT HEARING

BEFORE THE

## COMMITTEE ON THE DISTRICT OF COLUMBIA HOUSE OF REPRESENTATIVES

NINETY-SEVENTH CONGRESS

FIRST SESSION

ON

IMPACT OF REDUCTION IN FORCE BY FEDERAL GOVERNMENT ON THE METROPOLITAN WASHINGTON AREA

APRIL 27, 1982

SERIAL NO. 97-19

Printed for the use of the Committee on the District of Columbia

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MAY 1982
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U.S. GOVERNMENT PRINTING OFFICE
14-143 O WASHINGTON : 1983

**STATEMENT OF IVANHOE DONALDSON, ACTING DIRECTOR, D.C. DEPARTMENT OF EMPLOYMENT SERVICES, ACCOMPANIED BY RITA DRESELL, CHIEF OF TECHNICAL SERVICES STAFF, UNEMPLOYMENT COMPENSATION OFFICE, DEPARTMENT OF EMPLOYMENT SERVICES**

Mr. DONALDSON. Mr. Chairman, I would first like to say that the last time I came to testify on a matter relating to employment services, USDOL took a dim view of it. That being the case, I shall once again express the Department's view on what is going on.

As you know, the Employment Service principally is about the business of providing people with work. We of course are supporters of the initial concept of Humphrey-Hawkins.

Mr. Chairman and members of the committee, thank you for the opportunity to come here today to testify before you on the extent of reductions-in-force, which directly impacts on many of our residents and affects the economic conditions of the District of Columbia and to provide comments on the legislative proposals introduced by Congressman Fauntroy and Congresswoman Schroeder.

In light of the impact these RIF's are having on the major portion of our work force, the District of Columbia, and my Department as well, I welcome the opportunity to address this issue.

Federal employees deserve more than the callous treatment they are receiving from the Reagan administration. I support Congressman Fauntroy's bill, H.R. 4817, to require a compilation of a list of those RIF'd so that they can be considered for positions in the Federal Government when they become available. I also support Congresswoman Schroeder's bill, H.R. 5853, to institute voluntary reduced work time or furloughs as an alternative to RIF's.

The latter, as I am sure you know, is a procedure already in place in some agencies and one which may require the Federal Government to pay unemployment benefits.

Our statistics show that from January 1981 to March 1982 the number of new unemployment insurance payments filed by Federal employees has tripled as compared to new claims in 1980. We had only 3,703 Federal unemployment insurance claims in calendar year 1980, and I am referring to all local offices here in the District of Columbia. From January 1981 through January 1982, we had 9,052 new claims from Federal employees. In calendar year 1982, we have already taken 2,284 new claims from former Federal employees.

The total benefit payment has doubled from $9,572,307 in 1980 to $19,812,800 for 1981. Thus far in calendar year 1982, we have paid out $4,290,000 in benefits to RIF'd Federal employees. We have processed these Federal unemployment insurances claims in addition to a substantial increase of claims by employees in the private sector who have been laid off due to economic downturns. We have done this with fewer staff due to the drastic budget cuts we, too, have experienced.

The Department of Employment Services, with our limited resources and drastically reduced staff, is doing its part to assist these former Federal workers. Unemployment is still going up; the lines of unemployment insurance claimers are getting longer. The number of people to administer unemployment insurance continues

education, jobless benefits. Mr. Morrow urged his audiences not to stand by and let this happen. He urged them to work their "friends in Washington" to restore some of the funding for social programs to bring defense spending and tax cuts to a more reasonable level.

Further, Mr. Morrow stated, and I quote, "combined with the tax cuts that benefit mostly hiring of people, these programs add up to a major redistribution of net money in our society."

As long as we are faced with an administration that cares only for the rich and the powerful at the expense of the poor and the working poor and the middle class, an administration that puts all the blame for the problems of big Government and bureaucracy on the employees of the Government, Congress must protect their workers who carry out their programs and their agendas.

Mr. Chairman, I am here to support this committee and others who undertake to assist RIF'd employees in operating and obtaining jobs. Washington, D.C., was once thought to be recession-proof. This year we have seen what the Federal RIF's have done to our local economy. Our division of labor market information published data a few weeks ago that shows that February 1982 there were almost 10,000 fewer people employed by the Federal Government in the District of Columbia as compared to February 1981. In February 1982, there was 219,500 employed by the Federal Government in the District of Columbia as compared to 228,200 in February 1981.

Mayor Barry has stated that in the Washington metropolitan area, for every Federal employee RIF'd, one person in the private sector will be laid off. The Mayor is particularly concerned that the District of Columbia already has a higher unemployment rate than that of the metropolitan area.

The unemployment rate in the District of Columbia in February 1982 is 10 percent, up from 9 percent in January 1982. The District of Columbia has experienced a disproportionate number of RIF's in comparison to the rest of the Nation. Mike Causey, in his column last week, stated that 3 of every 10 budget-related Federal job cuts are in the Washington area. The Office of Personnel Management released figures last week to show for the first 5 months of fiscal year 1982—October through February—5,450 have taken place. In fiscal year 1981, 2,739 people were RIF'd, bringing it to a total of 8,189. Most of the 2,739 RIF's in fiscal year 1981 were in the Public Health Service; most of those jobs were in the Washington, D.C., area. The city has also suffered major losses in income and sales taxes as a result of the RIF's, and companion losses in the private sector.

The D.C. Office of Finance and Revenue estimates that in fiscal year 1982 the city will lose $3.5 million in income taxes, and one-half a million dollars in sales and revenues.

The Federal Government Service Task Force, of which I believe Congressman Fauntroy is a member, has data which shows that minorities and women have been disproportionately laid off from jobs in the Federal Government.

I would do anything possible to further assist the RIF'd employees. I would be happy to answer any questions.

Mr. FAUNTROY. I thank you again for the testimony that is chock full of valuable information and the kind of information we are

Appendix J

# HOME RULE

## HEARINGS

BEFORE

SUBCOMMITTEE NO. 6

OF THE

COMMITTEE ON
THE DISTRICT OF COLUMBIA
HOUSE OF REPRESENTATIVES

EIGHTY-EIGHTH CONGRESS

FIRST SESSION

ON

**H.R. 141, H.R. 461, H.R. 501, H.R. 502, H.R. 503, H.R. 504, H.R. 1576, H.R. 1805, H.R. 2579, H.R. 2893, H.R. 3352, H.R. 3568, H.R. 3963, H.R. 4237, H.R. 4821, H.R. 5564, H.R. 5732, H.R. 5794, H.R. 8105, H.R. 9128, H.J. Res. 91, and H.J. Res. 195**

BILLS TO PROVIDE SOME FORM OF HOME RULE FOR THE DISTRICT OF COLUMBIA

**PROPONENTS' TESTIMONY**

NOVEMBER 18, 19, AND 20, 1963, AND FEBRUARY 24, 1964

U.S. GOVERNMENT PRINTING OFFICE
25-714 WASHINGTON : 1964

Attorney General KENNEDY. Yes. I think that based on the statements that were made by the Founding Fathers and the fact that it was put into effect immediately and nobody raised any question about its constitutionality shows quite clearly that it is constitutional.

Mr. HORTON. It shows that the people at that time thought it was constitutional, but it does not show otherwise.

Attorney General KENNEDY. Finally, when it was passed on—when everybody thought that it was constitutional for 70 years including the Founding Fathers—it is now being raised here as to whether it was constitutional—it was passed on in 1953 by the Supreme Court which said unanimously that it was constitutional. I don't understand how anybody now can raise a question as to its constitutionality.

Mr. WHITENER. Are there any other questions, gentlemen? If not, thank you very much, Mr. Attorney General.

Attorney General KENNEDY. Thank you.

Mr. WHITENER. We are always very happy to have you here and we hope that you will have many more happy birthdays.

Attorney General KENNEDY. Thank you.

Mr. HAGAN of Georgia. I think that we could have some further comment in respect to this uniqueness as being the only reason for its existence in the first place. I do not imagine that if they intended that people be domiciled here to the extent that they are today, actually. I think that it was conceived and formed as the capital of a great, major nation. And I think that if there was any reason at all for its being unique and separate from others that would be the reason. The local government could have exercised control over the whole Nation if they could have amended their rules and regulations, such as for example if you stepped off the Capitol Grounds.

Attorney General KENNEDY. Of course, that is not what is being advocated in this legislation.

Mr. WHITENER. Thank you very much.

(The following letter and memorandum were subsequently received by the committee:)

DEPARTMENT OF JUSTICE,
*December 13, 1963.*

HON. BASIL L. WHITENER,
*House Committee on the District of Columbia,*
*Washington, D.C.*

DEAR MR. WHITENER: During the course of my testimony before your subcommittee on legislation to provide home rule for the District of Columbia, I undertook to supply for the record a memorandum discussing the constitutional questions presented by proposals to retrocede the District to Maryland. I attach such a memorandum, prepared in the Department of Justice, and ask that it be made a part of the record of your subcommittee's hearings.

Sincerely,

ROBERT F. KENNEDY,
*Attorney General.*

CONSTITUTIONALITY OF RETROCEDING THE DISTRICT OF COLUMBIA TO MARYLAND

I. INTRODUCTION

H.R. 5564, now pending before the 88th Congress, would retrocede and relinquish to the State of Maryland the entire District of Columbia, except for a small area extending from the Lincoln Memorial to the Supreme Court, together with East and West Potomac Parks. The area to be retained by the United States would consist of approximately 2.6 square miles (1,656 acres) and would contain about 75 residential dwelling units. A map showing the area to be retained is filed herewith.

## HOME RULE

The present District of Columbia comprises an area of 68.7 square miles, and has a population of 763,956 (according to the 1960 census). Washington, D.C., is the ninth largest city in the United States. Its population exceeds that of 11 States, and is more than 3 times that of Alaska.[1]

Retrocession would increase the population of Maryland (according to the 1960 census) from 3,100,689 to 3,864,645, an increase of 24.6 percent. Washington would become the second largest city in Maryland, and the combined population of Washington and Baltimore would constitute 44 percent of the population of Maryland.[2] Washington's population is greater than that of any existing congressional district in Maryland, and almost as large as the combined populations of the three smallest districts.[3]

The proposed transfer to Maryland of political jurisdiction over the ninth largest city in the United States, and the government of that city during the working out of the necessary rearrangements, would be a complex task. Provision would have to be made to establish a municipal charter and a city government for Washington, and to establish one or more new counties in Maryland. Functions now exercised by the District of Columbia government would have to be allocated between State, county, and city officials, since the District of Columbia presently exercises the functions of all three governmental units. Redistricting and reapportionment for State and congressional elections in Maryland would presumably be necessary. New governmental arrangements would doubtless be necessary in connection with utility, transportation, and other services to be performed in the retained Federal enclave by corporations chartered and regulated by Maryland. Significant differences between Maryland law and that applicable in the District of Columbia might present special problems of adjustment for particular businesses or classes of persons.

The working out of these practical problems would be greatly complicated by the fact that the legal validity of the proposed retrocession is subject to serious doubt, and hence any arrangements which were made might well be subject to litigation for a number of years and might ultimately have to be unmade if the retrocession were held invalid. The resulting uncertainties could affect not only the government of the city of Washington and any necessary electoral rearrangements in Maryland, but also the outcome of a presidential election, since the status of the three electoral votes provided for by the 23d amendment would be in doubt.[4]

This memorandum does not express any conclusion as to whether retrocession to Maryland is or is not constitutional. The final answer to that question is for the courts.[5] The purpose of the present memorandum is simply to point

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[1] See the following:

| | | | |
|---|---|---|---|
| Alaska | 226,167 | Hawaii | 632,772 |
| Nevada | 285,278 | Idaho | 667,191 |
| Wyoming | 330,066 | Montana | 674,767 |
| Vermont | 389,881 | South Dakota | 680,514 |
| Delaware | 446,292 | District of Columbia (1960 census) | 763,956 |
| New Hampshire | 606,921 | | |
| North Dakota | 632,446 | | |

[2] See the following:

| | |
|---|---|
| Baltimore | 939,024 |
| Washington | 763,956 |
| Total | 1,702,980 |
| Total, State of Maryland plus Washington | 3,864,645 |

[3] 1960 census:

| | |
|---|---|
| 1st District | 249,570 |
| 2d District | 621,936 |
| 3d District | 258,926 |
| 4th District | 283,320 |
| 5th District | 711,046 |
| 6th District | 608,686 |
| 7th District | 373,327 |

[4] It is quite conceivable that a presidential election could turn on three electoral votes. Three electoral votes would have been decisive in each of the following elections:

1876: Hayes, 185; Tilden, 184.
1800: Jefferson, 73; Burr, 73.
1796: Adams, 71, Jefferson, 68.

[5] The question could be raised in any of a number of ways. For example: (1) The validity and effect of the acquisition by Maryland of over 760,000 citizens could arise as an issue in pending or future litigation over apportionment of the Maryland Legislature. See *Maryland Committee for Fair Representation v. Tawes*, U.S. Supreme Court, October term, 1963, No. 29; (2) a Maryland voter could challenge the registration as a Maryland voter of a resident of Washington on the ground that the cession was invalid. Cf. *Leser v. Garnett*, 258 U.S. 130; (3) a resident of Washington might bring an action for

out the nature and substantiality of the constitutional questions presented, and the resulting likelihood that, if H.R. 5564 were enacted and retrocession purportedly made pursuant to it, the governmental status of Washington and the legal validity of all governmental actions relating to it would remain in doubt for several years, pending definitive judicial determination of these questions.

II. THE CONSTITUTIONAL CONCEPT OF THE SEAT OF THE GOVERNMENT

Article I, section 8, clause 17 of the Constitution provides that "The Congress shall have power * * * to exercise exclusive legislation in all cases whatsoever, over such District (not exceeding 10 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 question for consideration is whether the existence of a Federal district constituting the seat of Government was intended to be a permanent feature of our constitutional system or whether Congress is free to eliminate such a district. That question has often been raised but never authoritatively settled. A substantial argument can be made for the proposition that the Federal district was intended to be a permanent feature of our Constitution, and that that district was intended to be large enough to serve as the location of a capital city having substantial population. This portion of the memorandum will indicate the basis for such an argument.

*A. The power of Congress to retrocede the District of Columbia is not settled by any authoritative precedent*

The issue whether Congress can eliminate the Federal district created in accordance with article I, section 8, clause 17 by retrocession to the States from which it was obtained, has often been raised but never authoritatively settled. Thus in 1803, 12 years after the District was established, Congress rejected by vote of 66–26, a bill to retrocede the District to Virginia and Maryland respectively; a considerable part of the debate was devoted to argument pro and con on the constitutionality of such a step (12 Annals of Congress, pp. 486–491, 493–507). Retrocession of the Virginia portion of the District was enacted by Congress in 1846 (9 Stat. 35) despite constitutional objections which had led the Senate Committee on the District of Columbia to recommend against passage (15 Congressional Globe, pp. 985–986 (1846)). Subsequently, in 1867, the House of Representatives approved, by vote of 111–28, a bill repealing the 1846 act of retrocession on the stated ground that it was unconstitutional. The bill died in the Senate Judiciary Committee, presumably because it was felt that decision as to the constitutionality of the retrocession to Virginia was properly a matter for the courts (77 Congressional Globe, pp. 26, 32 (1867)).

In 1875, the constitutionality of the retrocession to Virginia was raised in *Phillips v. Payne* (92 U.S. 130 (1875)), but the Supreme Court avoided decision of the constitutional issue and disposed of the case on the grounds that the plaintiff had no standing to raise the issue, that he was estopped from doing so by the passage of time, and that, in any event, the matter was concluded by the de facto control which had been exercised by Virginia for over a quarter of a century. In 1910, additional arguments against the constitutionality of the 1846 act of retrocession were raised in an opinion inserted in the Congressional Record (45 Congressional Record 672 (1910); S. Doc. 286, 61st Cong., 2d sess. (1910)).[6]

The Supreme Court's holding in *Phillips v. Payne, supra*, has, for all practical purposes, settled any question as to the status of the Virginia portion of the District. If the Supreme Court refused to consider a challenge to that retrocession in 1875, on the ground that it was too late to overturn a de facto situation which had existed for over 25 years, it is obvious that no court would now permit such a challenge. But neither the action of Congress in 1846 nor the Supreme Court's decision in 1875 with respect to the Virginia portion of the Dis-

declaratory judgment or mandamus to require the District of Columbia or the United States to perform any governmental service or function which it is presently required to perform; (4) such a resident might challenge the application to him of any tax or regulatory requirement of Maryland. Cf. *Phillips v. Payne*, 92 U.S. 130; or (5) a resident of Washington might invoke the jurisdiction of the District Court for the District of Columbia, or any successor to it, alleging that he continued to be a resident of the District notwithstanding the purported retrocession.

[6] The opinion was by Mr. Hannis Taylor who was the author of a number of books on constitutional law: "The Origin and Growth of the American Constitution" (1911), "The Origin and Growth of the English Constitution" (1899–1904), "Jurisdiction and Procedure of the Supreme Court of the United States" (1905), "Due Process of Law and the Equal Protection of the Laws" (1917), "The Science of Jurisprudence" (1908).

trict is an authoritative precedent of the validity of retrocession of the remainder of the District to Maryland.

Clearly, the sole ground of the Supreme Court's decision in *Phillips* v. *Payne*—the long time which had elapsed since the retrocession—would be inapplicable if a judicial challenge were promptly made to the retrocession to Maryland. But of even greater significance is the factual difference between the two cases. The portion of the District ceded by Virignia had never been an integral part of the Federal City.[7] One of the principal reasons for the retrocession was that the people of Alexandria, while being deprived of certain political rights, did not share equally in the benefits to be derived from those public works, civic improvements, and buildings which were wholly concentrated in the Maryland portion. The act of 1846 begins with the following recital.

"Whereas, no more territory ought to be held under the exclusive legislation given to Congress over the District which is the seat of the General Government than may be necessary and proper for the purposes of such a seat; and whereas, experience hath shown that the portion of the District of Columbia ceded to the United States by the State of Virginia has not been, nor is ever likely to be, necessary for that purpose; * * *" (9 Stat. 35).

The clear inference from the 1846 act is that Congress deemed retention of the part of the District on the Maryland side of the Potomac to be "necessary for that purpose"—i.e., for a seat of government. It would seem no less so today when both the Nation and the Federal Government have grown manifold.

The constitutional considerations applicable to a reduction in the size of the District by about one-third, through retrocession of a portion of the District which was not and was not expected to be an integral paft of the Federal City, are very different from the considerations applicable to a retrocession of 96 percent of the area and substantially the entire population of the present Federal City.[8]

Decisions dealing with Federal enclaves are also not authoritative precedents on the present question. Article I, section 8, clause 17 deals with two subject matters—the district which may be cession of particular States and acceptance of Congress, become the seat of the government, and "all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of * * * needful buildings." The Supreme Court has stated that exclusive jurisdiction acquired by Congress over places in the second category may be ended by retrocession, or by sale to private persons. *S. R. A. Inc.* v. *Minnesota*, 327 U.S. 558, 562–4 (1946).[9] That statement does not dispose of the present issue, however, in view of the significant historical, practical, and legal differences between such Federal enclaves and the District forming the seat of the government.[10] Thus for example, it has been held that in the case of ordinary Federal enclaves, the State may condition its consent on a reservation of concurrent jurisdiction. *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 146–9 (1937). On the other hand, in *District of Columbia* v. *Thompson Co.*, 346 U.S. 100, 109 (1953), the court emphasized that the provisions of clause 17 relating to the seat of government were so drafted as to "eliminate any possibility that the legislative power of Congress over the District was to be concurrent with that of the ceding States." Accord: *Cooley* v. *Board of Wardens*, 12 How. 299, 318 (1851).

Thus, in contrast to the situation with respect to home rule legislation such as H.R. 5794, the constitutionality of which was squarely settled by the Supreme Court in *District of Columbia* v. *Thompson Co.*, 346 U.S. 100 (1953), the pro-

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[7] Congress, in establishing the District of Columbia and accepting the land ceded by Maryland and Virginia had provided that no public buildings were to be built on the Virginia portion of the District (1 Stat. 214 (1791)). Major L'Enfant's master plan for the city, which includes an elaborate network of streets, avenues, squares, and circles, left the Virginia portion of the District totally uncharted.

[8] The retrocession to Virginia covered about 31.8 square miles, or less than one-third of the 100-square-mile area of the then District; H.R. 5564 would retrocede about 60.1 square miles, or about 96 percent of the present 68.7 square mile area of the present District.

[9] Chief Justice Stone and Justice Frankfurter, concurring, characterized this statement as dictum, unnecessary to the decision, 327 U.S. 571, 572.

[10] In *Phillips* v. *Payne*, *supra*, counsel for the plaintiff pointed out that one significant difference between the two parts of clause 17 is that, under the second part, Congress' jurisdiction is attached to property purchased or otherwise acquired for ownership by the United States, and hence can be expected to terminate if the United States ceases to own the property, whereas the United States did not and does not own most of the land in the District of Columbia but rather exercises legislative power over land in private owne ship. In the one case the United States is acting primarily in a proprietary capacity; in the other in a purely governmental one.

posed retrocession to Maryland would present issues, under article I, section 8, clause 17, concerning which there is no authoritative precedent in either judicial decision or history.

*B. The constitutional status of the District constituting the seat of the government*

The clause empowering Congress to exercise exclusive legislation over the District which was to become the seat of the government is one of a series of enumerations of legislative power. It is permissive in form, rather than mandatory. However, the question whether Congress can delegate to a State, or abdicate, the powers conferred on it by section 8 of article I is not susceptible of easy answer.

In the leading case of *Cooley* v. *Board of Wardens*, 12 How. 299, 317–8 (1851), the Court considered that question with respect to the commerce power. It said "If the Constitution excluded the States from making any law regulating commerce, certainly Congress cannot regrant, or in any manner reconvey to the States that power." (P. 318.) It held that some aspects of interstate commerce were "of such a nature as to require exclusive legislation by Congress" while others were "local and not national" and hence Congress could authorize the States to regulate them. (P. 319.) The Court contrasted Congress' power over interstate commerce with its power of exclusive legislation over the District of Columbia, in these words (p. 318):

"The grant of commercial power to Congress does not contain any terms which expressly exclude the States from exercising an authority over its subject matter. If they are excluded it must be because the nature of the power, thus granted to Congress, requires that a similar authority should not exist in the States. If it were conceded on the one side, that the nature of this power, like that to legislate for the District of Columbia, is absolutely and totally repugnant to the existence of similar power in the States, probably no one would deny that the grant of the power to Congress, as effectually and perfectly excludes the States from all future legislation on the subject, as if express words had been used to exclude them." [11]

The conclusion expressed in this dictum is based on the nature of Congress power of legislation over the District of Columbia. Consideration of the nature of the act by which the District was created suggests a like conclusion. While Congress power to legislate for the District is a continuing power, its power to create the District by acceptance of cession contemplates a single act. The Constitution makes no provision for revocation of the act of acceptance or for retrocession. In this respect the provisions of article I, section 8, clause 17, are comparable to the provisions of article IV, section 3, which empower Congress to admit new States but make no provision for the secession or expulsion of a State. As the Supreme Court held in *Texas* v. *White*, 7 Wall. 700, 726 (1868), the relationship between a State and the United States is "indissoluble." While Congress was not required to admit a State, once it did so its act was "final." "There was no place for reconsideration, or revocation, except through revolution, or through consent of the States."

A similar argument was made in *Phillips* v. *Payne*, *supra*. Counsel for the plaintiff argued that Congress acted as agent for the American people in accepting the District of Columbia from the States, and that with the act of acceptance the purpose for which the agency was granted was carried out and the authority of the agent was exhausted.[12] The Supreme Court avoided passing on the merits of this argument.

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[11] It should be emphasized that the Court, in *Cooley*, was dealing solely with the question of what power the States could exercise over the seat of the Federal Government, and not with the question of what powers Congress could delegate to a legislative body of the District of Columbia. The latter question was determined in *District of Columbia* v. *Thompson Co.*, 346 U.S. 100 (1953).

[12] Counsel stated: "This act of acceptance is not an ordinary act of legislation. It might, with just as much propriety, have been submitted to any other body of men, or to the judicial or executive branch; just as, in the case of the act of cession by Maryland, authority to make such cession was conferred upon the Members of the House of Representatives sent from that State to the next Congress; and just as Congress finally did authorize the President to make the selection within certain limits, and to declare in advance that such territory, so selected, should be deemed the District accepted. Congress, in this acceptance, acted rather as agents of the people, or as a commission for a particular purpose, and not necessarily as a legislative body, having a general power to accept districts for seats of government, as often as they should deem an occasion to arise for such an act. What they did in this capacity, they cannot undo or repeal, as the Congress of the United States, in its ordinary legislative capacity" (plaintiff's brief on appeal, pp. 22–23, *Phillips* v. *Payne*, 92 U.S. 130 (1875)).

It is clear that the framers of the Constitution attached fundamental importance to the establishment of a permanent seat for the National Government which was not and could never be under the control of any State. Thus, Madison, in Federalist Paper No. 43, stated:

"The indispensable necessity of complete authority at the seat of government, carries its own evidence with it. It is a power exercised by every legislature of the Union, I might say of the world, by virtue of its general supremacy. Without it, 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 of 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. This consideration has the more weight, as the gradual accumulation of public improvements at the stationary residence of the government, would be both too great a public pledge to be left in the hands of a single State, and would create so many obstacles to a removal of the government, as still further to abridge its necessary independence."

As Story added in his "Commentaries on the Constitution," section 1218:

"It never would be safe to leave in possession of any State the exclusive powers to decide whether the functionaries of the National Government should have the moral or physical power to perform their duties."

To the same effect see 3 Elliot's Debates 432–3 (Madison), 439–41 (Pendleton).

In short, the view of the framers appears to have been that it was indispensably necessary to the independence and the very existence of the new Federal Government to have a seat of government which was not subject to the jurisdiction or control of any State. This view was the direct result of the humiliation of the Continental Congress in Philadelphia where, despite threats by some 300 mutineering soldiers, the Pennsylvania government took the position that it would not provide protection and aid until some "actual outrages" occurred. Indeed, despite the urgent need for a fixed location for the new government, in contrast to the nomadic life which the weak central government had had during 1774–89,[11] Congress rejected numerous offers to locate the Capital in any of the major cities on the eastern seacoast. In favor of establishing the Federal City in a then deserted and swampy location where it could become an exclusively Federal city, free of control by any State.

This view of the framers, that establishment of a Federal district as the permanent seat of the government, which would be entirely free from control by any State, was an "indispensable necessity" to the effective functioning of the Federal Government lends strong support to the position that the District of Columbia, once created, could not thereafter be abolished.

The question was most recently considered in the report of the House Committee on the Judiciary, in 1960, on the resolution proposing what has become the 23d amendment. The report states:

"It was suggested that, instead of a constitutional amendment to secure voting rights, the District be made either into a separate State or its land retroceded to the State of Maryland. Apart from the serious constitutional question which would be involved in the first part of this argument, any attempted divestiture by the Congress of its exclusive authority over the District of Columbia by invocation of its powers to create new States would do violence to the basic constitutional principle which was adopted by the framers of the Constitution in 1787 when they made provision for carving out the 'seat of government' from the States and set it aside as a permanent Federal district. They considered it imperative that the seat of Government be removed from possible control by any State and the Constiution in article I, section 8, clause 17, specifically directs that the seat of government remain under the exclusive legislative power of the Congress. This same reasoning applies to the argument that the land on which the District is now located be retroceded to the State of Maryland" (H. Rept. 1008, 86th Cong., 2d sess. pp. 2–3).

[11] During these 8 years the Continental Congress moved 10 times and met in 8 different cities and towns: Philadelphia, Baltimore, Lancaster, York, Princeton, Annapolis, Trenton, New York.

*C. The size of the District contemplated for the seat of the government*

H.R. 5564 would retain, under exclusive Federal jurisdiction, a small Federal enclave comprised primarily of parks and Federal buildings. Such a small enclave clearly does not meet the concept of the "permanent seat of government" which the framers held. Rather, they contemplated a Federal city, of substantial population and area, which would be the capital and a showplace of the new Nation.

The initial proposal made at the Continental Congress was that a Federal district be established no less than 3 miles square and no more than 6 miles square over which Congress would exercise exclusive jurisdiction (XXV Journals of the Continental Congress 603 (Sept. 22, 1783). Further consideration led to the designation in the Constitution of 10 miles square as the maximum area for the seat of government, and to the acceptance by the Congress of the cession of an area 10 miles square.[14]

As Major L'Enfant pointed out in a letter to President Washington, the creation of a Federal city represented a unique opportunity to erect a completely planned capital which would grow with the Nation and symbolize its aspirations:

"No nation ever before had the opportunity offered them of deliberately deciding upon the spot where their Capital City should be fixed, or of considering every necessary consideration in the choice of situation; and although the means now within the power of the country are not such as to pursue the design to any great extent, it will be obvious that the plan should be drawn on such a scale as to leave room for that aggrandizement and embellishment which the increase of the wealth of the Nation will permit it to pursue to any period, however remote." (September 11, 1789, copy in the L'Enfant-Diggs-Morgan papers, Library of Congress, reprinted in Caemmerer, Life of Pierre Charles L'Enfant (Washington, D.C., 1960).)

The plan for the city, executed by L'Enfant and submitted by President Washington to Congress on December 13, 1791, was at that time the most comprehensive plan ever designed for a city:

"[T]he whole city was planned with a view to the reciprocal relations that should be maintained among public buildings. Vistas and axes; sites for monuments and museums, parks and pleasure gardens; fountains and canals—in a word, all that goes to make a city a magnificent and consistent work of art were regarded as essential." Caemmerer, Washington, The National Capital 25 (1932) (S. Doc. No. 332, 71st Cong., 3d sess. (1931).

The "seat of government" contemplated by the framers included extensive residential areas. One of the reasons for establishing the Federal City was evidently the inconvenience suffered by the Continental Congress as a consequence of the lack of adequate accommodations in some of the towns where they met.[15] L'Enfant's plan, as originally drawn, was designed for a city of 800,000, the size of Paris at the time.[16] L'Enfant had worked out a plan for establishing small pockets of residential areas at various points in the city which would, as he put it, provide roots from which a population would spread out and extend toward the center of the city.[17]

In 1800, the District's population was approximately 15,000 and it was assumed by Madison, Jefferson, Monroe, and others that the District would continue to have a sizable and increasing population. A like assumption clearly underlies Madison's statement, 12 years earlier, in the Federalist, No. 43, which stresses the interests of the "inhabitants" of the Federal City:

"* * * as the State will no doubt provide in the compact for the rights, and the consent of the citizens inhabiting it, as the inhabitants will find sufficient inducements of interest to become willing parties to the cession; as they will

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[14] The 2.6 square miles which H.R. 5564 would retain as the District constituting the seat of government for a nation of nearly 200 million people contrasts markedly with the initial proposal of an area of from 9 to 36 square miles, revised to 100 square miles, for a nation which then had less than 4 million persons.

[15] See e.g., letter from Samuel Huntington to the Governor of Connecticut, Oct. 22, 1783: "The appointment of the only place for their residence at or near Trenton did not give satisfaction, and for want of present accommodations it seemed necessary to remove to some other place for their session the ensuing winter. * * *" (Massachusetts Historical Society, Collections, seventh ser. III, 447, reprinted in VII Letter of Members of the Continental Congress 345–346 (ed. Burnett, 1934.)

[16] Caemmerer, Washington, The National Capital 29 (1932) (S. Doc. No. 332, 71st Cong., 2d sess. (1931)).

[17] Letter of L'Enfant, May 30, 1800, to the Commissioners of Washington, reprinted in 44–45 Records, Columbia Historical Society (1942–43) p. 193.

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."

Similarly President Monroe in his message to Congress of November 16, 1818, directed Congress' attention to the problems of governing the residents of the District:

"The situation of this District, it is thought, requires the attention of Congress. By the Constitution, the power of legislation is exclusively vested in the Congress of the United States. In the exercise of this power, in which the people have no participation, Congress legislates in all cases directly on the local concerns of the District. As this is a departure, for a special purpose, from the general principles of our system, it may merit consideration, whether an arrangement better adapted to the principles of our Government, and to the particular interests of the people, may not be devised, which will neither infringe the Constitution, nor affect the object which the provision in question was intended to secure.

"The growing population already considerable [18] and the increasing business of the District, which it is believed already interferes with the deliberations of Congress on great national concerns, furnish additional motives for recommending this subject for your consideration" (33 Annals of Congress 18 (1818)). Monroe had taken a prominent part in the Virginia ratification convention and, therefore, his statement furnishes additional evidence that the framers contemplated a considerable population in the Federal City which would grow as the Federal Government grew. Reduction of the District to small strip of territory occupied almost wholly by Federal buildings is thus clearly inconsistent with the concept of the Federal City held by the framers.

The inadequacy, of the small area proposed to be retained by H.R. 5564, to meet the objectives of the framers and the inherent needs of our Federal system, is apparent. Thus, if H.R. 5564 were adopted, the Members of Congress, the heads of executive departments, and the employees of the legislative and executive branches, would have no alternative but to reside in the States of Maryland or Virginia. They would be dependent on one or the other State for the means of transportation to and from their Federal offices. Even transportation between Federal offices would probably be controlled by Maryland, since separate taxicab and bus service for the new District of Columbia would probably not be physically or economically feasible. All the foreign embassies would be located in Maryland, dependent on it for police protection, and subject to its zoning and other requirements. Indeed, even the present route of the inauguration parade and parades for foreign dignitaries would lie in Maryland; such parades, if held on the most direct route between the Capitol and the White House, would presumably require a license from Maryland authorities, and be dependent on Maryland for necessary police protection. The total inconsistency is evident between such a situation and the intention of the framers as reflected in the materials referred to above.

### III. THE 23D AMENDMENT

The argument that a Federal district constituting the seat of government is a permanent part of our constitutional system is substantially strengthened by the adoption of the 23d amendment. The 23d amendment to the Constitution, proposed by Congress June 16, 1960, and ratified April 3, 1961, provides:

"SECTION 1. 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 State, 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 12th article of amendment.

[18] It was then approximately 30,000.

"SEC. 2. The Congress shall have power to enforce this article by appropriate legislation." [18]

By its terms, this amendment presupposes the continuing existence of a "District constituting the seat of government of the United States," having a population sufficient to entitle it to at least three electors.

The fundamental inconsistency between H.R. 5564 and the 23d amendment can be shown in several ways.

1. The 23d amendment provides that the District constituting the seat of government shall appoint a certain number of presidential electors. At present the District of Columbia is entitled to three electors, the same number as the least populous state. If H.R. 5564 were enacted, the District would still be entitled to appoint three electors, since that number is the minimum to which any State is entitled, regardless of population.[19]

Three results appear to be possible, each of which produces an absurdity. First, the electors could be chosen, as Public Law 87-389 provides, by vote of the qualified residents of the geographic area designated in H.R. 5564 as retained by the United States. This would give to a handful of residents the same voting power, in a presidential election, as each of six States, a result which neither the Congress which proposed the 23d amendment nor the States which ratified it can possibly have intended. (See point 2, infra.) Second, Congress could provide some alternative means of appointing the electors. For example, they might be designated by the incumbent President, or the Speaker of the House of Representatives or by majority vote of one or both Houses of Congress. In effect, this would place three electoral votes at the disposition of whichever political party happened to be in power in Congress prior to a presidential election. It would be hard to imagine a result more opposed to our basic political traditions. And such a result would be inconsistent with the stated purpose of the amendment, which was, in the words of the House report, "To provide the citizens of the District of Columbia with appropriate rights of voting in national elections for President and Vice President of the United States." House Report 86th Congress, 2d session, page 1. (See point 4, infra.) Third, Congress could fail to provide any means of appointing the three electors, thus causing the 23d amendment to become a dead letter before it was ever used. This would do violence to the terms of the amendment. That amendment does not leave it up to Congress to determine whether or not the District of Columbia shall cast three electoral votes in a particular presidential election. It contains a clear direction that the District "shall appoint" the appropriate number of electors, and gives Congress discretion only as to the mechanics by which the appointment is made.

"It cannot be presumed, that any clause in the Constitution is intended to be without effect." *Marbury* v. *Madison*, 1 Cranch 1037, 174 (1803). Hence, it can well be argued that the Constitution does not permit Congress to take action which would reduce the 23d amendment to an absurdity.

2. Adoption of the 23d amendment was premised on the factual assumption that the District of Columbia had, and would continue to have, a population comparable in size to that of many States. Thus, the report of the House Judiciary Committee on the resolution proposing the amendment states, under the heading "Purpose,"—

"The District of Columbia, with more than 800,000 people, has a greater number of persons than the population of each of 13 of our States. District citizens have all the obligations of citizenship, including the payment of Federal taxes, of local taxes, and service in our Armed Forces. They have fought and died in every

[18] Congress has provided by statute for the election, in the District of Columbia, of presidential and vice presidential electors. Public Law 87-389, 75 Stat. 817 (Oct. 4, 1961), District of Columbia Code sections 1-1101 et seq. This law provides that any citizen of the United States, 21 years old (other than convicted felons and mental incompetents), who has resided in the District continuously for 1 year and who does not claim voting residence or the right to vote in any State or territory, is qualified to vote for presidential and vice presidential electors (sec. 1-1102). It prescribes in detail the procedure for registration, nomination of candidates, voting, counting votes, recount, etc. (secs. 1-1107 through 1-1114).

[19] The 23d amendment gives the District of Columbia a number of electors "equal to the whole number of Senators and Representatives in Congress to which the District of Columbia would be entitled if it were a State," not to exceed that of the least populous State. Article I, section 2 of the Constitution provides that "each State shall have at least one Representative." Article I, section 3 provides for "two Senators from each State." Each State is therefore entitled to three presidential electors, regardless of its population. Hence the District of Columbia, if it were a State, would be entitled to three presidential electors, regardless of its population.

U.S. war since the District was founded. Yet, they cannot now vote in national elections because the Constitution has restricted that privilege to citizens who reside in States. The resultant constitutional anomaly of imposing all the obligations of citizenship without the most fundamental of its privileges, will be removed by this proposed constitutional amendment" (H. Rept. 1698, 86th Cong., 2d sess., p. 2).[21]

Similarly, in the Senate, Senator Keating, in proposing the resolution, emphasized that "the population of the District of Columbia exceeds the population of 12 States." 106 Congressional Record 1759.[22]

The population of the District of Columbia and its bearing on the number of electoral votes to which the District should be entitled was discussed at length in the House. As passed by the Senate, the resolution (S.J. Res. 39) had provided that the District should have the same number of electoral votes which it would have if it were a State. As reported by the House Judiicary Committee, it also provided that the number of votes should not exceed that of the least populous State (H. Rept. 1698, supra). This limitation was supported, in part, because of questions raised as to how many residents of the District might currently be voting by absentee ballots in the States from which they came. 106 Congressional Record 12561 (Congressmen Whitener, Mason). It was opposed as unfair in that it gave the District a lower vote than that to which its population would entitle it. 106 Congresional Record 12563 (Congressman Lindsay). Detailed discussion was had of the number of electoral votes which the District would have on the basis of its then current population. 106 Congressional Record 12562 (Congressman Cramer). In short, the size of the population of the District of Columbia was a primary consideration to Congress both in deciding whether the amendment should be proposed, and in working out the detailed provisions of the amendment.

It is inconceivable that Congress would have proposed, or the States would have ratified, a constitutional amendment which would confer three electoral votes on a District of Columbia which has a population of 75 families or which had no population at all. It is equally inconceivable that Congress would have set in motion the cumbersome and arduous process of constitutional amendment, on a factual assumption which it anticipated might be utterly destroyed 3 years later.

3. Congress does not lightly invoke the process of constitutional amendment. Accordingly, when the resolution proposing the 23d amendment was under consideration, Congress considered carefully the availability of any alternative means of achieving its objective of giving the residents of Washington, D.C. an equitable voice in the election of the President and Vice President. The legislative history shows clearly that Congress considered the feasibility and legality of legislation either admitting the District of Columbia as a new State, or retroceeding it to Maryland. Both alternatives were explicitly considered and rejected in the report of the House Committee on the Judiciary, quoted supra p. On the floor of the House, Congressman Meader urged that further consideration be given to retrocession as an alternative to constitutional amendment. 106 Congressional Record 10259, 10260. Congressman Matthews replied:

"As the gentleman may know, I am a member of the much-criticized District of Columbia Committee. When we have hearings about home rule we always bring up the idea: Why do we not retrocede part of the District to Maryland, contracting the Federal City? The gentleman I am sure will be interested to know that we could find no enthusiasm whatsoever for that point of view. I do want the gentleman to know, however, that the point of view has been thoroughly explored by the District Committee." 106 Cong. Rec. 12560.

Thus it appears reasonable to construe the action of that Congress in proposing, and the States in ratifying, the 23d amendment as a considered choice among three alternative means of affording electoral votes to the residents of the District of Columbia: (1) separate statehood, (2) retrocession to Maryland, and (3) the grant of electoral votes to the District of Columbia. Congress and the States embodied this choice in the form of a constitutional amendment. Hence it is arguable that the choice can now be reconsidered only by means of another constitutional amendment.

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[21] To the same effect, see H. Rept. 1770, 86th Cong., 2d sess., p. 2; 106 Congressional Record 12558, 12559. The population figure quoted above was an estimate, given prior to the availability of the 1960 census data.

[22] There is no Senate committee report; in the Senate the provision relating to electoral votes for the District of Columbia was added to S.J. Res. 39 by amendment from the floor, 106 Congressional Record 1757, 1764.

4. The 23d amendment gave to the residents of the District of Columbia, as such, the constitutional right to choose three electors.[7] Retrocession would take away that right, and substitute a right to participate in Maryland's choice of the electors to which it is entitled. If the residents of Washington were denied the right to vote at the 1964 election, on the ground that they had not been residents of Maryland for 1 year (Maryland constitution, art. I, sec. 1) they would be effectively deprived of any voice in that election. If they were allowed to vote in Maryland, but Maryland's electoral votes were not increased to correspond to its increase in population, then both the residents of Washington and the other residents of Maryland would have had their electoral votes diluted. In any event, the right of the 764,00 residents of the District, after retrocession, to cast their votes for electors as part of a State of 3,600,000, would not be the same as their right, specifically granted by the 23d amendment, to cast their vote separately for 3 electors.

In view of these inconsistencies, a persuasive argument can be made that the adoption of the 23d amendment has given permanent constitutional status to the existence of a federally owned "District constituting the seat of government of the United States," having a substantial area and population. This is not to imply that the existing boundaries of the District of Columbia are immutable or that Congress could not move the seat of government to a different location, and there establish a new district which would be, or would be expected to become, comparable in size and population to the present one. It suggests only that the basic concept of a Federal district, at the seat of government, comprising an area substantially larger than that occupied by the Federal buildings, having a population comparable in size to that of a State, and entitled to cast three or more votes for presidential electors, can be said to have been adopted by the 23d amendment as a part of our Constitution, so that a constitutional amendment repealing the 23d amendment would be required to abolish that district.

IV. THE FIFTH AMENDMENT

Two arguments can also be urged against H.R. 5564 based on the guaranty of due process made by the fifth amendment.

The first arises by reason of the effect of H.R. 5564 on the electoral votes provided by the 23d amendment. In *Baker* v. *Carr*, 369, U.S. 186, 207–208 (1962) the Supreme Court indicated that a State's apportionment of votes which effects "a gross disproportion of representation to voting population" would violate the equal protection of the laws, guaranteed by the 14th amendment. See also *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960); *Gray* v. *Sanders*, 372 U.S. 368 (1963). While the fifth amendment does not expressly prohibit the denial of the equal protection of the laws, discrimination by the United States "may be so unjustifiable as to violate due process" *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954). Hence it is at least arguable that the principles of *Baker* v. *Carr* and subsequent decisions of State and lower Federal courts applying it are applicable to the apportionment of votes by Congress.

In effect, H.R. 5564 would result in a redistricting so as to create a District of Columbia having at most a few hundred residents, with 3 electoral votes, as compared with Hawaii (pop. 632,772) or Delaware (pop. 446,292), also having 3 electoral votes. The disparity in voting strength would be more than 1,000 to 1. Accepting the fact that some disparity in voting strength is inherent in the electoral college system established by article II and the 12th amendment, see *Gray* v. *Sanders*, 372 U.S. 368, 376–378, a disparity of this magnitude would be impossible to justify on any rational basis. The irregular configuration of the retained area could be urged as a further factor showing unreasonable and

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[illegible] [illegible] (H. Rept. 1558, p. 11). [illegible]

arbitrary action in violation of the due process clause. Compare *Gomillion* v. *Lightfoot*, *supra*.[24]

It might be urged that these objections would be eliminated if Congress made no provision for appointing the three electors from the District of Columbia or provided for their appointment on a basis which did not purport to represent the residents of the District of Columbia. An answer to either suggestion may be found, however, in the fact that the 23d amendment appears to be a direction that the District of Columbia "shall appoint" 3 electors, and the further fact that the express intention of Congress, in proposing the amendment, was "to provide the *citizens* of the District of Columbia with appropriate rights of voting in national elections for President and Vice President of the United States" (H. Rept. 1698, supra, p. 1). [Emphasis added.]

The second question under the fifth amendment arises by reason of the fact that H.R. 5564 makes no provision for obtaining the consent of a majority of the residents of the District of Columbia to the proposed retrocession. In this respect it is in contrast to the 1846 act of retrocession to Virginia, section 4 of which expressly provided, "That this act shall not be in force until after the assent of the people of the county and town of Alexandria shall be given to it," and set forth detailed procedures for a vote on the issue of retrocession.

There would appear to be a serious question whether the residents of the District can, consistently with due process of law, be required, against their will, to become citizens of Maryland, and subject to its existing constitution and laws, in whose making they had no part. Citizenship in a State is normally a voluntary matter. It would seem entirely foreign to our constitutional system to transfer a substantial population from one political sovereignty to another without their consent. It may not be a sufficient answer to say that residents of the District, and businesses chartered there, are free to remove elsewhere if they prefer not to be citizens of Maryland: this freedom may be illusory in the case of individuals with property, associations, and roots in the District, and businesses with investments, established customers, and good will in the District.

V. CONCLUSION

The foregoing discussion establishes, it is believed, that the constitutionality of H.R. 5564 is subject to serious question. A persuasive argument can be made that article I, section 8, clause 17, of the Constitution established, as a permanent part of our constitutional system, a Federal district constituting the seat of the government, having a substantial area and population. The merits of this argument have never been directly passed on by the Supreme Court; dicta lend it some support. Adoption of the 23d amendment has greatly strengthened the argument. The effect of the 23d amendment in this respect has not been passed on by any court. Finally, H.R. 5564 may be open to objections based on the fifth amendment.

This memorandum does not express an opinion on these questions, or seek to predict the outcome of a judicial test of them. Its purpose is simply to point out that the constitutional questions presented are substantial, that the uncertainties which they create could probably not be resolved without several years of litigation, and that these uncertaintainties could affect not only the validity of the proposed retrocession and of governmental actions affecting the retroceded area, but also the electoral system of Maryland and the outcome of a presidential election.

Mr. WHITENER. We will next hear from the Honorable Elmer Staats, Deputy Director of the Bureau of the Budget, who is with us. Mr. Staats, we are glad to hear from you at this time. I am sorry that we have kept you so long this morning. We do appreciate you and your colleagues for being here with us this morning. If you do not mind, will you identify them for the record. We will appreciate that.

[24] In *Gomillion*, the Court referred to the new boundaries of Tuskegee as forming an "uncouth 28-sided figure." The District of Columbia, as it would exist if H.R. 5564 were enacted, could be described as 50-sided figure.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988— 202-053/84755

**Statement of Kenneth R. Thomas**

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**Congressional Research Service**

**Before**

**Committee on Homeland Security and Governmental Affairs**

**United States Senate**

**September 15, 2014**

**on**

**S.132, the New Columbia Admissions Act**

Chairman Carper, Ranking Member Coburn, and members of the Committee:

My name is Ken Thomas. I am a Legislative Attorney with the American Law Division of the Congressional Research Service at the Library of Congress. I would like to thank you for inviting me to testify today regarding the Committee's consideration of S.132, the New Columbia Admissions Act. My testimony today will be directed to the issue of whether Congress has the constitutional authority to implement S. 132, which would create a state called New Columbia out of a portion of the land that currently constitutes the District of Columbia. I will not be addressing whether the creation of this new state is consistent with historical traditions regarding the creation of new states, nor will I be addressing what policy considerations Congress might wish to evaluate in examining this proposal.

Residents of the District of Columbia have never had more than limited representation in Congress.[1] Over the years, however, various approaches have been suggested to provide representation to these

[1] The District has never had any directly elected representation in the Senate, and has been represented by a nonvoting Delegate (continued...)

residents in the House and the Senate. For instance, an effort was made over thirty years ago to amend the Constitution for that purpose. In 1978, H.J. Res. 554 was approved by two-thirds of both the House and the Senate, and was sent to the states. The text of the proposed constitutional amendment provided, in part, that "[f]or purposes 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."[2] The Amendment was ratified by sixteen states, but expired in 1985 without winning the support of the requisite thirty-eight states.[3]

Since the expiration of this proposed Amendment, a variety of other proposals have been made to give the District of Columbia representation in the full House. In general, these proposals would avoid the more procedurally difficult route of amending the Constitution, but would be implemented by statute. Thus, for instance, bills have been introduced and considered which would have (1) granted the Delegate for the District of Columbia the authority to vote in the House of Representatives; (2) retroceded a portion of the District to the State of Maryland; or (3) allowed District residents to vote in Maryland for their representatives to the Senate and House. Efforts to pass these bills have been unsuccessful, with some arguing that these approaches raise constitutional and/or policy concerns.[4]

S. 132 would provide for an alternative option, which is to designate that the populated portions of the District of Columbia be admitted to the Union as a new state. This proposal raises a variety of novel constitutional issues. The primary concern that has been expressed regarding the creation of a "State of New Columbia" out of the existing capital is that it is inconsistent with the unique status of the District. The District of Columbia was established under the District and Federal Enclaves Clause[5] of the Constitution, the relevant portion of which authorizes Congress to establish a location for a federal seat of government that is under Congress's exclusive legislative jurisdiction. By creating a city to house the federal government, the Founding Fathers appear to have intentionally created an exception to the Constitution's structure for representative government. Because representation in Congress is limited to states, citizens of the District of Columbia are not currently represented in the Senate or the House. Thus, concerns about this lack of representation have been a topic of debate almost since the establishment of the District.

The question of whether Congress has the authority to admit the State of New Columbia under S. 132 implicates a number of constitutional provisions. In particular, a court evaluating the constitutionality of S. 132 might consider the Admissions Clause,[6] the District and Federal Enclaves Clause, and the Twenty-Third Amendment.[7] In analyzing these constitutional provisions, it is important to remember that the Constitution is made up of both congressional authorities and limitations on those authorities. So, perhaps the first provision that a court would consider in evaluating this proposal is the Admissions Clause, which provides Congress the authority to admit new states to the Union.

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(...continued)

in the House of Representatives for only a short portion of its over 200-year existence. *See* CRS Report RL33830, *District of Columbia Voting Representation in Congress: An Analysis of Legislative Proposals*, by Eugene Boyd.

[2] *See* Kenneth Thomas, Larry Eig, CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 51 (2012 ed.).

[3] Id.

[4] *See* CRS Report RL33830, supra note 1; 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*, by Kenneth R. Thomas.

[5] U.S. Const. Art. I, § 8, cl. 17.

[6] U.S. Const. Art. IV, § 3, cl. 1.

[7] U.S. Const. Amend. XXIII.

## The Admissions Clause

The Admissions Clause provides that:

> New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The power of Congress over the statehood admission process appears to be committed to Congress's discretion. There have been no significant challenges to the constitutionality of Congress having granted statehood, and the Supreme Court has provided *in dicta* that decisions regarding the territorial composition of a state are not generally reviewable by the judiciary.[8] The Admissions Clause does not specify the procedure by which statehood is to be granted, and in fact, the methods by which Congress has chosen to admit states have varied dramatically.[9] The only significant prerequisite for admission of a state appears to be that a state may be admitted only after the adoption of a state constitution, thus ensuring compliance with the Constitution's requirement that the United States "guarantee to every State in this Union a Republican Form of Government."[10] Further, the one explicit textual limitation in the Constitution to admission of a state - that no new state be formed or erected within the jurisdiction of any other state[11] - does not appear to be relevant here.

The Admissions Clause also contains a procedural requirement that, if a new state is to be made up of "Parts of States," the state whose land is being used must consent to such admission. As this requirement only applies to "Part of States," it would, at first glance, also not appear applicable here, as the area that would form the State of New Columbia would come from the federal government, not a state. An argument has been made, however, that Maryland ceded the lands making up the District of Columbia to the federal government with the understanding that the land would only be used for the creation of such a District.[12] Thus, the argument continues, in the event that the ceded land is not used for such purpose, Maryland maintains a reversionary interest by which it could claim the land. Under this theory, Maryland's permission must be sought and obtained before the State of New Columbia could be declared.

On its face, there would appear to be no constitutional bar to Maryland passing a law that transferred any remaining reversionary interest in the District of Columbia. On the other hand, it is not clear that any such reversionary interest exists.[13] After initial legislation determining where such land was to be situated

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[8] Phillips v. Payne, 92 U.S. 130, 132 (1875) ("In cases involving the action of the political departments of the government, the judiciary is bound by such action.").

[9] *See* Peter B. Sheridan, *Brief History of Statehood Admission Process* (April 2, 1985) (Congressional Research Service memorandum), *reprinted in* 131 Cong. Rec. S4441 (daily ed. April 15, 1985). Although the Admissions Clause does not define the procedure by which a territory becomes a state, the usual procedure for admission is: (1) the people of the territory through their territorial legislature petition Congress; (2) Congress passes an "enabling act" that, when signed by the President, authorizes the territory to frame a constitution; (3) the territory passes a constitution; and (4) Congress passes an act of admission approved by the President. Some states, however, have followed different procedures. Under the alternative "Tennessee Plan," territories draft a constitution and elect "Senators" and "Representatives" without any authorization from Congress. Statehood is then affirmed by congressional vote.

[10] U.S. Const. Art. IV, § 4.

[11] U.S. Const. Art. IV, § 3, cl. 1.

[12] Office of Legal Policy, U.S. Dep't of Justice, Report to the Attorney General on the Question of Statehood for the District of Columbia (hereinafter OLP Report) (available at https://www.ncjrs.gov/pdffiles1/Digitization/115093NCJRS.pdf).

[13] *See* Peter Raven-Hansen, *The Constitutionality of D.C. Statehood*, 60 Geo. Wash. L. Rev. 160, 180-83 (1991).

was passed by Maryland and the United States,[14] Maryland passed a statute ceding the specific lands in question. The language of that cession does not appear to contemplate a reversionary interest:

> That all that part of the said territory, called Columbia, which lies within the limits of this state, shall be and the same is hereby acknowledged to be forever ceded and relinquished to the congress and government of the United States, in full and absolute right, and exclusive jurisdiction, as well of soil as of persons residing, or to reside, thereon, pursuant to the tenor and effect of the eighth section of the first article of the constitution of the government of the United States.[15]

Property law in Maryland, which would appear to be the controlling law used to evaluate a real property transfer in the state, does not favor implied reversionary interests. "Conditions subsequent [are] not favored in the law, because the breach of such a condition causes a forfeiture and the law is averse to forfeitures."[16] Thus, the Maryland Court of Appeals has gone to "great lengths" to avoid finding that a property transfer implies a condition subsequent which would result in forfeiture.[17] To avoid this, the court insists on "words indicating an intent that the grant is to be void if the condition is not carried out."[18] Thus, the language of the statute transferring Maryland's land to the federal government for the creation of the District of Columbia would appear to be insufficient to indicate an intent to maintain a reversionary interest.

One might argue, however, that the language of the Maryland statute, which makes the transfer of land "pursuant to the tenor and effect of the eighth section of the first article of the constitution of the government of the United States," suggests that the transfer was made for the limited purpose of creating the District of Columbia under the District and Federal Enclaves Clause (found in section 8 of Article I). However, to the extent that the District and Federal Enclaves Clause, as discussed below, gives Congress the authority to both receive lands for the District of Columbia and subsequently dispose of them, the fact that the land grant was made pursuant to that Clause would appear to contemplate this possible result. Thus, the ultimate question as to what limits on congressional power exist regarding the land in question would appear to be determined by the District and Federal Enclaves Clause.

## The District and Federal Enclaves Clause

The District and Federal Enclaves Clause, Article I, Section 8, Cl. 17 of the United States Constitution, provides that:

> "[Congress shall have power . . .] [t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of 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.

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[14] In 1788, the General Assembly of Maryland authorized its representatives in Congress "to cede to the congress of the United States, any district in this state, not exceeding ten miles square, which the congress may fix upon and accept for the seat of government of the United States." An Act to Cede to Congress a District of Ten Miles Square in This State for the Seat of Government of the United States, 2 Kilty Laws of Md., ch. 46 (1788). In 1790, Congress accepted Maryland's offer of cession with only a general indication of the land to be accepted. An Act for Establishing the Temporary and Permanent Seat of the Government of the United States, 1 Stat. 130 (1790). *See* Adams v. Clinton, 90 F. Supp. 2d 35, 57-58 (D.D.C. 2000).

[15] 2 Kilty Laws of Maryland 1791, ch. 45 (1800) *as quoted in* Adams v. Clinton, 90 F. Supp. 2d at 58.

[16] Gray v. Harriet Lane Home for Invalid Children, 64 A.2d 102, 108 (Md. 1949).

[17] Id.

[18] Id.

The District and Federal Enclaves Clause establishes the procedure for the creation of a federal seat of government, as well as other federal enclaves within the United States that are suitable for military bases or other government facilities. The District and Federal Enclaves Clause also provides that Congress has "exclusive legislation in all Cases whatsoever" over these lands. Based on this language, courts have found that Congress has "plenary" or the blended powers of both a local and national legislature over these places.[19] Because of this plenary power, some ordinary constitutional restrictions do not operate. For instance, when creating local courts of local jurisdiction in the District, Congress acts pursuant to its legislative powers under the District and Enclaves Clause, so it does not need to create courts that comply with Article III court requirements.[20]

One concern that has been raised about statehood for the District of Columbia is whether Congress has the authority under the District and Federal Enclaves Clause to dispose of a significant part of the District. Under this argument, there is a minimum size for the District of Columbia that Congress is required to maintain in order to fulfill the purpose for the creation of the District. Further, the argument goes, once Congress has determined the necessary amount of land required and has accepted those ceded lands from the states, it cannot dispose of any of those lands, regardless of whether there is a continued need for them. Under this argument, the borders of the District of Columbia are irrevocably fixed once the seat of government has been established.[21]

It should be noted, however, that the District and Federal Enclaves Clause has no textual limitation that prevents Congress from reducing the amount of land associated with either the District of Columbia or with other federal enclaves. Further, there is no case law suggesting that such limitation exists, despite the fact that the borders of the District have been reduced since the land was ceded to the federal government. The only explicit limitation provided in the Clause is that Congress shall not establish a district larger than ten miles square, and the existence of this upper limit suggests that no specific lower limit exists. The flexibility provided to Congress to choose not only the location, but also the size of such district, suggests that the Founding Fathers intended to leave the determination of the appropriate size and place of the District to Congress.

There is also some indication that the Founding Fathers anticipated the need for the District of Columbia to vary in size or location after its formation. In the Constitutional Convention, Charles Pinckney of South Carolina suggested that the Committee on Detail report out language authorizing Congress "to fix and permanently establish the seat of Government of the [United States]."[22] Although part of his proposal was eventually incorporated into what became the District Clause, the word "permanently" was dropped in committee.[23] This suggests that the Founding Fathers intended for Congress to be left with the flexibility to move the capital to another location if events required such.[24]

In practice, Congress has reduced the boundaries of the District of Columbia before. In 1791, soon after Congress accepted the cession of land to create the District, the First Congress amended the act of

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[19] Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524, 619 (1838); Shoemaker v. United States, 147 U.S. 282, 300 (1893); Atlantic Cleaners & Dyers v. United States, 286 U.S. 427, 435 (1932); O'Donoghue v. United States, 289 U.S. 516, 518 (1933).

[20] Palmore v. United States, 411 U.S. 389 (1973). *See also* Swain v. Pressley, 430 U.S. 372 (1977).

[21] OLP Report at 18-21, *supra*, note 12.

[22] James Madison, The Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States (Gaillard Hund & James Brown Scott eds., 1920).

[23] Raven-Hansen, *supra* note 13, at 168.

[24] *See also* THE FEDERALIST, No. 43 (J. Cooke ed. 1961) ("]T]he gradual accumulation of public improvements at the stationary residence of the government would be both too great a public pledge to be left in the hands of a single State, and would create . . . *many obstacles to a removal of the government* . . .") (emphasis added).

acceptance, changing the southern boundary of the District.[25] This amendment, which was voted for by James Madison and other framers of the Constitution, amended the act which had accepted cession[26] to include portions of what are now Anacostia and Alexandria.[27] This strengthens the argument that Congress has the authority to vary the size of the District of Columbia, as the Supreme Court has held that acts passed by the first Congress, which contained many Members who had taken part in framing the Constitution, have special significance in discerning constitutional meaning.[28]

In 1846, Congress provided for a more significant alteration of the District of Columbia boundaries. Based on a variety of factors, including economic stagnation exacerbated by the decision not to locate federal buildings across the Potomac River, efforts were made to retrocede to Virginia that portion of the District formerly within Virginia's borders.[29] Congress subsequently passed a bill providing for the retrocession of close to one-third of the District of Columbia back to Virginia.[30] The constitutionality of the retrocession did come before the Supreme Court in the case of *Phillips v. Payne*,[31] but the Court in that case held that the passage of thirty years from the retrocession to the constitutional challenge "estopped" the plaintiff and prevented the Court from reaching the merits of the case.

It should also be noted the language of the District and Federal Enclaves Clause provides that Congress shall "exercise like Authority" as is exercised over the District "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." Further, Article IV, section 3, cl. 2 provides that Congress shall have "[p]ower to dispose of . . . Property belonging to the United States," and there are numerous instances where the United States has ceased to exercise ceded jurisdiction over federal enclaves by retrocession[32] or even by transfer of lands to another state.[33] Many of these transfers involved only partial retrocession of jurisdiction, for purposes such as providing voting rights for inhabitants of an enclave[34] or to allow states to police the highways of enclaves.[35] There have, however, been instances in which the federal government has ceded all legislative jurisdiction over a federal enclave to a state,[36] and the Supreme Court has suggested that there are few limitations on agreements between states and the federal

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[25] An Act to amend "An act for establishing the temporary and permanent seat of the Government of the United States," Act of March 3, 1791, 1 Stat. 214.

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

[27] Raven-Hansen, *supra* note 113, at 169.

[28] Marsh v. Chambers, 463 U.S. 783, 790 (1983).

[29] Mark David Richards , *The Debates over the Retrocession of the District of Columbia, 1801-2004*, Washington History,Vol. 16, No. 1 at 54, 60-62 (Spring/Summer, 2004).

[30] An Act to Retrocede the County of Alexandria, in the District of Columbia, to the State of Virginia, Act of July 9, ch. 351846, 9 Stat. 35.

[31] 92 U.S. 130, 132 (1875).

[32] *See* U.S. Interdepartmental Comm. For the Study of Jurisdiction Over Federal Areas Within the States, at 87-88, 90-93 *in* 2 JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES: A TEXT OF THE LAW OF LEGISLATIVE JURISDICTION (1957) (available at http://babel.hathitrust.org/cgi/pt?id=mdp.39015053597798;view=1up;seq=1).

[33] *See, e.g.* Act of Feb. 22, 1869, 44 Stat. 1176 (ceding to Virginia the authority to police an area originally ceded to the United States from Maryland).

[34] Id. at 90-93.

[35] Id. at 93-94.

[36] Id. at 89. *See* 66 Pub. L. 395, 41 Stat. 1439 (1921) (retroceding land acquired by the United States to house government employees to Virginia); 81 Pub. L. 14, 63 Stat. 11 (1949) (retroceding Los Alamos Atomic Energy Commission area to New Mexico); Public Law 83-704, 68 Stat. 961 (1954) (retroceding jurisdiction over Atomic Energy Commission land at Sandia Base, Albuquerque to New Mexico).

government as to how legislative authority over lands may be allocated.[37] Arguably, if Congress has significant discretion in the acquisition and disposal of federal enclaves, then it has "like authority" regarding the District itself.

Finally, concerns have been raised that the withdrawal of the populated areas of the District of Columbia into the proposed State of New Columbia is inconsistent with the intent of the District and Federal Enclaves Clause, as it would leave the federal government dependent on the State of New Columbia's infrastructure and services for protection of the health and safety of federal employees, officers, and elected officials. This argument is based on the assertion that the District Clause was intended to completely remove a new federal Capital from the control of any state, motivated in part by a desire to avoid a repeat of the humiliation suffered by the Continental Congress on June 21, 1783. In that incident, some eighty soldiers marched on Congress, which was sitting in Philadelphia, and physically threatened and verbally abused the Members. Neither municipal nor state authorities would take action to protect the Members of Congress,[38] and the Members were forced to flee the city.[39]

Beyond establishing a geographical enclave with a public health and safety infrastructure, it seems clear that the Founding Fathers also anticipated that the District of Columbia would have permanent local residents. James Madison, writing in The Federalist, assumed that there would be inhabitants at the seat of government who would have "their voice in the election of the government which is to exercise authority over them, as a municipal legislature for all local purposes, derived from their own suffrages, will of course be allowed them. . . ."[40] At the time of the establishment of the District of Columbia, however, permanent residents totaled just over 8,000, so the relevance of a sizable local population to support the purposes of the District and Federal Enclaves Clause is not clear. Further, the fact that many federal workers currently live in Maryland and Virginia would seem to diminish the significance of how many inhabitants must reside in the District of Columbia.

The ultimate question here would seem to be whether there would be sufficient infrastructure and services within the District of Columbia to meet the needs of the federal government after the admission of the State of New Columbia. The concern would be that, if the District of Columbia's public safety infrastructure and other services were transferred to the State of New Columbia, this would make the federal government so dependent on the new state that it would defeat the purpose of the District and Federal Enclaves Clause.

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[37] Fort Leavenworth Railroad Co. v. Lowe, 114 U.S. 525, 541-42 (1885). In *Lowe*, the Court stated that:

> [T]he state and general government, may deal with each other in any way they may deem best to carry out the purposes of the constitution. It is for the protection and interests of the states, their people and property, as well as for the protection and interests of the people generally of the United States, that forts, arsenals, and other buildings for public uses are constructed within the states. As instrumentalities for the execution of the powers of the general government, they are, as already said, exempt from such control of the states as would defeat or impair their use for those purposes; and if, to their more effective use, a cession of legislative authority and political jurisdiction by the state would be desirable, we do not perceive any objection to its grant by the legislature of the state.

[38] J. Fiske, THE CRITICAL PERIOD OF AMERICAN HISTORY, 1783-1789, at 112-113 (1888); W. Tindall, THE ORIGIN AND GOVERNMENT OF THE DISTRICT OF COLUMBIA, at 31-36 (1903).

[39] Thus, Madison noted that "[t]he indispensable necessity of complete authority at the seat of government, carries its own evidence with it. . . . Without it, not only the public authority might be insulted and its proceedings interrupted with impunity, but a dependence of the members of the general government on the State comprehending the seat of government, for protection in the exercise of their duty, might bring on the national council an imputation of awe or influence, equally dishonorable to the government and dissatisfactory to the other members of the confederacy." THE FEDERALIST, No. 43 at 288-89 (J. Cooke ed. 1961). *See also* 3 J. Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1213, 1214 (1833).

[40] THE FEDERALIST, No. 43 at 289 (J. Cooke ed. 1961).

An evaluation of the infrastructure and services that the current District of Columbia provides the federal government is beyond the scope of my testimony today, as is what federal infrastructure and services would be available in the District of Columbia after the State of New Columbia was established under S. 132. Clearly, the federal government has authority to provide for its own infrastructure and service, and to some extent the federal government has already done so. However, it is also the case that it might be difficult or impractical to replicate the infrastructure or services currently provided by the existing District of Columbia.

How would the courts be likely to resolve this issue? There appears to be little or no case law addressing whether the federal courts would consider the size of the District of Columbia a decision that is within the courts' purview. Certainly, the decision as to whether the State of New Columbia was sufficiently populous or of sufficient size to be admitted under the Admissions Clause might evade court review.[41] Whether the court would be similarly deferential to a decision to reduce the size of the District of Columbia is not clear, but it is also difficult to envision the standards under which the courts would make such an evaluation. One would assume, however, that the courts would provide some deference if Congress were to determine that sufficient infrastructure and services could be provided within a smaller portion of the District of Columbia so as to avoid unnecessary influence from the surrounding states.

## The Twenty-Third Amendment

Another concern that has been expressed about granting D.C. statehood is that such a statute would be incompatible with the Twenty-Third Amendment. The Twenty-Third Amendment provides that:

> Sec. 1. 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.
>
> Sec. 2. The Congress shall have power to enforce this article by appropriate legislation.

The purpose of this amendment was to provide the citizens of the District of Columbia with the right to vote in the national elections for President and Vice President of the United States. It gives District citizens the right to choose presidential electors who, along with electors from the states, would participate in electing the President and Vice President. As noted in the associated House Report, however, the Amendment would "perpetuate recognition of the unique status of the District as the seat of Federal Government under the exclusive legislative control of Congress."[42]

Now, the Twenty-Third Amendment does not textually appear to address either the power of Congress to admit states or the power of Congress under the District and Federal Enclaves Clause to dispose of property. Rather the concern is that admission of the State of New Columbia, by depriving the District of Columbia of a local population, would either make the Twenty-Third Amendment a "dead letter" or that it would leave the electoral franchise to the few persons living in the new District of Columbia, such as the President of the United States and his family.

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[41] *See* discussion accompanying footnotes 8-10, *supra*.

[42] H.R. Rep. No. 1698, 86th Cong. 2d Sess. 1, 2 (1960).

The first concern, that the Twenty-Third Amendment would be rendered a "dead letter" by the passage of a statute, does not appear to be of constitutional import. In general, it is the case that the Constitution cannot be amended by a statute. However, there appears to be no such conflict if a properly authorized federal statute has the practical result that a constitutional provision would fall into disuse. For instance, the Constitution provides that states have authority to establish the time, place and manner for the holding of U.S. House and Senate elections, subject to congressional revision.[43] The allocation of this power to the state, however, would not appear to prevent Congress from enacting comprehensive electoral regulations, occupying the legislative field, and for practical purposes making the states' power to regulate elections inoperative.

A more significant question is whether residents of the new federal enclave would be authorized to exercise the three electoral votes allocated to the residents of the District of Columbia. For instance, the White House, which would be located in the District of Columbia after passage of the S. 132, serves as the official residence of the President and his family, and would presumably continue to do so after the admission of the State of New Columbia. Now, it would appear that the mechanism for exercising the electoral franchise of the Twenty-Third Amendment would no longer exist after the passage of S. 132, as § 203 of the proposed bill would repeal the implementing legislation for that Amendment. In theory, however, a President and his family could bring a law suit under the Twenty-Third Amendment, seeking to mandamus the federal government to establish a mechanism for such vote to be effectuated. Thus, the possibility remains that a court could provide for this electoral franchise to continue to be exercised, allowing any residents remaining in the District of Columbia to vote for three electors for the Electoral College. It is not clear, however, whether such a law suit is likely to be brought.

[43] U.S. Const. Art. I, § 4, cl. 1.

DC Statehood: Support for the New Columbia Admission Act of 2013

Written Testimony Submitted by
Charles Allen, Democratic nominee, Council of the District of Columbia - Ward 6

September 30, 2014

Chairman Carper, Ranking Member Coburn, and Members of the Committee,

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As the incoming Ward 6 Councilmember, I have the honor and privilege of representing one of the largest, most diverse, and most dynamic wards in the District of Columbia. Ward 6 stretches from the historic Shaw community, through the up-and-coming NoMa neighborhood, and along the H Street NE corridor. It also includes the diverse Hill East community, follows the Anacostia River through the Navy Yard and Capitol Riverfront, and wraps around Buzzard Point to the Southwest neighborhood and the Washington Channel. In the middle of this ward is the neighborhood that borders the US Capitol: Capitol Hill. It's the neighborhood that many of the country's Senators, Members of Congress, and their staff reside.

Over the years, I have fielded calls from not only Congressional staff, but members, with issues that touch their lives - high quality schools for their children, growing small businesses and restaurants in their neighborhood, and ensuring dependable city services for their family. As their elected representative, it will be my job and responsibility to represent them, cast votes on legislation that impacts their lives, oversee the use of their local tax dollars, respond to their concerns, and work to improve the quality of their lives as a part of our great District of Columbia.

But that's where the relationship ends. There is no one in Congress for me to call. When Congress debates legislation impacting my life, I have no one to call. When Congress spends my tax dollars, I have no one to call. When Congress acts in ways that impact my life - or that of my family - I have no one to call.

The lack of full representation is an injustice that should end.

Many times you have heard our pleas that District residents fight and die in American wars and that District residents pay millions in federal taxes - all with no voice of representation. The New Columbia Admission Act can change that.

My challenge to the members of this committee, and to the entire Senate and House of Representatives, is this - either you believe the 646,000 residents of the District of Columbia are American citizens, or you don't. The fundamental tenet of our nation is a democracy where the people are represented -- and we have worked for over 200 years to realize that more perfect Union.

Over the centuries, this great nation has corrected our Founding Fathers mistakes. This nation has recognized that women are equal, and equally deserving of the right to vote for their representation. This nation has recognized that African-Americans are equal, and equally deserving of the right to vote for their representation.

I urge you – along with the hundreds of individuals listed below that signed a petition asking the same – to approve the New Columbia Admissions Act to bring what is right, just, and equal to the residents of the District of Columbia.

| | | | | | |
|---|---|---|---|---|---|
| Nathan Alberg | Washington | DC | Elizabeth Bacon | Washington | DC |
| Rick Bardash | Washington | DC | Robert Pohl | Washington | DC |
| Michael Berger | Washington | DC | Katie Niehaus | Washington | DC |
| Corinne Cannon | Washington | DC | Mary Procter | Washington | DC |
| Mumbi Carter | Washington | DC | Samuel Huxley | Washington | DC |
| Julia Robey Christian | Washington | DC | Michael Grace | Washington | DC |
| Bruce Darconte | Washington | DC | Sean Ward | Washington | DC |
| Mark Eckenwiler | Washington | DC | Christopher Sondreal | Washington | DC |
| Michael Godec | Washington | DC | Philip Toomajian | Washington | DC |
| Geoffrey Hatchard | Washington | DC | Tony Hurst | Washington | DC |
| Sarah Heffern | Washington | DC | Tarsha Devoe | Washington | DC |
| Michael Herman | Washington | DC | Darryl Pounds | Washington | DC |
| Martha Huizenga | Washington | DC | Alice Love | Washington | DC |
| Timothy Krepp | Washington | DC | Alan Perkins | Washington | DC |
| Kesh Ladduwahetty | Washington | DC | Myles Doherty | Washington | DC |
| Julie Lawson | Washington | DC | Tadashia Greenhill | Washington | DC |
| James Loots | Washington | DC | Kathryn Anderson | Washington | DC |
| Tom Madison | Washington | DC | Josei Harris | Washington | DC |
| Laura Marks | Washington | DC | Jennifer Gajdosik | Washington | DC |
| Nancy Masterson | Washington | DC | Aldwyn Hamilton | Washington | DC |
| Brian McEntee | Washington | DC | Robert Savelson | Washington | DC |
| Mindy Moretti | Washington | DC | William Cocke | Washington | DC |
| Rachel Reilly Carroll | Washington | DC | Antoinette Burnham | Washington | DC |
| Rick Rosendall | Washington | DC | Vicki Breman | Washington | DC |
| Seth Shapiro | Washington | DC | Richard Shea | Washington | DC |
| Keith Silver | Washington | DC | Marc Eisenberg | Washington | DC |
| Robert Summersgill | Washington | DC | Laura Brogan | Washington | DC |
| Dana Wycoff | Washington | DC | Mark Dedrick | Washington | DC |
| Sadie Healy | Washington | DC | Ana Unruh Cohen | Washington | DC |
| William Courtney | Washington | DC | Ivan Frishberg | Washington | DC |
| Diana Zinkl | Washington | DC | Adele Sheehan | Washington | DC |
| Baumanis | Washington | DC | Elizabeth Gossens | Washington | DC |
| Carolyn & Jeff Serfass | Washington | DC | Matthew Norris | Washington | DC |

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| Ramona Hupp | Washington | DC | Doris Morin | Washington | DC |
| Corinne and David Scott | Washington | DC | Courtney Sheehan | Washington | DC |
| Jane Jorgensen | Washington | DC | Victoria Dunning | Washington | DC |
| Mary Ternes | Washington | DC | Scott Magnuson | Washington | DC |
| Scott Long | Washington | DC | Theresa Pangelinan | Washington | DC |
| Jordan Usdan | Washington | DC | Joseph Rauscher | Washington | DC |
| Michelle Harburg | Washington | DC | Susan Sedgewick | Washington | DC |
| Stan Kolbe | Washington | DC | Kevin Wheeler | Washington | DC |
| Adam Stinelli | Washington | DC | Ellis Richard | Washington | DC |
| Jesse Leifert | Washington | DC | Holly Harper | Washington | DC |
| Rebecca Schendel Norris | Washington | DC | James McKay | Washington | DC |
| Matt Tucker | Washington | DC | Bob Fiddler | Washington | DC |
| Paul Gay | Washington | DC | Lise Bruneau | Washington | DC |
| Justin Gelito | Washington | DC | Patrick Hodgens | Washington | DC |
| Samuel Sweet | Washington | DC | Molly Wagoner | Washington | DC |
| Jill Strachan | Washington | DC | Sarah Porter | Washington | DC |
| Elaine Graves | Washington | DC | Sean Murphy | Washington | DC |
| Janice Kruger | Washington | DC | David Goldblatt | Washington | DC |
| Jared Critchfield | Washington | DC | Thomas Wackman | Washington | DC |
| Mary McCue | Washington | DC | Judith Knee | Washington | DC |
| Staci Walkes | Washington | DC | Dave Salovesh | Washington | DC |
| Anne Corbett | Washington | DC | Barbara Moon | Washington | DC |
| Sandra Moscoso Mills | Washington | DC | Marguerite Nutter | Washington | DC |
| Chuck Burger | Washington | DC | Joe Weedon | Washington | DC |
| Carl Nash | Washington | DC | Adam Kent | | |
| Sean Pichon | Washington | DC | Kelly Godsoe | Washington | DC |
| Phyllis Jane Young | Washington | DC | Danica Petroshius | Washington | DC |
| Anne Willis | Washington | DC | Kitty Richards | Washington | DC |
| Anne Kraemer | Washington | DC | Cullen McDonald | Washington | DC |
| Brian Chamowitz | Washington | DC | Nichole Remmert | | |
| Clare Feinson | Washington | DC | Maryam Nock | Washington | DC |
| Elissa Silverman | Washington | DC | Monica Rao | Washington | DC |
| John Zottoli | Washington | DC | Brian Adkins | Washington | DC |
| Michael Hindi | Washington | DC | Peter Gladis | Plainville | CT |
| Steven Carfagno | Washington | DC | Jonathan Goldfuss | Washington | DC |
| Nichole Opkins | Washington | DC | Robert Stillwell | Washington | DC |
| Tiffany Milone | Washington | DC | Kimberley Isbell | Washington | DC |
| Barbara Mowat | Washington | DC | Amanda Davis-Aitken | Washington | DC |
| Susan Borchardt | Washington | DC | Tara Flakker | Washington | DC |
| Barbara Bonessa | Washington | DC | Hilary Hansen | Washington | DC |
| Marc Ferrara | Washington | DC | Marc Nelson | Washington | DC |
| Peter Theil | Washington | DC | Kevin Kelly | Washington | DC |
| Matthild Schneider | Washington | DC | Jessica Bul | Washington | DC |

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|---|---|---|---|---|---|
| Larry Slagle | Washington | DC | Roberta Stewart | Washington | DC |
| Elsa Huxley | Washington | DC | Stephen O'Connor | Rockville | MD |
| Gloria Junge | Washington | DC | Alexandra Alberg | | |
| Peterbug Matthews | Washington | DC | Bryan Weaver | Washington | DC |
| Christopher Hutson | Washington | DC | Pedro Urquilla | Hyattsville | MD |
| Ibrahim Mumin | Washington | DC | Henry Coppola | Washington | DC |
| Ellen Spencer | Washington | DC | Tom Bridge | Washington | DC |
| Joshua Bedwell | Washington | DC | Lee Granados | Washington | DC |
| Lucy Rojansky | Washington | DC | Shawn Smith | | |
| Jennifer Demayo | Washington | DC | Charlotte Oman | Washington | DC |
| Robert Dardano | Washington | DC | Katherine Loveric | Washington | DC |
| Patricia Joseph | Washington | DC | Georgia Abraham | Washington | DC |
| Charles Allen | Washington | DC | Antonio Barnes | Washington | DC |
| Rebecca Brink | Washington | DC | Katherine Coventry | | |
| Jesse Lovell | Washington | DC | Britaini Carroll | Washington | DC |
| Bonnie Cain | Washington | DC | Russell Ward | Washington | DC |
| Naomi Mitchell | Washington | DC | jason cross | Washington | DC |
| Chris Burch | Washington | DC | Nathan Cross | Arlington | VA |
| Michael Templeman | Washington | DC | Christine McCoy | | |
| Jill Cashen | Washington | DC | David Zurbuchen | Washington | DC |
| Jay Williams | Washington | DC | | | |

**DC Voting Rights Project**
**Committee for the Capital City**
**PO Box 77443**
**Washington DC 20013**

September 30, 2014

The Honorable Thomas R. Carper
Chairman
Committee on Homeland Security and Governmental Affairs
United States Senate
Washington DC 20510

Dear Chairman Carper:

Thank you for the opportunity to submit testimony for the record concerning the hearing you chaired on September 15, 2014 regarding voting rights for residents of the District of Columbia and S. 132, The New Columbia Admissions Act.

The DC Voting Rights Project of the Committee for the Capital City believes you struck exactly the correct tone in your comments and questions during the hearing. You talked about educating a new generation regarding DC's lack of voting rights, about seeking wisdom and applying the Golden Rule, about "finding a workable solution," and, regarding statehood, your repeatedly asked, "if not this proposal, which?" We wish we could have testified, because those you heard from did not address all the options for statehood.

We concur that the time is now to put more ideas on the table, which means looking at more than just the one option of making the District of Columbia the 51st state. As we see it, another way to provide DC statehood is for DC to join an existing state. Re-joining Maryland or voting through Maryland has not received adequate consideration. In light of the difficulty so far in achieving voting rights and home rule for the citizens of the District of Columbia, it is time to explore all options that achieve these goals, and we hope to be helpful in this regard. It is time for a paradigm shift in how we work to achieve full DC voting rights.

If we can provide further information, we would be pleased to be of assistance. I can be reached at 202-906-9200, or by email at johnfordc@hotmail.com.

Respectfully submitted,

John Forster
Activities Coordinator
DC Voting Rights Project
Committee for the Capital City

Attachment

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For More Information:
John Forster, Activities Coordinator, Committee for the Capital City
JohnForDC@hotmail.com
202-906-9200 cell/text

**DC VOTING RIGHTS PROJECT**
**COMMITTEE FOR THE CAPITAL CITY**

**TESTIMONY SUBMITTED FOR THE RECORD**

**THE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS**
**UNITED STATES SENATE**

**HEARINGS on S. 132 "THE NEW COLUMBIA ADMISSION ACT of 2013"**
**"Equality for the District of Columbia: Discussing the Implications of S. 132**

**SEPTEMBER 15, 2014**

Thank you Chairman Carper for the opportunity to provide testimony for the record of the Committee's hearings on securing full voting rights for the residents of the District of Columbia and on S. 132, the New Columbia Admission Act.

The Committee for the Capital City is a non-profit, non-partisan citizens organization that since 1995 has exclusively focused on identifying workable solutions to the problem of the lack of voting rights and home-rule for the people of the District of Columbia. We recently launched the DC Voting Rights Project to take our message to the public.

Residents of the District of Columbia want and deserve full voting rights and home rule equal to that of all other Americans, rights they have been denied for over two hundred years. This injustice is well known and well documented. Our testimony addresses alternative methods of providing these rights and responsibilities in ways that are both politically realistic and constitutionally sound.

There are two approaches to achieve statehood for the District of Columbia. One is to become a new state as is envisioned by S. 132. An alternate approach is for DC to join an existing state. Because the

part of the District of Columbia that was originally ceded to the federal government by Virginia was successfully reunited with that state by Congressional action in 1846, we have studied the potential return of the remainder to Maryland, as well as other Maryland-based voting rights solutions.

This statehood alternative of joining an existing state needs to be equally considered with forming a new state because of four significant concerns:

1. Republican members of Congress are universally opposed to creating two new US Senate seats for what is now the District of Columbia. We note that there are currently no Republican supporters of either S. 132 or the identical House bill H.R. 292, even though Republicans are on record as supporting voting rights for DC residents by other means.

2. Some US Senators from large-population states may not support their Senate representation being diluted by the addition of Senate representation for one city-state. For example, ranked by population, there are three counties in Maryland that are bigger than DC and the city of Baltimore is similar.

3. Some US Senators from rural agrarian states may not support the addition of two Senate members exclusively representing an urban area.

4. Maryland elected officials may ultimately choose not to support a solution that could lead to the creation of a commuter tax. For the same reason, any Virginian support for a new state is equally suspect.

**A SOLUTION WITH BI-PARTISAN SUPPORT**

In addition to considering the existing statehood proposal S. 132, Congress, Maryland, and DC should consider other solutions that are likely to generate Republican support and avoid the possibility of a commuter tax.

We have concluded that rejoining Maryland has all the ingredients to gain support from DC residents, Maryland residents, and Congress.

Maryland consists of twenty-three counties and one home-rule city (Baltimore.) A solution that re-unifies the city of Washington with Maryland as a unique home-rule city like Baltimore has many benefits for the residents of DC and Maryland, as well as the country as a whole.

**BENEFITS FOR DISTRICT RESIDENTS**

What would DC residents stand to gain if DC became a part of Maryland?

1. The city would retain its unique status and character as the nations "Capital City." Washington would retain all that its residents currently enjoy: its existing borders, its existing elected officials, its vibrant neighborhoods and local civic involvement.

2. As part of a unique political subdivision within the state of Maryland, DC's current residents would finally have the representation of two US Senators, and a voting Representative in Congress. If DC were fully integrated with Maryland, its residents would gain five additional elected statewide leaders including the Governor, and the addition of potentially four Maryland state senators and twelve Maryland state delegates to Annapolis. These twenty-four new elected representatives for the people of the District of Columbia would create political representation, participation, and accountability equal to that of all other Americans. Furthermore, DC's locally elected officials would be accountable to only them. Political life in DC would no longer be a dead-end street, segregated from the rest of our American political system.

3. Joining Maryland would lead to many additional benefits as these two entities combine their resources and realize numerous cost savings and efficiencies. Does DC really need to duplicate all the costly statewide functions already existing in Maryland? DC residents would no longer have to support both city and state functions from a city revenue base where large portions of both its land and income are not subject to local taxation because the federal government and other non-taxable entities own the land and the income is earned by non-residents.

4. DC residents would gain full voting rights and home-rule equivalent to that of all other Americans. The days of "taxation without representation" would end and DC would no longer be under the control of the federal government.

**BENEFITS FOR MARYLAND RESIDENTS**

There are also many benefits that would accrue to Maryland from assimilating DC back into Maryland:

1. The State of Maryland would gain an extra electoral vote in the Presidential elections and an additional member of its Congressional delegation.

2. DC has a Gross State Product (GSP) greater than that of 16 states, adding approximately 33% to Maryland's economic power.

3. DC has balanced its budget for 17 straight years and has a record budget surplus.

4. DC residents have a higher per capita income than Maryland residents.

5. DC has a higher portion of its residents with a college degree than Maryland.

6. Marylanders would take pride in becoming the nations "Capital State." Maryland would be better positioned to compete for local, national, and international economic activity. Further, Maryland would reinforce its history as the state that provided the federal government its capital city. Expanding Maryland back to its original size would likely produce numerous unpredictable benefits for Maryland.

7. The vast majority of Maryland jurisdictions would likely welcome the return of District residents back into Maryland. Montgomery and Prince Georges Counties would benefit from the increased political power of the Washington suburbs while Baltimore would likely support the additional attention to urban issues and the empowerment of DC residents. To the Democrats who currently control Maryland, the addition of DC would strengthen their control.

8. Maryland would no longer run the risk of DC being allowed to implement a commuter tax.

**BENEFITS FOR CONGRESS AND THE AMERICAN PEOPLE**

Congress has an interest in providing voting rights for DC residents and would likely approve a plan with bi-partisan support.

1. The United States of America is now the only democracy in the world that denies the residents of its capital city representation in the national legislature. It has become an international embarrassment for the US to be charged with this human rights violation in its own capital city.

2. Congress has more important issues to focus on than the local affairs of the residents of Washington, DC.

3. Congress would continue to exercise exclusive legislation and control over federally owned land in Maryland which would then include the federal buildings on the mall in addition to its other facilities in Maryland such as the National Institutes of Health campus in Bethesda and the NSA at Fort Meade. This control would be identical to the exclusive control Congress has over all other federal holdings providing critical federal functions like the Pentagon and CIA facilities in Virginia. The federal government owns almost 30% of the land in the United States and has no difficulty in successfully asserting its authority in those areas without state interference. The citizens who live on those federal lands similarly have no difficulty voting as citizens of those states.

4. Congress could solve a problem and demonstrate broad bi-partisan support. Republicans and Democrats alike favor voting rights and full democracy for DC residents, as long as the solution doesn't lead to statehood or two new exclusive US

Senators representing the people of Washington DC. Reuniting DC with Maryland is a solution both parties can support.

**OTHER DC VOTING RIGHTS AND HOME RULE ALTERNATIVES**

Notwithstanding this elegant, complete, and bi-partisan solution to the long-standing seemingly insurmountable problem of how to provide voting rights and home rule for the citizens of DC, there are other interim steps Congress could take to right these wrongs. There have been many calls for budget and legislative autonomy that Congress could fully delegate to the City of Washington. Legislation is pending to address these issues and should be adopted without delay.

There is also a bill currently in the House that provides full federal voting rights for the residents of the District of Columbia. This legislation, which is strongly supported by the Committee for the Capital City, is H.R. 299, the "District of Columbia Voting Rights Restoration Act of 2013", introduced by Rep Dana Rohrabacher (R-CA).

H.R. 299 restores the rights of DC residents to vote as part of the Maryland electorate solely for the purposes of federal voting rights. As we know, the city of Washington was originally a part of Maryland when the nation was formed. Even after Maryland ceded the land to the federal government, DC residents continued to vote in Maryland's federal elections until Congress took away that right with passage of the "Organic Act of 1801" which formally established the jurisdiction of the District of Columbia. H.R. 299 seeks to restore this right to a federal vote by allowing DC residents to be fully represented in Congress by their current Delegate, who would become a real Representative, as well as the two Maryland US Senators. DC residents would be eligible to run for all three elected positions.

As an interim step to full voting rights, legislation could also be drafted that would provide House-only representation for DC residents as part of the Maryland delegation. Incorporating the new seat as part of the Maryland delegation would overcome the constitutional issues that faced previous efforts along these lines.

The Committee for the Capital City and the DC Voting Rights Project call on the elected officials of Congress, Maryland, and DC to hold hearings and conduct studies that explore all the options available to provide DC residents the voting rights and home rule they seek and are entitled to.

We've talked about this lack of equal voting rights and home rule for the citizens of DC long enough. It's now time to debate the solutions and solve the problem. It is time for our elected official in Congress, Maryland, and DC to act.

# THEORIES OF REPRESENTATION: FOR THE DISTRICT OF COLUMBIA, ONLY STATEHOOD WILL DO

Mary M. Cheh*

## INTRODUCTION

The District of Columbia suffers uniquely for its position as the seat of the national government. Because it is not a state, it does not qualify for congressional representation and has no vote in the national legislature, even as to matters affecting entirely local interests.[1] Indeed, Article 1, Section 8 of the U.S. Constitution vests Congress with the power to "exercise exclusive legislation in all cases whatsoever" over the District, which permits Congress to pass laws ranging from budget control to street sweeping.[2] The fact that the District exercises any local authority at all arises from permission granted to it by Congress.[3]

Indeed, the District's uniquely impoverished democracy renders its situation even worse than that of the territories. Like residents of the District, people living in U.S. territories have no right to vote for members of Congress, their laws may be nullified by Congress, and, although they may send a delegate to Congress, the delegate has no vote there.[4] But, unlike a territory, the District has no historically settled path to statehood.[5] The District has always been geographically part of the

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[1] *See generally* Peter Raven-Hansen, *Congressional Representation for the District of Columbia: A Constitutional Analysis*, 12 HARV. J. LEGIS. 167, 174–79 (1975) [hereinafter Raven-Hansen, *Congressional Representation*] (discussing the disenfranchising effect of the 1801 legislation that provided for the formation of the federal District).

[2] U.S. CONST. art. I, § 8 cl. 17; *see, e.g.*, Neild v. District of Columbia, 110 F.2d 246, 250–51 (D.C. Cir. 1940) (finding the District Clause gives Congress broad control over the District's affairs, allowing it to legislate on an array of issues).

[3] Home Rule Act, Pub. L. No. 93-198, 87 Stat. 774 (1973). *See infra* Part III.C.

[4] 2 U.S.C. § 25a (2012).

[5] *See D.C. Statehood: Hearing on H.R. 51 Before Subcomm. on Fiscal Affairs & Health of the H. Comm. on the District of Columbia*, 100th Cong. 228 (1987) (statement of Sen. Edward Kennedy) [hereinafter Statement of Sen. Kennedy] (noting the three historically recognized conditions for admission to statehood: "commitment to the principles of democracy, resources and population sufficient to support statehood, and the will of the people for statehood").

union, and its citizens previously exercised, but then lost, the right to vote for members of the national legislature.[6] Residents of the District must pay individual federal income taxes while, broadly speaking, those who reside in a territory are exempt from such taxation.[7] Perhaps most offensive, however, is the propensity of members of Congress to use the District as a political plaything. For example, members have chosen to trumpet their opposition to financing poor women's abortions, needle exchange, or medical marijuana by prohibiting local initiatives that would support such measures.[8]

This essay posits that the only complete legal and moral remedy for the District's political subjugation is statehood, and it explains why remedies short of statehood are inadequate. The essay then identifies the various paths to statehood. Finally, it discusses the strategic dilemma of the District either holding out exclusively for statehood or proceeding in incremental steps on that path.

## I. THE CASE FOR STATEHOOD

The 646,000 residents of the District of Columbia,[9] unlike the residents of any other democratic capital in the world, have no vote in their national legislature.[10]

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[6] *See* Raven-Hansen, *Congressional Representation, supra* note 1, at 174.

[7] *U.S. Insular Areas: Information on Fiscal Relations with the Federal Government: Hearing Before the Subcomm. on Native Am. & Insular Affairs of the H. Comm. on Res.*, 104th Cong. 177–79 (1995) (statement of Natwar M. Gandhi) (noting that residents of the United State's five insular territories do not pay federal income tax on earnings within the territories).

[8] *See* Ben Pershing, *Budget Deal Reminds D.C. that Congress is in Charge*, WASH. POST, Apr. 10, 2011, at A10, *available at* http://www.washingtonpost.com/blogs/dc-wire/post/sources-budget-deal-includes-dc-abortion-rider-money-for-school-vouchers/2011/04/08/AF3ET24C_blog.html (describing how Republicans included bans on needle exchange and use of local funds for abortions as part of budget deal to avoid a government shutdown); Phillip Smith, *Medical Marijuana: U.S. House Overturns Barr Amendment, Removes Obstacle to Implementing 1998 D.C. Vote*, STOP DRUG WAR (July 17, 2009, 12:00 AM), http://stopthedrugwar.org/chronicle/2009/jul/17/medical_marijuana_us_house_overt (reporting that because the Barr amendment was overturned, the District has been able to allow for the use of medical marijuana); *see also* Tim Craig, *D.C. Wire: Medical Marijuana Now Legal*, WASH. POST (July 27, 2010, 12:13 AM), http://voices.washingtonpost.com/dc/2010/07/medical_marijuana_now_legal.html (noting that the Districts's medical marijuana law passed when Congress "declined" to intervene).

[9] Aaron Wiener, *D.C. Population Boom Continued in 2013*, WASH. CITY PAPER (Dec. 30, 2013, 11:21 AM), http://www.washingtoncitypaper.com/blogs/housingcomplex/2013/12/30/d-c-population-boom-continued-in-2013/.

[10] *See* Tim Craig, *Obama to Use D.C. Protest License Plates*, WASH. POST, Jan. 16, 2013, at B1, B5, *available at* http://www.washingtonpost.com/local/dc-politics/Obama-to-use-dc-taxation-without-representation-license-plates/2013/01/05/f91b09ac-5f5b-11e2-99410-6fc488f3fecd_story.html ("[A]fter living in the city for four years [President Obama] has

And this legislature, the Congress of the United States, exercises complete dominion over District residents.[11] Because of this subordination, the District is sometimes called the "last colony."[12] This current, abject condition was never envisioned and never intended by the Framers when they drafted the District Clause of the Constitution giving Congress full power "[t]o exercise exclusive legislation in all cases whatsoever"[13] over the District.[14]

*A. History of the District*

To understand how this democratic anomaly came to be, we have to return to 1783 and the Confederation Congress. In June of that year, Congress, sitting in Independence Hall in Philadelphia, was besieged by soldiers of the Continental Army demanding back pay.[15] Although the actual danger of the mutiny was likely exaggerated by federalists who sought a strong central government,[16] and "historians do not agree on various details of what happened,"[17] it is clear that Congress asked Pennsylvania for protection[18] and Pennsylvania refused.[19] Faced with the inability to expeditiously protect itself,[20] the Congress adjourned and removed to Princeton, New Jersey.[21] When drafting the Constitution a mere four years later, members of the Constitutional Convention were far more concerned with creating a federal seat

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'seen how patently unfair it is for working families in D.C. to work hard, raise children and pay taxes, without having a vote in Congress.'").

[11] *See, e.g.*, Pershing, *supra* note 8 (noting that "Congress is in charge" and that "the District has precious little control over its finances").

[12] *See, e.g.*, Statement of Sen. Kennedy, *supra* note 5, at 227 ("The time has come in America's bicentennial year to end the unacceptable states of the District of Columbia as America's last colony.").

[13] U.S. CONST. art. I, § 8 cl. 17.

[14] *See infra* notes 124–125 and accompanying text.

[15] KENNETH R. BOWLING, THE CREATION OF WASHINGTON D.C.: THE IDEA AND LOCATION OF THE AMERICAN CAPITAL 30–32 (1991) (describing an armed demonstration of more than 250 continental soldiers seeking back pay from the Pennsylvanian government and surrounding a building full of not only state but federal congressmen).

[16] *Id.* at 34.

[17] Mark S. Scarberry, *Historical Considerations and Congressional Representation for the District of Columbia: Constitutionality of the D.C. House Voting Rights Bill in Light of Section Two of the Fourteenth Amendment and the History of the Creation of the District*, 60 ALA. L. REV. 783, 871 (2009).

[18] BOWLING, *supra* note 15, at 32; *see also* Raven-Hansen, *Congressional Representation*, *supra* note 1, at 169.

[19] BOWLING, *supra* note 15, at 32.

[20] Although, at one point, Congress considered ordering General George Washington to march troops on the city. *Id.* at 33.

[21] *Id.* at 33–34.

that could protect the federal government than considering whether the residents of that seat would be represented in the Congress they were creating.[22]

Lack of concern for the residents of the District was perhaps not a glaring defect at the time. In 1790, the District was little more than a swamp, with significant settlements only at Georgetown and Alexandria.[23] Even in 1800, twelve years after the ratification of the Constitution, the total population of the District had risen to only 14,093.[24] As Representative Randolph of Virginia would note in 1803, "[t]he other states can never be brought to consent that two Senators and, at least, three electors of the President, shall be chosen out of this small spot, and by a handful of men."[25] By 1960, however, when the population of the District had risen to over 760,000[26], the nation realized that the foundation of that statement had crumbled. This was signified by the ratification of the Twenty-Third Amendment to the Constitution, allowing the District to vote for electors for President of the United States.[27]

The Framers could not have foreseen that the District would grow to a population greater than both Wyoming and Vermont and close to the populations of several other states.[28] They could not have imagined states like Wyoming and Vermont sharing four Senators and two Representatives between them while hundreds of thousands of residents of the District remained disenfranchised. And it is incongruous to think that the Framers, having just fought a war to ensure that there would be no taxation without representation, would enshrine in the Constitution that same disability on such a significant population of their own countrymen. Now, in the

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[22] Raven-Hansen, *Congressional Representation*, *supra* note 1, at 171–72, 178.

[23] *See* S. REP. NO. 507, 67th Cong., 2d Sess. 13–14 (1922).

[24] *Id.* at 14, *cited in* Raven-Hansen, *Congressional Representation*, *supra* note 1, at 177. At the time of the 1800 Census, the population of the District was not counted separately, but rather included in the totals for Maryland and Virginia, respectively, for their ceded land. Although the Virginia data appears to be lost, the Maryland data reflects a population of 8,144 in the 1800 census. TABLE 23. DISTRICT OF COLUMBIA—RACE AND HISPANIC ORIGIN: 1800 TO 1990, CENSUS.GOV, http://www.census.gov/population/www/documentation/twps0056/tab23.pdf (last visited Apr. 4, 2014) [hereinafter RACE AND HISPANIC ORIGIN].

[25] 12 ANNALS OF CONG. 499 (1803), *quoted in* Raven-Hansen, *Congressional Representation*, *supra* note 1, at 178.

[26] *See* DISTRICT OF COLUMBIA POPULATION OF COUNTRIES BY DECENNIAL CENSUS: 1900 TO 1990, http://www.census.gov/population/cencounts/dc190090.txt (last visited Apr. 4, 2014).

[27] U.S. CONST. amend. XXIII § 1.

[28] *See* Wiener, *supra* note 9. Wyoming has a population of 582,658 people, and Vermont has a population of 626,630 people. *Id.* Alaska and North Dakota have populations of 735,132 people and 723,393 people, respectively. STATE & COUNTY QUICKFACTS: ALASKA, UNITED STATES CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/02000.html (last visited Apr. 4, 2014); STATE & COUNTY QUICKFACTS: NORTH DAKOTA, UNITED STATES CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/38000.html (last visited Apr. 4, 2014).

twenty-first century, to achieve equality and dignity of citizenship for District residents fully on par with all other citizens of the United States, statehood is the only complete and adequate answer.

*B. Creating a New State*

When territories are admitted to the Union, they are admitted under the "Equal Footing Doctrine."[29] That is, a new state acquires the same power, dignity, and authority of every other state and that equality may not thereafter be compromised.[30] If the District were admitted to the Union as a state, it too would be on equal footing with all other states. Such equality is not conferred for the benefit of the government—it is conferred for the people so that they might exercise the full powers of a local sovereign: the power to pass civil and criminal laws, to tax, to insure the health, safety, and welfare of their residents to the same extent as all other states, and to participate in the National government on equal terms.[31]

The three historically recognized conditions for territories to be admitted to the Union are commitment to democracy, the will of the people, and resources and population sufficient to support statehood.[32] There is no question that the residents of the District are fully committed to democratic governance. They have embraced every Home Rule[33] opportunity (impoverished as it may be), to exercise the right to vote and choose representatives based on democratic principles.[34] And the District's desire to assume statehood is reflected in the overwhelming support of a referendum seeking entry into the Union.[35] District residents ratified state constitutions in 1982 and 1987 referring to the proposed state of New Columbia.[36] Since 1990, they have also voted for shadow representation in Congress to advance statehood.[37]

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[29] *See, e.g.*, Johnny Barnes, *Towards Equal Footing: Responding to the Perceived Constitutional Legal and Practical Impediments to Statehood for the District of Columbia*, 13 D.C. L. REV. 1, 4–5 (2010) (describing the components of the Equal Footing Doctrine).

[30] Coyle v. Smith, 221 U.S. 559, 567 (1911).

[31] Van Brocklin v. Tennessee, 117 U.S. 151, 167–68 (1886).

[32] Statement of Sen. Kennedy, *supra* note 5, at 228.

[33] Pub. L. No. 93-198, 87 Stat. 774; *see infra* Part III.C.

[34] District voters approved the creation of an elected Attorney General position by referendum in 2010. Patrick Madden, *D.C. Council Pushes Back Election of Attorney General to 2018*, WAMU 88.5 (Oct. 2, 2013), http://wamu.org/news/13/10/02/dc_council_pushes_back_election_of_attorney_general_to_2018.

[35] *See* Lawrence M. Frankel, *National Representation for the District of Columbia: A Legislative Solution*, 139 U. PA. L. REV. 1659, 1678–79 n. 76 (1991) (noting that D.C. residents in 1980 "approved an initiative calling for statehood by a margin of 60% to 40%").

[36] D.C. CONST. of 1982, pmbl. (1982); D.C. CONST. of 1987, pmbl.

[37] Will Sommer, *Shadow of a Doubt*, WASH. CITY PAPER Sept. 6, 2013, http://www.washingtoncitypaper.com/articles/44734/shadow-of-a-doubt-dc-statehood-activists/.

Although there is hope for more expansive popular action,[38] such as large demonstrations and protests, there remains a constant undercurrent of agitation for statehood. The current Mayor and Council routinely call for statehood: the Mayor, Council Members, and a group of citizens were recently arrested protesting Congressional interference in local lawmaking,[39] and there is a steady drumbeat of advocacy by activists and groups in favor of statehood.[40]

But what of the third requirement, does the District have the population and resources to support statehood? As already indicated, the population of the District exceeds the population of Wyoming and Vermont, and it is growing.[41] Estimates are that the District's population is increasing by approximately one thousand to twelve hundred residents a month and projections are that it will continue on this trajectory for decades.[42] And contrary to some of the myths propagated about the District, its population is not entirely or even largely made up of transient military personnel or federal workers.[43] Like any other thriving state, the District's population is made up of families, children, singles, young professionals, white- and blue-collar workers, senior citizens, and students.[44] The District is home to distinct and thriving neighbor-

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[38] Jamin B. Raskin, *Domination, Democracy, and the District: The Statehood Position*, 39 CATH. U.L. REV. 417, 417–18 (1990) (proposing a popular movement to accelerate the statehood initiative process "with mass organizing and public protest to dramatize and transform the District's oppressed condition").

[39] *See DC Mayor Uses March Rally to Call for DC Statehood*, AP (Aug. 28, 2013), http://bigstory.ap.org/article/dc-mayor-uses-march-rally-call-dc-statehood; Ben Pershing, Mayor, *Council Members Are Arrested: D.C Rally Protests Budget Bill Riders that Restrict City Spending*, WASH. POST, Apr. 12, 2011, at A1, A11 *available at* http://www.washingtonpost.com/local/politics/gray-council-members-arrested-at-protest-of-dc-riders-in-spending-bill/2011/04/11/AFRWPBND_story.html.

[40] *See generally* www.dcvote.org (a 501(c)(3), web-based organization dedicated to securing voting rights for D.C. residents).

[41] *See supra* note 28 and accompanying text.

[42] *See* UNITED STATES CENSUS BUREAU, STATE AND COUNTY QUICKFACTS, DISTRICT OF COLUMBIA, *available at* http://quickfacts.census.gov/qfd/states/11000.html (showing a population growth from 601,767 in 2010 to 646,449 in 2013, a growth of approximately 1,240 residents per month); *see also* DEP'T OF COMTY PLANNING & SERVS, METRO WASHINGTON COUNCIL OF GOV'TS, Pub. No. 20138465, ROUND 8.2 COOPERATIVE FORECASTING: POPULATION AND HOUSEHOLD FORECASTS TO 2040 BY TRAFFIC ANALYSIS ZONE V (2013), *available at* http://www.mwcog.org/publications/departmental.asp?CLASSIFICATION_ID=6&SUBCLASSIFICATION_ID=27 (showing an estimated District of Columbia population growth, from 601,720 in 2010 to 771,162 in 2040).

[43] *10 Myths about the District of Columbia*, DC VOTE, https://www.dcvote.org/inside-dc/10-myths-about-district-columbia (last visited Apr. 4, 2014) (finding over fifty percent of residents have lived in the District for twenty years or more).

[44] *See* DISTRICT OF COLUMBIA OFFICE OF PLANNING, DC FACTS 2013 (2013), *available at* http://planning.dc.gov/DC/Planning/DC+Data+and+Maps/DC+Data/DC+Quick+Facts/DC+Facts+2013.

hoods, universities, professional sports teams, small businesses, banks, a growing technology sector, and headquarters of businesses.[45] The robust population of the District includes residents who have served and continue to serve in the Armed Forces,[46] and District residents pay federal income taxes well beyond the average per capita payment of most other states.[47]

Economically, the District is strong. The District's total government budget is over $12 billion, of which approximately $7 billion is entirely local funds.[48] Its current general obligation bond credit rating is an A2 from Moody's Investors Service and an A- from both Standard and Poor's and Fitch Ratings.[49] The District's balance sheet, and its ability to meet the needs of its citizens would be even more robust if Congress did not prohibit the District from taxing the income of people who work in the District but do not live there.[50] Every state in the Union can impose a non-resident income tax in such cases. Given that over half of the income earned in the District is earned by non-District residents,[51] this prohibition creates a two

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[45] *See, e.g.*, DC NEIGHBORHOODS, http://washington.org/topics/neighborhoods (last visited Apr. 4, 2014) (hosting an interactive website describing the sights, features, in the District's various neighborhoods); *2012 Top DC Companies*, WASH. POST, http://apps.washingtonpost.com/local/top-dc-companies/2012/ (last visited Apr. 4, 2014) (click twice on the "city" columns to see the District's top companies grouped by sector).

[46] OFFICE OF THE DEPUTY UNDER SECRETARY OF DEFENSE, 2011 DEMOGRAPHICS: PROFILE OF THE MILITARY COMMUNITY 32, 82 (2012), *available at* http://www.militaryonesource.mil/12038/MOS/Reports/2011_Demographics_Report.pdf.

[47] *See* Ben Pershing, *An Idea that Won't Quit: D.C. Exemptions from U.S. Income Tax*, WASH. POST, Apr. 14, 2013, at C7, *available at* http://www.washingtonpost.com/local/dc-politics/decades-long-effort-to-exempt-dc-residents-from-us-income-tax-still-simmers/2013/04/13/2b364794-a3b8-11e2-be47-b44febada3a8_story.html.

[48] *See* OFFICE OF THE CHIEF FINANCIAL OFFICER, GOVERNMENT OF THE DISTRICT OF COLUMBIA FY 2014 APPROVED BUDGET GROSS FUNDS 6 (2014), *available at* http://cfo.dc.gov/node/770962.

[49] *Debt Management*, OFFICE OF THE CHIEF FIN. OFFICER, http://app.cfo.dc.gov/info/debt_management/credit_rating_upgrades.shtm (last visited Apr. 4, 2014); Mike Debonis, *D.C. Wins Bond Rating Upgrade from S&P*, WASH. POST (Mar. 21, 2013), http://www.washingtonpost.com/blogs/mike-debonis/wp/2013/03/21/d-c-wins-bond-rating-upgrade-from-sp/ (quoting S&P as having said that it upgraded the District's ratings in recognition of its "improved financial position that has been strengthened by recent strong revenue performance as well as the rebuilding of reserves in accordance with . . . recently adopted new reserve policies"). It is true that the District suffered financial reverses in the 1990s, but similar difficulties have faced other jurisdictions before and after.

[50] *See, e.g.*, Jenny Reed, *What Would a "Commuter Tax" Mean for DC?*, D.C. FISCAL POL'Y INST. (July 26, 2012), http:// www.dcfpi.org/what-would-commuter-tax-mean-for-dc (last visited Apr. 5, 2014) This is commonly, though mistakenly, referred to as a "commuter tax"—a term which will be used, however reluctantly, in the balance of this essay.

[51] COMMUTER BITE OUT OF INCOME EARNED IN DC IS THE SMALLEST IN 40 YEARS, D.C. OFFICE OF REVENUE ANALYSIS (2013), http://cfo.dc.gov/sites/default/files/dc/sites/ocfo/publication/attachments/2013-1%20--%20Commuters.pdf.

billion dollar imbalance,[52] a problem immediately rectified if the District were a state.[53]

Contrary to another myth about the District, the District is not too financially dependent on the federal government and would be able to stand on its own as a state. Yes, the District does have an economic advantage in that the seat of the federal government is here, and that provides a certain measure of resiliency in economic downturns; but, this is an advantage also enjoyed by nearby Virginia and Maryland. The federal government is not even the principal employer in the District.[54] As a whole, more District residents are employed in the fields of education, health care, hospitality and tourism, and professional services even though the federal government remains the single largest employer in the District.[55] Although geographically small, the District's economy has the depth and diversity to justify statehood.

Beyond material conditions, it is important to add the moral imperative for statehood. Residents of the District often observe that the United States government is a champion of democracy and self-determination for countries around the world. Yet, in the shadow of the Capitol, hundreds of thousands of citizens are denied self-government and voting rights equivalent to all others in the country. This condition has been decried in many articles, speeches, and presentations, and its historical roots aside, it can only be seen as a profound injustice.[56]

## II. ALTERNATIVE MODES OF REPRESENTATION AND AUTONOMY

### *A. The District Has a Delegate to the House of Representatives*

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[52] Reed, *supra* note 50.

[53] *See id.* (noting that the District's ability to raise revenue is impaired by its ability to impose a "commuter tax").

[54] *See* DC FACTS 2013, *supra* note 44 (finding only 28.6 percent of employed DC residents were government employees).

[55] DISTRICT OF COLUMBIA: WAGE AND SALARY EMPLOYMENT BY INDUSTRY AND PLACE OF WORK, D.C. DEPT. OF EMP'T. SERVS. (2013), *available at* http://does.dc.gov/sites/default/files/dc/sites/does/publication/attachments/CESdc1Dec13.pdf (estimating that approximately 373,000 D.C. residents work in non-financial-sector private-employer jobs while approximately 200,000 work for the federal government).

[56] *See, e.g.*, Sen. Orrin G. Hatch, *"No Right More Precious in a Free Country": Allowing Americans in the District of Columbia to Participate in National Self-Government*, 45 HARV. J. ON LEGIS. 287 (2008) (concluding that the District's disenfranchisement is "an injustice that has lasted far too long"); Raskin, *supra* note 38, at 417 (describing the District as America's "last colony" full of "second-class citizens"); Aaron E. Price, Sr., Comment, *A Representative Democracy: An Unfulfilled Ideal for Citizens of the District of Columbia*, 7 D.C.L. REV. 77, 78 (2003).

Beginning in the 1970s, Congress accorded the District a certain degree of autonomy over its local affairs and a form of representation in the House of Representatives.[57] These actions create an illusion of equal citizenship for District residents; but, because they are neither complete nor permanent forms of relief, they actually serve to perpetuate the District's second class status.[58] These actions have given rise to a variety of arguments that, in one form or another, posit that District residents are well represented under current arrangements and that statehood is unnecessary. A close look belies that notion.

In 1970, Congress provided the District with a delegate in the House of Representatives, elected every two years by the people of the District.[59] She may participate in debates, but has no vote.[60] At one time, from 1996 to 2007, the House permitted the Delegate to vote in the Committee of the Whole with the proviso that, if the vote were ever decisive, it would not count.[61] The position is held in such low esteem by other House members that, on several occasions, the District's current delegate, Eleanor Holmes Norton, has been denied the opportunity to testify before a House subcommittee on legislation directly affecting the District.[62]

Political theorists argue that representation comes in many forms and that the representative need not be elected or have a vote in a body.[63] This may be the case, for example, where a non-elected person "represents" a national government in a global institution or forum. The delegate's role is to inform the body of the principal's views and to register that information by vote or otherwise.[64] Such representa

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[57] *See generally* Price, *supra* note 56, at 84–88 (outlining the historical progression of D.C.'s non-voting delegate to the House of Representatives and Home Rule, and arguing that both are insufficient for guarding the District's interests before Congress).

[58] *See* Raskin, *supra* note 38, at 425–26 (discussing the insufficiency of suffrage solutions short of statehood, and noting that District residents "would not endure [such] indignities and injustices [] if not for its own 'political impotence'").

[59] 2 U.S.C. § 25a (2012).

[60] *Id.*

[61] Michel v. Anderson, 817 F. Supp. 126, 142 (D.D.C. 1993), *aff'd*, 14 F.3d 623 (D.C. Cir. 1994); Arjun Garg, *A Capital Idea: Legislation to Give the District of Columbia a Vote in the House of Representatives*, 41 COLUM. J.L. & SOC. PROBS 1, 2 n.4 (2007); Ben Pershing, *Norton Fails in Effort to Prevent Loss of Committee of the Whole Vote*, WASH. POST (Jan. 5, 2011), http://voices.washingtonpost.com/dc/2011/01/norton_effort_to_prevent_loss.html.

[62] Perry Stein, *House GOP Again Tries to Restrict Abortion in D.C.*, WASH. CITY PAPER (Jan. 9, 2014), http://www.washingtoncitypaper.com/blogs/citydesk/2014/01/09/house-gop-again-tries-to-restrict-abortion-in-d-c/; Quinn Wonderling, *They Did It Again: GOP Refuses to Hear Congresswoman's Testimony on DC Abortion Bill*, MSNBC (May 18, 2012), http://www.msnbc.com/msnbc/they-did-it-again-gop-refuses-hear-c?lite=.

[63] *See generally, e.g.*, J. Roland Penrock, *Political Representation: An Overview*, *in* REPRESENTATION: YEARBOOK OF THE AMERICAN SOCIETY FOR POLITICAL AND LEGAL PHILOSOPHY 8 (J. Roland Penrock & John W. Chapman eds., 1968).

[64] *See e.g.*, DAVID MCCULLOUGH, JOHN ADAMS 260–63 (2001) (describing Congress's

tion is authorized, accountable, and deemed adequate to represent another's interests.[65] This theory is fundamentally flawed as a response to the District's current position of subordination. It is true that the people of the District send a delegate to Congress, but that "representation," although certainly not meaningless,[66] is incapable of parrying the many ways that Congress can interfere in District affairs—interference that would be impermissible if the District were a state.[67] And even on its own terms, this theory of representation cannot respond to the circumstances of the District: the District's delegate may be authorized in that she is elected, but authorized to do what? She simply does not stand on equal footing with the other representatives and they can, and do, ignore her at will.

Even if the delegate were given the right to vote, the situation would not be much improved. The delegate is only a representative in the House, with one vote. The District would still lack two Senators, and thus lack the influence and power of two votes in that much smaller body. Moreover, what Congress gives, Congress can take away.

*B. The District Is Represented—By All Members of Congress*

The argument here proceeds from the flip side of the principle of political accountability endorsed in *McCulloch v. Maryland*.[68] That is, although the part cannot control the whole, the whole can control the part. In *McCulloch*, the Supreme Court ruled that the state (the part) could not tax instrumentalities of the federal government (the whole).[69] But, conversely, the federal government (the whole)

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appointment of five men, including John Jay, to negotiate peace with Great Britain in 1781 in Paris after the Revolutionary War).

[65] *See e.g.*, *id.* at 456–57 (describing how the peace treaty brokered with Great Britain by John Jay went to the Senate in 1795 with George Washington's approval despite its having terms that "would ingnite a storm of protest").

[66] For instance, Delegate Eleanor Norton Holmes has worked with Representative Darrell Issa, Chairman of the House Oversight and Government Reform Committee, to bring budget autonomy to the District. Press Release, Eleanor Holmes Norton, *Norton to Continue to Defend Budget Autonomy Referendum, Following GAO Opinion* (Jan. 30, 2014), *available at* http://norton.house.gov/media-center/press-releases/norton-to-continue-to-defend-budget-autonomy-referendum-following-gao. Significantly, her advocacy resulted in a shutdown-avoidance provision for the District being included in the fiscal year 2014 omnibus appropriations bill. *Id.*

[67] *See generally*, *e.g.*, New York v. United States, 505 U.S. 144, 174–76, 180 (1992); Printz v. United States, 521 U.S. 898 (1996) (holding respectively that Congress can neither commandeer a state's executive officers to enforce federal law against the state's own citizens).

[68] 17 U.S. 316 (1819).

[69] *Id.* at 360–62, 398.

could tax the state (the part).[70] In the same vein, the argument runs, Congress—all of its representatives—can speak for the District, with the many looking out for the few. Although theoretically this could be so, there is no accountability to the few. Congressional representatives need not account for the District's needs or act in its best interests.[71] In fact, the District has sometimes been used by Congress as a kind of petri dish to grow programs not embraced by D.C. residents.[72] In this regard, former House Speaker Newt Gingrich identified the District as a "laboratory" for the Republican Party's pet policies such as school vouchers and certain tax policies.[73] More recently, Senator Rand Paul observed that congressional control over the District gave representatives the opportunity to draw attention "to some issues that have national implications."[74]

The idea that the entire Congress could actually represent District residents perhaps made sense at the beginning of the Republic. In 1800, when District residents were disenfranchised as part of the law transferring full authority from the states ceding land to the federal government to create the District, the assumption was that Congress would care for the residents and that the residents would be able to directly lobby Congress.[75] In 1801, Representative Dennis, remarking on the House floor about District residents, suggested that "[f]rom their contiguity to, and residence among the members of the General Government, they knew, that though they might not be represented in the national body, their voice would be heard."[76] And this made sense given that the House of Representatives then had scarcely over 100 members[77] and the District a population of fewer than 15,000 residents.[78]

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[70] *Id.*

[71] *See, e.g.*, Raskin, *supra* note 38, at 421 ("Without any meaningful voice in the legislative process . . . the people of the District have no check against legislative tyranny.").

[72] In the 1990s under then–House Speaker Newt Gingrich, a Republican task force on the District pushed for tax cuts and school voucher programs that were unpopular with District residents. Sommer, *supra* note 37. Such unwanted interference continues to this day with Senator Rand Paul attaching a loosening of the District's gun control laws as an amendment to a budget autonomy bill. Ben Pershing, *D.C. Budget Autonomy Bill Pulled after Rand Paul Offers Amendments on Guns, Abortion, Unions*, WASH. POST (June 26, 2012), http://www.washingtonpost.com/blogs/dc-wire/post/rand-paul-seeks-to-change-district-laws-on-guns-abortion-unions/2012/06/26/gJQAOTTf4V_blog.html [hereinafter Pershing, *Budget Autonomy Bill Pulled*] (noting that Senator Paul is one of many Republicans eager to change the District's laws").

[73] Sommer, *supra* note 37.

[74] Pershing, *Budget Autonomy Bill Pulled*, *supra* note 72.

[75] 10 ANNALS OF CONG. 998 (1801).

[76] *Id.*

[77] The 6th Congress had 106 Representatives. *Congress Profiles: 6th Congress (1799–1801)*, UNITED STATES HOUSE OF REPRESENTATIVES, http://history.house.gov/Congressional-Overview/Profiles/6th/ (last visited Mar. 21, 2014).

[78] RACE AND HISPANIC ORIGIN: *supra* note 24.

Members of Congress apparently envisioned a small, cozy community with residents readily mingling with the national representatives. If that were ever true, it is most surely not true now.

*C. Representation via Allies in Congress and Political Elites*

One might look at the District and pronounce it "lucky." The federal government bailed out the District in the 1990s when its bonds were rated below junk and bankruptcy loomed.[79] The federal government took over the District's pension liabilities at that time as well.[80] And the federal government continues, to this day, to pay for the court system and its related costs.[81] District residents also enjoy the multiplicity of federal jobs available in the District, although the trend of the federal government employing a significant amount of District residents is on the decline.[82]

In these and other ways, the argument runs, control by Congress has been benign, even beneficial overall.[83] Congress's actions toward the District do not reflect deep-seated prejudices or a desire to harm a politically powerless group.[84] It is this notion that led the D.C. Circuit Court to evaluate equal protection discrimination claims against Congress vis-à-vis the District by mere rational basis review.[85] In a case involving the automatic commitment to mental institutions of federal criminal defendants charged in the District, *United States v. Cohen*, the D.C. Circuit Court noted that higher, more rigorous standards of review are reserved for a class that is "more likely than others to reflect deep-seated prejudice rather than legisla-

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[79] *See* Lisa Hoffman, *Odd Couple: Barry, Gingrich Find Common Ground*, DALLAS MORN. NEWS, Oct. 15, 1995, 16A; David A. Vise & Yolanda Woodlee, *$146.7 Million Loan to D.C. Approved by U.S. Treasury*, WASH. POST, June 23, 1995 at C3.

[80] Mike Debonis, *D.C.'s Pensions Are Looking Pretty*, WASH. POST (Mar. 11, 2013), http://www.washingtonpost.com/blogs/mike-debonis/wp/2013/03/11/d-c-s-pensions-are-looking-pretty/.

[81] Zoe Tillman, *D.C. Courts to Furlough One-Third of Employees During Shutdown*, LEGAL TIMES (Oct. 1, 2013), http://legaltimes.typepad.com/blt/2013/10/dc-courts-to-furlough-one-third-of-employees-during-shutdown.html.

[82] Jennifer Liberto, *Washington D.C. Jobs: Ground Zero for Budget Cuts*, CNN MONEY (Feb. 7, 2013), http://money.cnn.com/2013/02/07/news/economy/washington-dc-jobs-budget/.

[83] *See, e.g.*, Debonis, *supra* note 80 ("[I]t helps, to a great degree, that the city has the benefit of Congressional oversight. . . ."); John Connor, *House Panel Votes for Unit to Oversee District's Finances*, WALL ST. J., Mar. 31, 1995, at B7 ("Rep. Joe Scarborough (R., Fla.), said Congress is demanding that the city do something the federal government hasn't done in more than 25 years: balance its budget.").

[84] *See* Hoffman, *supra* note 79 ("Gingrich sees his job is to fix the city, not run roughshod over it.").

[85] United States v. Cohen, 733 F.2d 128, 132–36 (D.C. Cir. 1984) (J. Scalia, en banc).

tive rationality in pursuit of some legitimate objective."[86] The court, led by now-Justice Scalia, did not find any reason to believe there could be Congressional prejudice against the District's populace.[87] Moreover, Judge Scalia could not believe the District to be politically powerless because the District's population included members of the political elite, such as officers of all three branches of the federal government.[88] These political elites would presumably look out for the interests of the District.[89]

This line of thinking mirrors the Supreme Court's approach to discrimination against the mentally disabled. In *Cleburne v. Cleburne Living Center*,[90] the Supreme Court applied rational basis review to laws giving disparate treatment to mentally disabled persons on the theory that most such laws were either helpful or benign and that such persons were not truly powerless.[91] They had proxies such as parents and interest groups who could defend their interests in the political marketplace.[92]

Not only are such arguments inherently demeaning in that they suggest that District residents are not fully capable of representing their own interests, but they mistake the consequences of federal control. It is not always generous or benign. It can, and has been, quite harmful and intrusive. As described above, politicians use the District to test their pet policies and push for their agendas, ignoring the desires of District residents.[93]

Moreover, the idea that District residents are adequately represented by political elites, as then-Judge Scalia contended,[94] is quite naïve. Yes, it is true that some members of the three branches of the federal government live in the District, but they make up only a tiny percent of the 646,000 residents and their behavior mostly

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[86] *Id.* at 134 (quoting Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982)).

[87] *See id.* at 136 (applying rational basis review to laws affecting District residents).

[88] *Id.* at 135.

[89] *Id.* ("It is, in any event, fanciful to consider as 'politically powerless' a city whose residents include a high proportion of the offices of all three branches of the federal government, and their staffs".).

[90] 473 U.S. 432 (1985).

[91] *Id.* at 445–46. The rational basis review in Cleburne was actually stronger than the rational basis in Cohen because it was really what has come to be termed as "rational basis with bite." *See, e.g.*, Gayle Lynn Pettinga, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L. J. 779, 780–87 (tracing the evolution of "rational basis with bite" as a fourth standard of review).

[92] 473 U.S. at 445 ("[T]he legislative response, which could hardly have occurred and survived without public support, negates any claim that the mentally retarded are politically powerless in the sense that they have no ability attract the attention of the lawmakers.").

[93] *See supra* Part II.B.

[94] *Cohen*, 733 F.2d at 135.

evinces indifference to District issues.[95] This is a jurisdiction in which most residents are ordinary citizens with no professional connection to the federal government.[96]

It is true that the District has been granted "Home Rule" by Congress.[97] Under the Home Rule Act, District residents elect a mayor and a thirteen-member Council.[98] The Act provides the District with legislative powers over District affairs consistent with some of the powers held by the states.[99] Using these powers, in recent years the Council has enacted such progressive legislation as marriage equality, decriminalizing marijuana, creating a right to shelter, and providing undocumented immigrants with driver licenses.[100] Nevertheless, the Home Rule Act reserves a number of important powers for Congress and the federal government. For instance, judges of District courts are appointed by the President of the United States with the advice and consent of the Senate.[101] Congress also reserves for itself considerable oversight of the District; the Home Rule Act in no way blunts the application of the District Clause in the Constitution.[102] Additionally, Congress delineated several areas over which the Council cannot legislate, including a prohibition on imposing any income tax on non-District residents who work in the District.[103] As welcome as the Home Rule Act may be, the essential defect remains. Anything the District is empowered to do is at the sufferance of Congress. And what District residents have gained under the Home Rule Act, they may lose just as readily, given that the Home Rule Act itself states:

> [T]he Congress of the United States reserves the right, at any time, to exercise its constitutional authority as legislature for the District, by enacting legislation for the District on any subject, whether within or without the scope of legislative power granted to the Council by this Act, including legislation to amend or

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[95] An observation based on my 30-plus years in the District and eight years on Council of the District of Columbia.

[96] *See* Raskin, *supra*, note 38, at 420 n.18.

[97] *See generally* Home Rule Act, *supra* note 3.

[98] *Id.* at §§ 401–13, 421–23.

[99] *Id.* at § 302.

[100] Indeed, the Council's structure as a unicameral legislative body of only thirteen members may help the District pass such progressive legislation more efficiently than state legislative bodies, which are almost all bicameral. *See* Mike Debonis, *Is D.C. Overgoverned? Or Undergoverned?*, WASH. POST (Feb. 3, 2011, 9:00 PM), http://www.washingtonpost.com/wp-dyn/content/article/2011/02/03/AR2011020307010.html.

[101] Home Rule Act, § 433(a).

[102] *See* U.S. CONST. art. 1, § 8, cl. 17; *Id.* at § 601 (reserving the right for Congress to continue exercising its constitutional authority to legislate for the District.

[103] *See* Home Rule Act, *supra* note 3, at § 602(a)(5).

> repeal any law in force in the District prior to or after enactment of this Act and any act passed by the Council.[104]

One palliative to this subordinate state of affairs might be found in the view that the District's position with Congress is no better or worse than any local government's relationship to its state government. Under conventional local government theory, towns, cities, and counties are "creatures of the state" and, as such, they may be empowered or abolished or controlled by the state in a variety of ways.[105] One might see an analogy with the District vis-à-vis Congress. Municipalities get to "act like" local governments but only insofar as they are given permission by the superior entity, the state.[106] The District gets to act like a local government under "Home Rule," but only insofar as given permission by Congress.[107] District residents, the notion runs, should consider themselves as a municipality to Congress. However, the essential error in this analogy is that the District is not similarly situated to a local government and its state because the District has no equal vote—indeed no vote at all—in the legislative chamber that controls it.

## III. GETTING TO STATEHOOD

Because the District's subordination can only be fully cured by joining the ranks of states, the question is how can that be done? Commentators and supporters of statehood have offered several avenues to achieve statehood or, at least, to achieve a close resemblance to statehood. Only two offer the chance for authentic statehood, and all face significant obstacles.

### *A. Pseudo or Nominal Statehood*

From early in the Republic's history, there has been debate over whether the District was nominally a state.[108] Proponents of nominal statehood argue that because certain words in the Constitution do not have a rigid, inflexible meaning, use of the word "state" in the Constitution can encompass the District.[109] Although in *Hepburn v. Ellzey*, the Supreme Court initially rejected this idea, holding that "state" has only one meaning,[110] the Court later said, in *Loughborough v. Blake*, that

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[104] Home Rule Act, *supra* note 3, at § 601.

[105] *See* Clinton v. Cedar Rapids, 24 Iowa 455, 475 (1868) ("Municipal corporations . . . are, so to phrase it, the mere tenants at will of the legislature.").

[106] *See id.*

[107] *See supra* notes 101–103 and accompanying text.

[108] This debate reached the level of the Supreme Court with *Hepburn v. Ellzey*, 6 U.S. 445 (1805).

[109] Raven-Hansen, *Congressional Representation*, *supra* note 1, at 179.

[110] Hepburn, 6 U.S., at 452–53.

the District could be treated as if it were a state, at least for the purposes of laying taxes pursuant to Article 1, Section 2.[111] The Court later extended this thinking to other clauses,[112] adopting the view that, "[w]hether 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."[113]

Seizing on this approach, Professor Peter Raven-Hansen, among others, argues that the Court should use the theory of nominal statehood to permit the District to be a state for the purposes of securing representation in the House of Representatives pursuant to Article 1, Section 2.[114] But the argument meets strong headwinds in the case of *Adams v. Clinton*, which rejected the idea outright,[115] and the Supreme Court affirmed without an opinion.[116] Moreover treating the District as a state for some clauses of the Constitution is a rule of construction. It would have no effect on Congress's express powers under the District Clause[117] to control District affairs in every particular.[118] Courts have interpreted the District clause broadly, finding Congress can act as a "legislature of national character" over the District and is not constrained by the limits on state legislatures.[119]

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[111] *See* 18 U.S. 317, 318–320, 322–25 (1820).

[112] *See, e.g.*, Stoutenburgh v. Hennick, 129 U.S. 141, 147 (1888) Callan v. Wilson, 127 U.S. 540, 548–49 (1887).

[113] District of Columbia v. Carter, 409 U.S. 418, 420 (1973).

[114] Raven-Hansen, *Congressional Representation*, *supra* note 1, at 184–85. However, an interpretation finding the District a state for purposes of Article 1, Section 2 representation could easily apply to Article 1, Section 3, which provides for two senators from each "state." This would be an even more difficult interpretive case to make.

[115] 90 F. Supp. 2d 35, at 35–36, 55–56, 61–62 (D.D.C.), *aff'd*, 531 U.S. 941 (2000) (also rejecting the plaintiffs' claims for representation under the theories of equal protection, privileges and immunities, due process, and the republican guarantee clause).

[116] 531 U.S. 941 (2000).

[117] U.S. CONST. art. 1, § 8, cl. 17.

[118] Under the District Clause, Congress can exploit the District's lack of autonomy for political gain and act contrary to the desires of District residents. For instance, in the 1990s, Congress passed the Barr Amendment, which prohibited the District from spending any funds on marijuana legalization ballot initiatives, preventing District residents from voicing their opinions on the subject at the ballot box. Turner v. D.C. Bd. of Elections & Ethics, 77 F. Supp. 2d 25, 27, 30 (D.D.C. 1999) (noting in dicta that Congress's attempt to interfere with District residents' ability to express their legislative preferences through their votes infringed on "the crux of the democratic system"); Bill Miller & Spencer S. Hsu, *Results Are Out: Marijuana Initiative Passes*, WASH. POST Sept. 21, 1999, at A1.

[119] Neild v. District of Columbia, 110 F.2d 246, 250–51 (D.C. Cir. 1940) (noting that while the dormant Commerce Clause constrains the states, it does not limit Congress's ability to legislate for the District); *see* Palmore v. United States, 411 U.S. 389, 397–98 (1973). When Congress treats the District in a discriminatory way, applying standards different from those applied for states, such treatment stands provided it meets a watered-down version of rational basis scrutiny. United States v. Cohen, 733 F.2d 128, 132–36 (D.C. Cir. 1984) (J.

Nevertheless the theory of nominal or pseudo statehood may have utility in pursuing actual statehood. That is, the more occasions there are to think of the District as a state, the more likely the idea of true statehood may take hold.[120]

*B. Diluted Statehood: Retrocession to Maryland*

An additional way to secure the rights and benefits of statehood for District residents would be to retrocede District land to Maryland. Just as Congress retroceded Arlington and Alexandria back to Virginia in 1846, some commentators advocate for retrocession of the District, save for the National Capital Service Area, to Maryland.[121] This would grant District residents the rights and privileges of living in a state without actually forming a new state.[122] With this plan, Congress would retain dominion over land left as the national capital.[123]

The precedent of retroceding now-Arlington and Alexandria counties to Virginia illustrates how this would be accomplished. The retrocession involved the approval of three parties: the people of Alexandria County, the Commonwealth of Virginia, and the United States Congress.[124] In the 1830s, residents of the land ceded to the District from Virginia, then known as Alexandria County, grew increasingly dissatisfied with their situation.[125] They did not perceive themselves as receiving any of the economic benefits the rest of the District residents were receiving, even as they suffered the loss of the privileges of being a citizen of a state.[126] In 1840, Alexandria County voted in favor of retrocession to Virginia,[127] and in 1846, Congress approved retrocession, noting that Virginia had also signaled its willingness to take back the land.[128] In the opening line of Congress's legislation, Congress noted that "no more territory ought to be held under the exclusive legislation given to Congress over the District which is the seat of the General Government than may be necessary and proper for the purposes of such a seat."[129] The Supreme Court

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Scalia); *see supra* Part III.C.

[120] *See supra* Part V.

[121] Garg, *supra* note 61, at 14.

[122] *Id.*

[123] *See id.*

[124] Barnes, *supra* note 29, at 59.

[125] *Id.* at 16, (citing Mark David Richards, *The Debates over Retrocession, 1801–2004*, WASH. HIST., Spring/Summer 2004 at 52.

[126] *Id.* (citing Richards, *supra* note 125) (At the time the District was created form Virginia and Maryland, the Framers believed the selected site would benefit form $500,000 being spent there annually).

[127] Barnes, *supra* note 29, at 16 (citing Richards, *supra* note 125, at 67).

[128] An Act to Retrocede the County of Alexandria, in the District of Columbia, to the State of Virginia, ch. 35, 9 Stat. 35 (1846).

[129] *Id.*

approved the retrocession in *Phillips v. Payne* when a resident of that county challenged the assessment of Virginia property taxes against him.[130]

Following the precedent established by the Virginia retrocession, retroceding to Maryland would entail approval of the retrocession by District voters and Maryland voters and an act of Congress.[131] Congress would shrink the national seat of government to a federal enclave comprising the Capitol, the White House, Supreme Court, national monuments, and adjacent federal buildings. The Constitution places a maximum size for the seat of government ("not exceeding ten Miles square"), but it does not place a minimum size on the District.[132] Some critics advance the "fixed form" argument to oppose this reading, arguing that a strict construction of the District Clause means "once the cession was made and this 'district' became the seat of government, the authority of Congress over its size and location seems to have been exhausted."[133] However, the Virginia precedent and the Court's approval of that retrocession in *Phillips* fatally weakens this as a viable argument.

Moreover, the Framers' primary concerns that led to the creation of the District no longer stand. The reason for having a national seat of government under the purview of Congress alone purportedly comes from the Continental Congress's early experience in Philadelphia.[134] As described above, this experience of a local government being able to hold power over the federal legislature led drafters of the Constitution to desire the nation's seat of government to be a place of exclusive federal jurisdiction.[135] This experience suggests the drafters had the thought of preserving police powers over the District at the forefront of their minds, which explains why they vested broad authority over the District in Congress.[136] But, retroceding this land to Maryland would still leave the federal enclave containing the seat of national government fully under Congress's control.[137]

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[130] 92 U.S. 130 (1875).

[131] *See* Barnes, *supra* note 29, at 59.

[132] U.S. CONST. art. I, § 8, cl. 17.

[133] U.S. DEP'T. OF JUSTICE, OFFICE OF LEGAL POLICY, REPORT TO THE ATTORNEY GENERAL: THE QUESTION OF STATEHOOD FOR THE DISTRICT OF COLUMBIA 18 (1987); *see also* Peter Raven-Hansen, *The Constitutionality of D.C. Statehood*, 60 GEO. WASH. L. REV. 160, 167–70 (1991) [hereinafter Raven-Hansen, *Constitutionality of Statehood*].

[134] *See supra* Part II A.

[135] *Id.*

[136] Raven-Hansen, *Congressional Representation*, *supra* note 1, at 170–72, 178 ("[T]he District was created for the relatively narrow purpose of preserving national police authority and jurisdiction at the seat of the government."). This concern with who had control of security at the seat of government suggests one reason why the drafters did not pay much attention to the representation question of future District residents. *Id.* at 172–73. Another reason why representation received little attention is because drafters assumed states ceding land to the federal government for the District would make provisions for the representation of District residents in the acts of cession. *Id.* at 172.

[137] Barnes, *supra* note 29, at 24–25, 28.

The Twenty-Third Amendment presents another possible obstacle to retrocession. The Amendment provides for at least three electoral votes for presidential elections for the District.[138] Retroceding this land would make this amendment redundant because Maryland already has its own electoral votes as provided under the Constitution, but the remaining federal enclave, according to critics, would also continue to have its three electoral votes, even though only the First Family would now live in the nation's seat of government.[139] Critics argue that an act of Congress cannot repeal a constitutional amendment.[140] However, Professor Raven-Hansen argues statehood would likely make the Twenty-Third Amendment moot, either by making it no longer applicable to the District or by impliedly repealing it.[141] By effectively divesting the national enclave of any voters, the Twenty-Third Amendment would simply be inapplicable rather than repealed, thus avoiding any constitutional obstacle.[142]

It is unclear whether Maryland would embrace the opportunity to annex the District. Maryland would gain a strong economic center[143], and retrocession would also minimize the possibility of the District imposing an income tax on Maryland residents working in the District.[144] But, annexation would also bring challenging education problems, significant poverty and homelessness rates, and other social ills.[145] And, it is certainly questionable whether annexation is beneficial for or preferred by the District. The District would not enjoy an identity as its own state. Instead, it would be subsumed by Maryland and would have to reorganize itself according to Maryland law. Although the District would finally enjoy congressional representation as part of the Maryland delegation, the District's interests do not always align with Maryland's interests. District residents simply do not identify as Marylanders. Retrocession would require a cultural shift as well as a political shift, and it would dilute the political power and autonomy of the District.[146]

### *C. Authentic Paths to Statehood*

The District can achieve authentic statehood either by an act of Congress or by a constitutional amendment.

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[138] U.S. CONST. amend. XXIII.

[139] Raven-Hansen *Constitutionality of Statehood*, *supra* note 133, at 183–84.

[140] *Id.* at 184–86.

[141] *Id.* at 184–89.

[142] *Id.*

[143] *See supra* notes 47–52 and accompanying text.

[144] Philip G. Schrag, *The Future of District of Columbia Home Rule*, 39 CATH. U. L. REV. 311, 321 (1990).

[145] Raven-Hansen *Constitutionality of Statehood*, *supra* note 133, at 161.

[146] *Id.* at 161–62; Schrag, *supra* note 144, at 321–22 n. 58, 322.

1. Creating the State of New Columbia

Besides having the power to grant representation to the District, Congress also has the power to create the state of New Columbia out of District land.[147] Congress could shrink the seat of government to an area containing only the Capitol building, the White House, Supreme Court, national monuments, and adjacent federal buildings.[148] The remaining District land would become the state of New Columbia[149] via Congress's power to admit new states to the Union.[150] The only constitutionally required steps for the process of admitting a new state would be an admission bill passed by Congress and presentment of that bill to the president.[151]

The advantage of this approach is that once a territory, or, in this case the District, becomes a state, its statehood cannot be taken away.[152] Despite the obvious advantages, some commentators question whether creating a new state out of the District "would destroy the original concept of the Seat of Government being independent from any state."[153] But, Congress would still maintain exclusive control of the area designated the capital.[154] Additionally, as described above, there is precedent for shrinking the size of the District.[155] Although the shrunken territory would go to create a new state rather than an existing state, this difference is not problematic. The Framers were concerned about the proximity of any state to the seat of national government; under this logic, it should not matter whether the state is one of the original colonies or a newly created one.

The House introduced a bill to achieve this result in 1993, but it suffered a 277–153 defeat after two days of floor debate.[156] At the time, there were questions of the constitutionality of such legislation because of its possible relationship to the Twenty-Third Amendment.[157] However, just as the Twenty-Third Amendment should not present an obstacle to retrocession, it should not present an obstacle to creating a new state. The creation of New Columbia would make the Twenty-Third

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[147] Garg, *supra* note 61, at 11.

[148] *Id.*

[149] *Id.*

[150] U.S. CONST. art. IV § 3.

[151] *Constitutional and Economic Issues Raised by D.C. Statehood: Hearing on H.R. 325 Before the Subcomm. On Fiscal Affairs and Health of the H. Comm. On the District of Columbia*, 99th Cong. 35 (1986) (statement of Prof. Raven-Hansen).

[152] Barnes, *supra* note 29, at 24.

[153] *Id.*

[154] *Id.* at 24–25, 28.

[155] *See supra* Part V.B.

[156] Garg, *supra* note 61, at 11–12.

[157] *Id.*

Amendment either moot or no longer applicable because there would not be any voters remaining in the federal enclave.[158]

The true obstacle to this approach is political; to pass an enabling act to create the state of New Columbia, the legislation must have bipartisan support. Many Republicans appear unlikely to support legislation creating a new state of a staunchly Democratic area. If the District were able to send two additional Democratic senators to the Senate, it would upset the current political balance, making it more difficult for Republicans to either achieve or maintain a majority. These political calculations make such a bill's passage unlikely. At the moment, the New Columbia Admission Act sits in committees in both the House and the Senate, but prognosticators accord the bills a slim chance of passage.[159] If such a bill could not pass in the 1990s, it is unlikely to pass now when Congress has grown increasingly partisan.

2. Passing a Constitutional Amendment for Either Statehood or Representation

Although nothing in the Constitution expressly denies Congress the power to either make the District a state or grant it representation, some believe achieving either of these goals requires a Constitutional amendment.[160] Appealingly, a constitutional amendment would be both legally and politically sound.[161] Unlike a statute granting representation or greater autonomy, a constitutional amendment could not be easily repealed when party power changes in Congress. Nevertheless, passing a constitutional amendment is always an uphill battle. The D.C. Voting Rights Amendment was proposed in Congress in 1978.[162] It would have treated the District as a state, securing for it full Congressional representation, full participation in the Electoral College system, and full participation in the constitutional amendment process.[163] Although it passed both the House and the Senate by supermajorities, it failed to he ratified by a sufficient number of states.[164] Because the bill provided for

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[158] Raven-Hansen, *Constitutionality of Statehood*, *supra* note 133, at 184–89.

[159] *H.R. 292: New Columbia Admission Act*, GOVTRACK, https://www.govtrack.us/congress/bills/113/hr292 (last visited Feb. 20, 2014) (giving the House bill a seven percent chance of enactment); *S. 132: New Columbia Admission Act*, GOVTRACK, https://www.govtrack.us/congress/bills/113/s132 (last visited Feb. 20, 2014) (giving the Senate bill a seventeen percent chance of enactment).

[160] *See* Garg, *supra* note 61, at 24–27 (delineating the various arguments against the constitutionality of a statute granting representation).

[161] *Id.* at 26.

[162] H.R.J. Res. 554, 95th Cong. (1978).

[163] *Id.*

[164] Barnes, *supra* note 29, at 37.

a seven-year ratification period, the Amendment would once again have to pass the House and Senate if anyone tried to revive it.[165]

The difficulty in ratifying an amendment securing statehood for the District has only increased since the 1970s.[166] First, the 1970s amendment did not secure full statehood for the District.[167] The inability to ratify this amendment by a sufficient number of states suggests that an amendment securing full statehood for the District would have an even smaller chance at ratification. Second, the political landscape in Congress has changed dramatically since the 1970s. The ability to secure enough support to pass an amendment in the House and Senate is greatly diminished, particularly when, as described above, the outcome would dramatically change the political balance in the Senate.

## IV. ON THE WAY TO STATEHOOD: THE ADVANTAGES AND DISADVANTAGES OF INCREMENTALISM

If the District is to achieve authentic statehood via an act of Congress or a constitutional amendment, the public needs to be educated and engaged in the District's plight, supporters must be persistent in lobbying Congress, and District residents and their local and national allies must pursue a vigorous public campaign akin to civil rights struggles of old. This is likely to be a difficult and long-term project, and in the meantime, the District faces a strategic dilemma: should the residents pursue an incremental approach to gradually achieve greater autonomy and some voting representation in Congress? Or should they hold out for statehood exclusively?

Under an incremental approach, the end goal would remain statehood, but advocates would pursue a step-by-step approach, gradually posturing the District as if it were a state.[168] This has already been happening in actions real and symbolic. The District exercises many powers of a state under the Home Rule Act,[169] and it has voted to assume autonomy over its local budget.[170] The District's lawyer is no longer referred to as "corporation counsel" but as "attorney general,"[171] and some elected officials have suggested that the Mayor and Council be called the governor and

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[165] H.R.J. Res. 554, 95th Cong. (1978).

[166] *See id.*

[167] Barnes, *supra* note 29, at 37–38.

[168] *See* Schrag, *supra* note 144, at 322.

[169] *See supra* Part III.C.

[170] *See* Emma Dumain, *Voters Pass D.C.'s Budget Autonomy Referendum, Many Ask "Now What?"*, ROLL CALL (Apr. 24, 2013, 6:17 PM), http://www.rollcall.com/news/voters_pass_dcs_budget_autonomy_referendum_many_ask_now_what-224328-1.html.

[171] *Mayor Renames OCC to Office of the Attorney General for DC*, OFFICE OF THE ATTORNEY GEN. (May 26, 2004), http://oag.dc.gov/release/mayor-renames-occ-office-attorney-general-dc.

legislature.[172] An entire lobbying effort has coalesced around achieving a vote in Congress for the District's delegate, and one of the most visible and active District groups is DC Vote, which, for years, has made the delegate's vote its main objective.[173] The advantages of incrementalism are that it might positively change public perceptions of the District's ability to govern itself, that Congress would ultimately see statehood as more palatable and less threatening, and that, in the meantime, the residents would, in fact, acquire greater autonomy and control over their local affairs.

But incrementalism carries disadvantages and risks. The first is the frustration that will come if greater autonomy is conferred and then snatched back by a new set of Congressional overseers. Second is the danger of compromises the District may be forced to make for modest and always contingent advances, compromises that themselves cement the District's second class status and teach the wrong lesson about the political maturity of the District. In this regard, consider the legislation proposed in the late 2000s that would have secured a voting representative in the House of Representatives for the District. On April 18, 2007, the House passed the District of Columbia Voting Rights Act of 2007, which would have provided for a single Congressional district for the District of Columbia.[174] To appease those who worried this would throw off the political balance in the House, the bill would have increased the House from 435 to 437 seats, adding an extra seat for Utah as well.[175] Because the District is reliably Democratic and Utah is reliably Republican, this would have preserved the balance. Unfortunately, the Senate version of the bill failed to pass.[176] The bill was introduced again in the House and Senate in 2009.[177] This time, it passed the Senate.[178] However, it included a hastily added amendment repealing most of the District's gun control laws.[179] Although moderate House

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[172] *See* Mike DeBonis, *Why does the D.C. Council Have 13 Members?*, WASH. POST (Feb. 7, 2011, 5:58 PM), http://voices.washingtonpost.com/debonis/2011/02/why_does_the_dc_council_have_1.html; Lori Montgomery, *Just Call Him Gov. Williams, If You Please*, WASH. POST, Mar. 2, 2006, at B1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/03/01/AR2006030102320.html.

[173] *Mission*, DC VOTE, https://www.dcvote.org/dc-votes-mission-work (last visited Mar. 21, 2014); *see also* Sommer, *supra* note 37 (describing efforts of shadow delegation and other individuals outside District government to promote statehood).

[174] H.R. 1905, 110th Cong. § 2 (2007).

[175] *Id.* at § 3; Kate Phillips, *Senate Passes D.C. Voting Rights Bill, 61–37*, N.Y. TIMES (Feb. 26, 2009), http://thecaucus.blogs.nytimes.com/2009/02/26/senate-passes-dc-voting-rights-bill-61-37.

[176] *S.1257 (110th): District of Columbia House Voting Rights Act of 2007*, GOVTRACK, https://www.govtrack.us/congress/bills/110/s1257#overview (last visited Feb. 6, 2014).

[177] *S. 160 (111th): District of Columbia House Voting Rights Act of 2009*, GOVTRACK, https://www.govtrack.us/congress/bills/111/s160 (last visited Feb. 6, 2014).

[178] *Id.*

[179] *See* Phillips, *supra* note 175.

Democrats were willing to pass the bill with the amendment, D.C. voting rights advocates demanded a clean bill.[180] Eventually, Delegate Eleanor Norton Holmes, who introduced the bill, agreed with Majority Leader Steny Hoyer to table the bill, finding the amendment to be too difficult to swallow.[181] This experience illustrates the kinds of compromises an incremental approach would force District residents to accept. When the District must give up one form of autonomy to secure another form of autonomy, there is neither a gain for residents nor movement forward.

The final and most worrisome disadvantage of incrementalism is that its success may sap the fervor for statehood and dilute the arguments that may, in purer form, ultimately win. This is particularly true of the effort to secure a vote for the delegate in the House of Representatives. If such a vote were recognized, opponents of statehood could then argue that the District does have a vote and one, in their opinion, more commensurate with the District's geographic size and population. Supporters would lose their greatest rhetorical weapon—taxation without representation. It's much easier to make one's case by saying, "we have no vote in Congress," than it would be to say, "we have a vote but want more votes."

The dilemma of incrementalism may be solved by taking what works to posture the District as a state, such as budget autonomy, but holding out for full and permanent voting rights, which can only be achieved by statehood.

## CONCLUSION

This Symposium was dedicated to defining and evaluating different aspects of democratic representation, such as expressly adopting a constitutional right to vote. But there is one issue that is unique in this Symposium, and that is the anomalous second class status of the people of Washington, D.C. Although historically explicable, the District's status is no longer politically or morally defensible. But there is a complete remedy: statehood. The District's population, resources, and democratic commitment entitle it to statehood. And for the District, only statehood will do.

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[180] Mary Lu Carnevale, *D.C. Voting Rights Bill Is Slowed over Gun Amendment*, WALL ST. J. (Mar. 4, 2009, 12:49 PM), http://blogs.wsj.com/washwire/2009/03/04/dc-voting-rights-bill-is-slowed-over-gun-amendment/.

[181] Mike DeBonis, *Breaking: Norton Kills Voting Rights Bill*, WASH. CITY PAPER (June 9, 2009, 12:58 PM), http://www.washingtoncitypaper.com/blogs/citydesk/2009/06/09/breaking-norton-kills-voting-rights-bill/.

DISTRICT OF COLUMBIA BAR
*District of Columbia Affairs Section*

**Statement of the District of Columbia Affairs Section of the District of Columbia Bar on S. 132 -- the New Columbia Admission Act -- Presented to the United States Senate Committee on Homeland Security and Governmental Affairs**

The District of Columbia Affairs Section of the District of Columbia Bar (the "Section") commends **Senator Tom Carper** (D-DE) for holding a hearing on S. 132 – The New Columbia Admission Act (the "Bill") -- on September 15, 2014 before the Senate Homeland Security and Governmental Affairs Committee.[1] The Section respectfully submits the following statement in support of the Bill which, if enacted, would grant Statehood to the residents of the District of Columbia.[2]

The Section consists of D.C. Bar members who are concerned about issues relating to the laws and government of the District of Columbia. The legislation falls within the Section's special expertise and jurisdiction over Home Rule issues and relates closely and directly to the administration of justice. The Section has consistently advocated for full and equal citizenship rights for District of Columbia residents through budget and legislative autonomy, Congressional voting rights, and full Home Rule.

Nothing compromises the administration of justice in the District of Columbia more than denying its residents the equal rights of self-determination enjoyed by the residents of the 50 states. District residents pay federal taxes like all other Americans and do not have a vote in the federal legislature that determines whether to tax and how to spend those taxes. District residents have fought in every war since the Revolution and

[1] The views expressed herein represent only those of the D.C. Affairs Section of the District of Columbia Bar and not those of the D.C. Bar or of its Board of Governors.

[2] This statement was approved by the Section's Steering Committee on September 19, 2014, by a vote of eight of its nine members voting in favor, one abstaining.

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yet do not have an elected representative who can vote on whether to go to war. Residents of the District have no vote in Congress on federal measures that would overturn laws duly enacted by the Council of the District of Columbia; and the District's local budget containing its own taxpayer-raised revenue (over $6 billion in recent years) cannot become law until Congress affirms it. District residents have no vote on riders that Congress proposes to add to the District budget, even if those riders would undo decisions made by local legislators accountable to District residents. There is no legitimate reason why federal budget impasses should force a shut-down of the District of Columbia, alone among the 50 states, and prevent it from spending its own locally-raised tax dollars. These undemocratic constraints on District self-determination (and many others) negatively impact upon the administration of justice in the Nation's Capital.

If adopted into law, the Bill would remedy these injustices by admitting into the Union as the 51st state the State of New Columbia on an equal footing with the other 50 states. Admission would occur upon approval by the voters of the District of Columbia of the State Constitution and joining the Union. Among other things, the Bill provides that the State of New Columbia would hold elections for two Senators and one Representative in Congress; and the Mayor and members of the Council and the Chair of the Council at the time of admission would be deemed the new state's Governor, members of the House of Delegates, and the President of the House of Delegates, respectively. A portion of the existing District of Columbia, to include the White House, the Capitol Building, the United States Supreme Court Building, other Federal buildings, monuments and military property would remain in the new District of Columbia and thus remain under Federal control for purposes of serving as the seat of the government of the United States.

The Bill is Constitutional. Under the Constitution's Admission clause, Article IV Section 3, Congress may admit new states into the Union. Although the Constitution's District clause, Article 1 Section 8, limits the size of the District of Columbia to ten miles square, there is no minimum size. The Bill does not eliminate the District of Columbia; it reduces its size. Indeed, the Constitution's Article IV Section 3 permits Congress "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." The Bill also includes conforming statutory and Constitutional changes. The Bill strikes Title 3, United State Code section 21 considering the existing District of Columbia to be a state for purposes of the election of the President and Vice President of the United States, and provides for expedited repeal of the 23rd Amendment which allows the District to appoint electors as if it were a state.

The Bill would put District residents on an even playing field with other Americans and is a substantial remedy for self-determination because Statehood would guarantee to the residents of the District of Columbia full Congressional voting representation, budget and legislative autonomy, and all of the rights that the people of the 50 United States enjoy.

As the United States continues to bring democratic values and ideals to nations historically governed by tyrants, the Section urges Congress to correct a lingering injustice in its own shadow, namely, the denial of equality and full democracy to the more than 640,000 residents who live in the Nation's Capital.

For further information please contact: Section Legislative Committee Co-Chair James S. Bubar, JBubar@aol.com, or Section Steering Committee Co-Chairs Ariel Levinson-Waldman, relwaldman@hotmail.com, or Joel Cohn, cohnjoel@gmail.com.

# Testimony by Attorney Johnny Barnes
# The Implications of the New Columbia Admission Act
# Presented to the Senate Committee
# Homeland Security and Governmental Affairs
# SD-342, Dirksen Senate Office Building
# Washington, D.C. 20510

## 15 September 2014*

Chairman Carper, Ranking Senator Coburn and other distinguished Senators of the Committee, thank you for conducting this important and timely Hearing on "Equality for the District of Columbia: Discussing the Implications of S. 132, the New Columbia Admission Act of 2013."

You have been a long distance runner, Mr. Chairman, in our quest for equal footing. I well remember when hundreds of us journeyed by train to Philadelphia in 1987 to highlight our desire to become a state. Along the way, we stopped in Wilmington, Delaware, where you arranged a warm greeting for us from citizens of your state, including the Mayor of Wilmington. That was a great day, one that I am certain helped lead to this day.

My testimony is the product of a series of writings, first began in 1975. From the moment I settled in Washington, D.C. in 1970, it struck me as strange that by virtue of the routine act of crossing an invisible line, coming within the boundaries of the nation's capital and making it my home, most of the rights I had enjoyed, as a citizen of the state of Indiana, were lost. In the shadow of one of the greatest icons of democracy, the Washington Monument, that simple act of moving, an act carried out by thousands and thousands over the years, has made our lives difficult and different from the lives of every other citizen in America. That simple act caused us to become second-class, non-voting citizens unable to partieipate fully in our federal government.

Currently, close to 650,000 taxpaying Americans who reside in the District of Columbia, more than the number of those who reside in the state of Wyoming and close to the number who reside in six other states, bear all the burdens of citizenship, yet do not share in the benefits, particularly, the right to vote in the same manner as all other citizens. In 1978, the House of Representatives and the Senate passed House Joint Resolution 554 by a two-thirds vote. The Resolution proposed that the District of Columbia would be treated "as though it were a state," for the purposes of electing Senators, Representatives, the President and Vice-President and members to the Electoral College. As the principal author of that Resolution; as one who labored with many others for the seven years following passage of the proposal to secure ratification by thirty-eight states, only to fall short of our goal; as the principal staff author of the very first D.C. Statehood Bill, following the District of Columbia's historic Statehood Constitutional Convention, House Resolution 51, introduced before Congress in 1987; and as a forty-five year resident of the District of Columbia, this is a subject that has claimed much of my attention and a great deal of my interest.

Over the years, I have written about this contradiction between benefits and burdens. Most notably, I have written two law review articles, two booklets published in the Congressional Record, three unpublished articles and a 250-page, definitive treatise on D.C. Statehood among other writings. America seeks to "extend the perimeters of democracy around the world," as former President Reagan often stated, yet democracy comes to a screeching halt within view of the White House. I have joined many and many have joined me in these writings, far too many to mention here. These writings have been designed to assist readers in understanding the complex relationship

between the federal government and the American citizens who happen to reside in the nation's capital. Throughout the muddied history of the District of Columbia, this relationship has been marked by false promises, mounting legal complications, and the unwillingness of the courts to provide the rights that we as citizens deserve. This relationship, unique throughout the world, is a classic "chicken and egg" dilemma. If District residents had political standing and sovereignty, we could have senators, representatives, and local autonomy. If we had senators, representatives, and local autonomy, we could have political standing and sovereignty. The challenge, however, is how to initiate this cycle, because currently, the District has neither the chicken nor the egg. As an Assistant Attorney General for the United States, former Supreme Court Chief Justice William Rehnquist stated, "The need for an amendment [providing representation for the District] at this late date in our history is too self-evident for further elaboration; continued denial of voting representation from the District of Columbia can no longer be justified." Unfortunately, the promissory note that Justice Rehnquist once issued has never been collected. This abandoned promise of the United States still persists as the greatest stain on our country, and now is the time, more than ever before, when we should insist that this promise be fulfilled.

One of my writings is a Law Review Article published by the University of the District of Columbia Law School. Inasmuch as that Article addresses and, I believe, debunks any and all arguments against D.C. Statehood, as part of my testimony, I here submit it for the Record of this Hearing. Thank you Chairman Carper.

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**University of the District of Columbia Law Review** Spring 2010

TOWARDS EQUAL FOOTING: RESPONDING TO THE PERCEIVED CONSTITUTIONAL, LEGAL AND PRACTICAL IMPEDIMENTS TO STATEHOOD FOR THE DISTRICT OF COLUMBIA

**I. Introduction**

**A. Making D.C. Citizens the Same as All Other Citizens of the World**

Every human being on this planet, residing in a nation with representative government, enjoys political standing 1, and most enjoy sovereignty 2 - except those who happen to reside in Washington, D.C. 3 Political standing in America grows out of the Seventeenth Amendment, providing for the popular election of senators; 4 as well as Article I of the Constitution. 5 The absence of true representation for the people of Washington, D.C. in the United States Senate and only a cloistered presence in the House of Representatives is a blight on America's democracy; a glaring imperfection of a way of life this nation seeks to foist on all others. This contradiction empowers America's detractors and weakens its proponents. 6 Senator Edward M. Kennedy (D-MA) testifying at a House of Representatives D.C. Statehood Hearing in 1984 stated, 'The time has come at long last to end the unacceptable status of the District of Columbia as America's last colony.' 7

Sovereignty for non-federal entities in the United States stems from the Tenth Amendment. 8 The constraints on sovereignty for non-federal entities are specifically stated in several parts of the Constitution, but are generally found in the Commerce Clause - for example, only the federal government maintains the power to make money, declare war, enter into treaties with foreign governments, and exercise broad taxing authority. 9 These constraints on non-federal entities should not be read, however, as only limiting the rights given to the states and local governments, but those of individuals. In *New York v. United States*, the United States Supreme Court noted, "[t]he Constitution does not protect the sovereignty of states for the benefit of the states or state governments as abstract political entities, or even for the benefit of the public officials governing the states. The Constitution divides authority between federal and state governments for the protection of individuals." 10 When citizens have the benefit of political standing and sovereignty, as every American except those residing in Washington, D.C. have, they are said to be on equal footing. 11

**II. Background**

In America, citizens in small states are treated no different than citizens in large states. Small town farmers are treated no different than big city business people. When it comes to the Constitution and the Bill of Rights, the wealthy elite are treated no different than the modest middle class or the downtrodden homeless. Instead of James Madison's vision of a national government free of any power among the states as the final version of the Constitution granted the states a substantial role and basic involvement in the operation of the national government. When the Constitution was written in 1787, it did not contain a Bill of Rights, a subject of much contention. 12 The Bill of Rights, the first ten amendments, was adopted four years later in 1791. 13

Basic rights and equal treatment for all have been a fundamental premise since the creation of our government. Notwithstanding this history, basic rights continue to elude the people of the District of Columbia.

**A. Admitting a New State**

Since the admission of Tennessee in 1796, every act making new states a part of the United States has included a clause providing, in relevant part, entry "on an equal footing with the original states in all respects whatever." 14

Congress alone has the power to admit new states. 15 The doctrine of equality of states - treating all states the same and hence all citizens within the states the same - is now an axiom of constitutional law. 16 "Equality of constitutional right and power is the condition of all the states of the Union, old and new." 17 "The power is to admit new states into this Union. This Union was and is a union of states, equal in power, dignity and authority...[t]o maintain otherwise would be to say that the Union...might come to be a union of states unequal in power... ." 18 With that reasoning, the Court struck down a restriction Congress had sought to impose as a condition for admitting Oklahoma into the Union. Congress had sought a change in the location of the state capital in Oklahoma, which, under the Equal Footing Doctrine, is a matter solely within the state. 19 The "equal footing" clause was designed not to wipe out economic diversities among the several states, but to create parity as respects political standing and sovereignty. 20 The Equal Footing Doctrine is deeply rooted in history. 21 That view was repeated in a more recent case in which the Court rejected an argument that Congress could not regulate federal land within a state. 22 Political standing and sovereignty means that a new state is entitled to exercise all the powers of government that the original states exercised. 23 A new state gains authority over civil and criminal laws in order to preserve public order and safety and protect persons and property within its boundaries. 24 A new state has the power to tax private activities conducted within the public domain. 25 Statutes applicable to areas that become new states no longer have any force or effect, unless the new states adopt such statutes. 26

The right of local self-government, as known to our system as a constitutional franchise, belongs, under the Constitution, to the states and to the people thereof...Admission on an equal footing with the original states, in all respects whatever, involves equality of constitutional right and power, which cannot there-afterwards be controlled, and it also involves the adoption as citizens of the United States of those of whom Congress makes members of the political community, and who are recognized as such in the formation of the new state... 27

It seems clear that if the people of the District of Columbia are to be treated the same as all other American citizens – placed on equal footing - ultimately, the Constitutional path to that end is Article IV, Section 3, Clause 1, relating to the admission of new states.

**B. The Current Situation**

Those residing in Washington, D.C. lack political standing and sovereignty. No other citizens are similarly situated. District residents cannot vote for senators or representatives; although they do vote for a non-voting delegate to the House.28 No matter the population, citizens entitled to only as many electors to the Electoral College as the least populous state. 29 As a result, the District's representation does not correspond with its population. Moreover, while

the Home Rule Act 30 gave District residents the right to vote for a local elected government, Congress placed such severe restraints on that right, that some refer to the Act as "Home Fool." 31 Others liken District residents to Native Americans, commenting that with Home Rule, District residents were given "the reservation without the buffalo." 32 This label is particularly poignant at times when the District government seeks to manage and conduct its financial affairs. Congress must pass an appropriations bill for the District, as it does for every federal agency. Thus, from local budget formulation to implementation the process can take as many as eighteen months. 33

The form and structure of the District makes it very different from any state and makes it difficult to conduct an efficient government. 34 District of Columbia citizenship is particularly diluted when democracy is tested. Had Congress decided the Bush-Gore presidential contest and the Florida vote in 2000, District residents would have had no vote in that vital process. 35 They had no vote when Congress passed the Patriot Act. 36 District citizens also had no vote when decisions were made to involve America in Iraq. District residents shoulder all the duties of citizenship, including paying federal taxes, and fighting and dying in wars, but they do not share in all the fruits of citizenship. 37 Moreover, they have performed both of those responsibilities, paying taxes and fighting in wars, at higher rates than much of the rest of the country. This blight on America exists notwithstanding the fact that Americans living in the District of Columbia pay taxes, 38 as well as fought and died in every war since the American Revolution. 39 Additionally, while over 95 percent of the District's local budget is from local tax dollars, the federal government controls the entire budget. 40 Congress has the power to enact local laws on the District and has final say over any laws passed by the local government. 41 Controlling the budget and laws epitomize "Taxation Without Representation." 42

Congress may at any time - for any reason or no reason, at times arbitrarily, capriciously, and even whimsically – decide to interfere and intervene in the affairs of the people of Washington, D.C. and tell them how to live or tell them how to die. 43 There is pending language in an amendment to the current D.C. Voting Rights Bill that would effectively repeal the revised gun regulation law passed by the District government following the Heller 44 case. That language mirrors language in a bill introduced in a recent Congress. 45 Before Heller, gun control existed in Washington, D.C. for more than thirty years and was supported by the vast majority of District residents because crimes involving guns is a matter of grave concern when it comes to public safety in the District. Notwithstanding that strong local sentiment, Congress sought to repeal the District's strict gun control law. 46 Congress has considered denying tax exemptions for interest on bonds used for health care facilities that perform abortions. 47 A number of rules enacted by Congress are opposed by most District residents, including: bans on the spending of local tax dollars on reproductive rights, 48 medical marijuana, 49 AIDS prevention measures, 50 and domestic partnership benefits. 51 In fact, at this writing the U.S. House of Representatives voted to end the ban on distributing sterile needles and syringes. While not law yet, it seems some in the Congress recognize that human life is more precious than conservative dogma. 52 Congress has debated whether dogs should be on leashes and where kites should be flown in the District of Columbia. Imagine putting aside any discussion of war and debating the removal of snow and ice in District, 53 permission for firefighters to play in the Police Band, 54 or the restructuring of a football stadium. 55 Those debates appear in the Congressional Record. District residents, like all other American citizens, deserve to have authority, power and control over how their tax dollars are spent, and how they conduct their private lives. They deserve sovereignty and political standing.

**III. Historical Perspectives**

It is important to this discussion that we understand why and how the District of Columbia was created, as well as how this shaped the District to the present day. 56 Indeed, the questions and possible answers that flow from these muddied waters are illuminating. Would the Founding Fathers who fought to end the tyranny of "Taxation Without Representation" have intentionally imposed such a system on their fellow citizens? If so, how could these individuals - giants of the American Revolution and pillars in our history - in good conscience reason such a result? If such reasoning was sound and justified at the time, does it remain sound and just today? Finally, can it really be

argued without contradiction that our Constitution, the very document that gives us rights, must be read to take those same rights away? To the fair mind with historical perspectives, the answers become obvious.

It is the seemingly minor incidents in America's history that often propel the occurrence of major events. 57 Such was the case in creating our nation's capital. During its early days, the capital city was quite peripatetic. 58 Beginning with the First Continental Congress when the young nation's leaders met at Founder's Hall in Philadelphia, the capital city moved from one former colony to another as the exigencies of war demanded, with stints in Baltimore, Lancaster, York, Princeton, Annapolis, Trenton, and New York City, peppered with frequent periods back to Philadelphia. 59 From the end of the Second Continental Congress to the Articles of Confederation, the capital was located in Philadelphia. 60 While meeting there, local militia demanding pay forced Congress to flee. 61 This seemingly minor incident would be a major factor when the Framers crafted the enabling legislation for the nation's capital, with enormous implications for generations who would inhabit the land where the Anacostia and Potomac rivers meet. 62 It was soon apparent that the Articles of Confederation 63 were insufficient for uniting the former colonies as a single nation. 64 With the Mutiny of 1783 fresh in many minds, the idea of exclusive federal jurisdiction over the capital became dominant in the debates. 65 If Philadelphia could not, or perhaps would not, protect its state government, how could the national government rely on a local entity for its safety? 66

**A. Site Selection**

There was very limited debate concerning the location of the Capital during the Constitutional Convention. 67 Moreover, the Philadelphia episode was not the only compelling argument for exclusive federal jurisdiction over the seat of government. 68 It was to assuage regional jealousies and be free from the influence of adjacent states. 69 After perhaps one of the longest debates in the annals of Congress, these guiding principles manifested themselves in Article I, Section 8, Clause 17 of the United States Constitution - the Seat of Government Clause. 70 Every corner of the country attempted to locate the capital as close to their state as possible. 71 Offers came from New York and Maryland. 72 Other states followed. 73 In addition to the regional disputes, competing views existed on what kind of city should be selected and what would be the ideal of American life. Urban members favored a capital in a thriving metropolis, such as Philadelphia or New York City, 74 because these cities had the greatest claim to time as the capital. 75 These members felt that urbanization and its related commerce ought to be the hallmarks embodied in the capital as they would be "central to America's growth." 76 The war debts question was at issue and the future of slavery was thought to be at stake. 77 While the northern states wanted the capital, the southern states wanted it as well. 78 The South expressed the sentiment that a less urban site was closer to their ideals that cities were unhealthy, physically and morally, a view amplified by their experiences during Philadelphia's reign as the nation's capital. 79 The notion of an agrarian-rooted capital, they felt, embodied a breaking away from the traditional European approach of placing the capital in a large city. 80 Nonetheless, there was consensus that Congress have jurisdiction over the permanent seat of government. 81

Ultimately the agrarian position prevailed. This may have had more to do with George Washington's influence. Washington not only wanted the capital close to his home at Mount Vernon, he also had significant land holdings in the area. 82 On July 16, 1790, the Potomac site was selected and a "district of territory, not exceeding ten miles square ... accepted for the permanent seat of the government of the United States." 83 Philadelphia, as a compromise, because it was not selected as the permanent seat, would be the temporary capital. 84 In return for the north's acquiescence on a southern location, the south agreed to support the assumption of the Revolutionary War debts. 85 President Washington was authorized to survey the land for the capital. 86 On November 21, 1800, Congress convened for the first time in the District of Columbia. 87 Interestingly, two weeks earlier, on November 11, 1800 the residents of the District of Columbia cast ballots in congressional elections. 88 A few days later, President Adams instructed Congress to immediately exercise the authority granted to them by the District Clause. By the end of the following February, the Organic Act of 1801 was signed into law. 89 The implications of the Organic Act would be significant, as it had the effect of robbing the residents of the sovereignty they enjoyed as citizens of Maryland and Virginia. It also affected their ability to vote in both the U.S. House elections and state

legislative elections, where U.S. senators were elected at the time. 90 Interestingly, at no place in the Organic Act of 1801 does it expressly state that these rights were to be stripped. 91 In a view expressed by one member of Congress, "[they] have not one political right defined and guaranteed to them by that instrument, while they continue under the exclusive jurisdiction of the United States. 92 Of course, they agree, prompting many to proclaim, "We didn't land on Plymouth Rock. Plymouth Rock landed on us!" 93

**B. Effects of the Selection**

There is little record reflecting analysis at the time the rights of those residing within the "permanent" Seat of Government were stripped away. It is clear that as quickly as Congress stripped the rights, it looked to restore them. By 1803, a member introduced legislation to retrocede the land back to Maryland and Virginia. 94 Those who enjoyed the rights of citizenship and lost it when moving from the states recognized the wrong in their disenfranchisement. 95 One member 96 stated that he never saw the purpose of giving Congress exclusive jurisdiction, except to serve hastening the capital selection process. 97 This view was offset by the notion that the District would receive a benefit not bestowed upon the several States. 98 Many regarded the benefit as a bargained-for exchange for the burden of second-class citizenship. 99 In 1789, it was estimated that the selected site would benefit from $500,000 spent there annually. 100 This benefit in exchange for rights was explained by James Madison in The Federalist, Number 43, 101 "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. . ." 102 A colleague of Representative Smilie (R-PA) observed, "No pecuniary advantages could ever induce me to part with my elective franchise, but it has been the pleasure of those people to part with theirs, and the Constitution of the United States has authorized them to do so." 103 If the surrendering of rights was a bargained-for exchange, then it must be regarded as a compact. 104 Whit Cobb nalyzes the idea of a compact between Congress and the District in a 1995 article in the Dickinson Law Review. 105 Cobb introduces the compact as an agreement. 106 Notably, each time removal was debated, a prime reason it failed was recognition of the compact. 107 In 1808, urban members, smarting from roughing it in the yet to be built capital, launched an attempt to return the capital to Philadelphia. 108 John Love of Virginia observed that removal would be a "violation of obligations solemnly entered into, and destroy the contracts made." 109 Nathaniel Macon of North Carolina stated, "I consider the faith of the government as much pledged that the Seat of Government shall be permanently fixed [in Washington, D.C.], as it can be to any contract under the sun." 110 Some members favored removal, yet believed the District ought to be compensated for losing the benefit. That opinion was not universal. 111 Still, if surrendering political standing and sovereignty was the consideration, a material breach should result in returning the District to its position before the agreement: full citizenship status. However, a court cannot grant such relief. 112 A compact is, "an agreement or covenant between two or more parties, especially between governments or states." 113 The compact with Congress was entered into on behalf of the District by Maryland and Virginia acting with apparent authority. 114 Cobb's article reveals that under the compact the exchange that was bargained for was exclusive benefit. This is supported by the provision creating the District and the history of attitudes concerning capital removal. 115 While the statutory language provides that, "offices attached to the seat of government," may be built elsewhere, it may do so only when "expressly provided by law." 116

**C. Resizing the District**

By the 1830s, Congress was full filing its promise of economic benefit to much of the District. This was not so for those along the southern banks of the Potomac. 117 The former Virginia parcel had yet to receive any benefit whatsoever. 118 This void was viewed as making those residents, "subject to all the evils, without any of the benefits of being citizens of this District," while further being, "denied many valuable privileges enjoyed by the citizens of the States." 119 As one might expect, those subject to this arguable breach of the compact sought some remedy. The remedy they sought was to be retroceded. When the County of Alexandria finally decided to put the idea of retrocession up for a vote on January 24, 1832, it was soundly defeated by a margin of 57% to 42%. 120 However, the growing dissatisfaction was quite clear, and by 1835 Alexandria began to lobby Congress to be

transferred back to its former jurisdiction. 121 At the same time, in spite of Maryland's willingness to reaccept Georgetown, those citizens soundly rejected retrocession by a margin of four-to-one. 122 By 1840, a retrocession vote in Alexandria won solid support, with the yes votes coming in at 537 to 155. 123 Alexandria relied on the slave trade as a principal source of revenue. 124 It feared that the slave trade would soon be abolished, 125 and with it, destruction of the local economy. 126 Congress recognized the need for remedy by passage of the Bill that retroceded Alexandria County. 127 Retrocession enjoyed support from abolitionist and slave states. However, this support was not without challenges. In *Phillips v. Payne*, Alexandria resident Phillips was unhappy at paying higher taxes and filed a claim based on the fact that he had not subscribed to the retrocession and was entitled to be reparated. 128 The Court, without ruling on the constitutionality declared: Virginia is de facto in possession of the territory. She has been in possession, and her title and possession have been undisputed, since she resumed possession, in 1847, pursuant to the act of Congress. .More than a quarter of a century has since elapsed. During all that time, she has exercised jurisdiction over the territory in all respects. She does not complain of the retrocession . . her government. . .[has] asserted her title; and her judicial department has expressly affirmed it. No murmur of discontent has been heard. . .the transfer is a settled and valid fact. 129 Both the Constitution and the Organic Act of 1801 limited the size of the District to no greater than ten miles square, however, neither prescribed a minimum size. 130 While there is an explicit ceiling, there is no explicit floor. Consequently, the wording of the decision in Phillips gives credence to the belief that the Court was not going to recognize a constitutional challenge to retrocession. 131 More importantly, the ruling indicates that there is no barrier to reducing the size of the District from its maximum limit of "ten miles square" to a substantially smaller size. 132

**D. Impact of the Selection**

After *Phillips* was decided, attempts at removing the capital slowed, though never vanishing entirely. 133 As the twentieth century progressed, technological advances had a major impact on Congress' near-perfect commitment to the compact. 134 Plausible expansions within the District reached critical mass, spurred by the First World War and the New Deal. Even with increased construction, there was a lack of office space to house the expanded federal government, as well as housing shortages. Congress turned to removing parts of the government to the suburbs. 135 The first significant crack in the compact was the relocation of the National Institutes of Health prior to World War II. 136 This removal ignored two facts: 1) the District was and is prohibited from building skyscrapers; and 2) the federal government had ample undeveloped land in the District. 137 Additionally, it enhances the validity of *Phillips* on the question of whether it was constitutional for Congress to retrocede Alexandria and reduce the size of the capital. Moreover, this process may be the only way in which Arlington could have possibly been reunited with the District, as Article IV, Section 3, Clause 1 would require consent from the Commonwealth to sever the state. 138 Senator McCarran accurately forecasted an era of Congressional spoils, undermining the compact. 139 McCarran argued:

If [the Pentagon] belongs anywhere it belongs in the District of Columbia . . . If the state of Virginia is to have this building, the State of Maryland will claim the right to have the Navy Building, some other state will claim the right to have the Internal Revenue Building, and so on. . . 140 Cobb argues that the removal decision, in spite of Congress' will, was unconstitutional, and the District needed the land back to house its expanding federal agencies. 141

**IV. The District of Columbia as a State**

A former judge of U.S. Court of Appeals for the District of Columbia, Kenneth Starr, 142 advanced a very interesting theory during the Davis Hearing. 143 This was not a hearing on the issue of D.C. Statehood, but a hearing on a bill that would have provided voting representation only in the House for the people of the District of Columbia. 144 According to Judge Starr, Congress has wide authority to govern over the District of Columbia under Article I, Section 8, Clause 17- the Seat of Government Clause. 145 He testified before the Committee that, "[w]hile...the Constitution does not affirmatively grant [District residents] the right to vote in congressional

elections, [the Constitution] does affirmatively grant Congress plenary power to govern the District's affairs." 146 There have been several instances in the past where Congress has treated the District of Columbia as a state. 147 While recognizing that "[w]hether 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," 148 the Supreme Court has often afforded great deference to such Congressional determinations. 149 Significantly, where the Court had previously found that the term "state" for purposes of Article III diversity jurisdiction did not apply to the District of Columbia, 150 it later upheld a Congressional statute allowing for diversity jurisdiction between citizens of the District and citizens of a state. 151 A plurality recognized the plenary power afforded Congress under the District Clause finding the clear language of Article III, Section 2 referring to "different states" to be no bar. 152 Similarly, although 42 U.S.C. § 1983 was found inapplicable to the District of Columbia, 153 the Court acknowledged Congress' authority to amend the statute to make it applicable under its Article I, Section 8, Clause 17 powers 154 - which, in fact, Congress later did. 155 Despite language referring to "states" in several provisions, the Court has allowed wide latitude in applying constitutional provisions through the District Clause. 156 Congress is permitted to directly tax D.C. residents; 157 to regulate commerce across District borders; 158 and to delegate to the District the power to enact local legislation. 159 At times, the courts have even been willing to recognize the District as a state, without explicit Congressional inclusion. 160 The Full Faith and Credit clause of Article IV, Section 1, has been interpreted to include the District, despite the constitutional text that specifies "state." 161 In addition, the Court found a treaty made applicable by statute to the states was also applicable to the District. 162 Such interpretations show the Court's willingness to acknowledge the District of Columbia as a state under some circumstances, yet for other circumstances, the Court has allowed Congress to legislate on the matter under its District Clause power. 163

In 2000, a three judge panel of the U.S. District Court for the District of Columbia ruled that representation in either house of Congress for the District of Columbia was not constitutionally mandated. 164 In its ruling, the Court emphasized that it was without authority to provide remedy for the disenfranchisement of District residents. 165 Without stating that the Constitution barred the enfranchisement of the District, the court merely held that because the Constitution only provided for representation for the states, the District was not required to have representation. 166 The courts have maintained that District plaintiffs have to seek redress in other forums and Congress alone provides the remedy for a right not explicitly prohibited. 167 Some have argued that the reading of Congress' plenary power is inconsistent with the Twenty-Third Amendment to the Constitution, which permits the District of Columbia to choose electors for President and Vice President. 168 In 1961, the 86th Congress found it necessary to amend the Constitution to grant the District the right to vote for President because the District is not a state. 169 The Committee Report stated:

[T]he District is not a State or a part of a State, there is no machinery through which its citizens may participate in such matters ... apart from the Thirteen Original States, the only areas that have achieved national voting rights have done so by becoming a State as a result of the exercise by the Congress ... to create new States pursuant to Article IV, § 3, Clause 1 of the Constitution. 170 The Committee also recognized Congress' limitations: [The Amendment] does not give the District of Columbia any other attribute of a State or change the...powers of the Congress to legislate with respect to the District of Columbia and to prescribe its forms of government. It would not authorize the District to have Representation in the Senate or the House. 171 Arguably, in the context of D.C. Statehood, if the Constitution is read as some would have it, Judge Starr's assertion of Congress' broad powers is inconsistent with the powers considered when the Seat of Government Clause was enacted. 172 It is also inconsistent with an understanding of the Constitution when the Twenty-Third Amendment was enacted more than 150 years later in 1961. 173 If the Judge's theory is correct, 174 it may well represent the least difficult manner in which political standing for the District could be achieved. 175 If Congress can use its plenary powers to grant the District of Columbia a representative, then it should be able to use its plenary powers to grant the District senators and, ipso facto, to create a state out of the District. 176 Judge Starr's reasoning, therefore, is inconsistent with his central conclusion.

**A. The Courts Close Their Doors On Equal Footing For the District**

Inasmuch as the essence of Washington, D.C. is steeped in constitutional doctrine, one might presume that a path through federal courts could facilitate at least political standing, if not sovereignty, for the District of Columbia. However, the courts have rejected this approach, although sympathizing with the need for relief, while indicating that the matter involves a political question not judicial intervention. Two cases involving claims of constitutional deprivation of voting rights for representation for District residents were consolidated in federal court and decided in 2000. 177 The decision dashed the hopes of District residents that the courts might resolve the equal footing dilemma. In 2004, a subsequent decision in *Banner v. United States*, made clear that the court was not a place to seek relief for questions involving sovereignty for the people of Washington, D.C. 178 Plaintiffs in the *Adams* and *Alexander* cases argued that District residents were entitled to voting representation in Congress on various grounds, including equal protection and due process. In the *Banner* case, the courts rejected an effort to invalidate the limitation imposed by Congress on the ability of the District of Columbia to tax income at its souree. The *Banner* Court stated, 'simply put ... the District and its residents are the subject of Congress' unique powers, exercised to address the unique circumstances of our nation's capital."

**B. The Statehood Option**

Statehood is the express goal of many local District organizations, including the ACLU of the Nation's Capital, with self-government and full voting representation "until then." 179 In fact, the only time in recent history a popular vote has been held in the District of Columbia, the citizens overwhelmingly voted for Statehood. 180 Article IV, Section 3 of the Constitution sets up the framework for becoming a state. 181 The provision requires simple legislation, 182 stating, "[n]ew states may be admitted by the Congress into this Union." 183 The grant of statehood would provide District residents their full bundle of rights. It would provide political standing and sovereignty. It would mean the District would be represented in the federal government, 184 and the District would have a state government to replace the current Council and Mayor. 185 It would allow Congress to avoid dealing with local legislation. 186 Moreover, once statehood is granted, it cannot be taken away. 187 The area within the District proposed for the state are residential neighborhoods. 188 It would not include certain federal buildings or national monuments. 189 Nothing requires the Seat of Government to be larger than that proposed, 190 so reduction to this area seems appropriate. 191 Opponents argue that making the District a state would destroy the original concept of the Seat of Government being independent from any state. 192 Indeed, the U.S. Department of Justice presented an extensive legal memorandum that remains conservative dogma. 193 Some are concerned that the Seat of Government would be surrounded by one state that may exert its influence over the federal government. 194 As it stands, Maryland generally surrounds the current District. 195 By delegating exclusive control of the District, the Constitution enables Congress to address all issues whatsoever that concern the District. If the authority extended to Congress is exclusive, then Congress may do with the District what it thinks best, 196 including designating

it as a state. 197 Statehood would solve the problem of representation and sovereignty for those who reside within the District of Columbia. 198 Moreover, as indicated, Congress has used this expansive power in the past. 199 In 1846 a bill allowed for the retrocession of one third of the District back to Virginia. 200 As noted, thirty years later, when the Supreme Court was presented with the opportunity to rule the retrocession unconstitutional, the Court rejected the claim. 201 The defining language describing the geographical limits of the District simply states that the federal seat of power is not to exceed ten miles square. 202 The retrocession of 1846 reduced the District from one hundred square miles to sixty-seven square miles. 203 The District may be reduced in size without violating any provisions of the Constitution. 204 Opponents argue that a fair reading of the terms of the Maryland Act of Cession, does not allow Congress to create a state from that land. 205 The history of the creation of West Virginia makes this seem unlikely. 206 Article IV, Section 3, Clause 1 of the Constitution requires Congress to obtain a state's consent before Congress can change that state's borders. 207 Yet, in 1863, Congress approved an area of western Virginia for statehood, thus creating present-day West Virginia. 208 Opponents also argue that, given the District Clause 209 and the Twenty-Third Amendment, creating a state out of the District of Columbia can only be done by amending

the Constitution. 210 They argue that because the District is provided for in the Constitution, only an amendment to the Constitution can change its borders. 211 Essentially they posit that the "form and function" of the District under the Constitution does not permit any change. 212 The Virginia precedent is again instructive. 213 In 1846, to protect slavery and at the request of Virginia, thirty-three square miles were returned by Congress to Virginia. 214 That act was done by statute, a simple legislative act of Congress. 215 There is already a considerable record from congressional hearings that the non-federal parts of the District can be converted, by simple act of Congress, into a state without amending the Constitution. 216 Even if a constitutional amendment is required to create a state, 217 statehood remains the preferred option 218 among District residents. Critics worry that the District is not economically viable as a state. 219 They also express concerns about the District's small land area and how it will affect the potential for population growth. 220 These worries are unfounded. The District is economically viable as a state. 221 The District has had a balanced budget *27 in the past eleven years and has been relatively free of mismanagement and corruption for at least that long. 222 The Control Board, during its existence, certified that the District is economically stable, and gave the District the freedom to enter into the markets. 223 As a state, the District would also have the power to tax the income of non-residents working here. 224 In fact, experts have assessed the economic viability of the District of Columbia over the years and have reached similar conclusions. The findings of these experts are presented later in this Article. 225

Over the years, members of Congress and scholars have also addressed the constitutional and legal issues associated with statehood. Senator Edward M. Kennedy (D-MA), who once chaired the Senate Judiciary Committee and who introduced a companion D.C. Statehood Bill in the Senate, stated: I believe that the District...meets the generally accepted historic standards for the admission of the States to the Union. The three preeminent conditions are the commitment to the principles of democracy, resources and population sufficient to support statehood, and the will of the people for statehood. 226 Senator Arlen Speeter (R-PA), who also served as Chair of the Senate Judiciary Committee, echoed similar sentiments, "[M]y sense is that every consideration should be given to the question of statehood for the District of Columbia, and my instincts are in favor of it." 227 Democratic Representative Peter W. Rodino of New Jersey, who chaired the House Committee on the Judiciary for many years, said about D.C. statehood: There is no clause in the Constitution that expressly prohibits Congress from erecting a state out of the non-federal part of the District of Columbia. Under Article I, § 8, Clause 17, Congress exercises "exclusive" authority over the District. If the authority is exclusive, Congress can do with the District what it wishes. If Congress cannot create a state out of the District, the authority must be less than exclusive - an interpretation which runs against the plain meaning of the "exclusive" power clause. 228 On the question of whether it is necessary to repeal Article I, Section 8, Clause 17 of the Constitution prior to going forward with a D.C. Statehood bill, Chairman Rodino was unequivocal again. 229 Referring to the 1846 act of retrocession, the Chairman concluded, "[t]he authority for admitting new states into the union is vested solely in the Congress of the United States by Section 3 of Article IV of the Constitution...." 230 Peter Raven-Hansen, Professor of Constitutional Law at George Washington

University Law Center, agrees. 231 While opponents point to a view by former Attorney General Robert Kennedy, 232 proponents can point to a view of the power of Congress by Professor Viet Dinh, a political conservative and principal author of the Patriot Act. 233 While scholars differ, the weight of authority favors the proponents of D.C. Statehood. Rather than constraining Congress, the District Clause offers the broadest powers in the Constitution. On the question of whether the federal government or the new state would owe any obligation to the state of Maryland, which ceded the land to create the District of Columbia, Professor Raven-Hansen found that the original act of cession was unconditional, and the act of Maryland ratifying the cession unequivocally acknowledged the land "to be forever ceded and relinquished to the Congress and government of the United States in full and absolute right, and exclusive jurisdiction... ." 234 Congress would continue to have authority over the Seat of Government when the size changes. 235 Indeed, the presence of a ceiling and the absence of a floor 236 suggest that the Framers intended for Congress to have the ability to alter the size of the Seat of Government. 237

The Twenty-Third Amendment established the current framework by which District of Columbia residents vote for President and Vice President. 238 What becomes of that Amendment in the wake of D.C. Statehood? 239 According to Professor Stephen Saltzburgh, a Professor of Constitutional Law from the University of Virginia Law School, "[t]he truth is, I don't know why anybody cares about what happens with the Twenty Third Amendment . . . every time you tinker with the Constitution it's so costly it would be better to leave it alone . . . ." 240 Similarly, Professor Raven-Hansen reasoned that the Twenty-Third Amendment will become moot, either on the theory that it is no longer applicable by its terms and intent to any existing political jurisdiction, or on a theory of implied repeal by the act of admission of "New Columbia" to the Union. Legislation under the enforcement provisions of the Fourteenth Amendment can work "a pro tanto repeal of the Eleventh Amendment and the incorporated doctrine of sovereign immunity." 241 Moreover, the Constitution is "replete with asterisks to sections that are now obsolete or superseded. They are still in there, but they do not work anymore because subsequent legislation or amendment changed the purpose or made the purpose no longer achievable." 242 There are, of course, contrary views. 243 On the question of whether Congress can impose limitations on the District as a condition for admission as a state, as it has under the Home Rule Act, both J. Otis Cochran, Professor of Constitutional Law at the Tennessee School of Law and ***30** Professor Raven-Hansen cited to *Coyle v. Smith* 244 and *Permoli v. City of New Orleans*. 245 Professor Cochran said "[t]he answer to this question...is fairly straightforward primarily because there is judicial precedent on this point...the binding effect of those 'conditions' may be severely limited or non-existent after statehood is achieved... ." 246 Professor Raven-Hansen said, "Imposing conditions prior to admission of a state is tantamount to writing, at least in part, that state's constitution." 247 In sum, all states must be admitted on equal footing. 248 The District's population is larger than one state and not that much smaller than other states. It is in the range of states such as Alaska, Vermont Wyoming, and North Dakota. 249 There is also great potential for population growth. Some think that because the District is largely urban, there is no place for new residents to move. The facts show this is not the case. 250 In recent years, the District had 200,000 more residents than it has now. 251 One additional thought, as in the Home Rule Act, Congress could provide that no more than one Senator may be elected from any one political party, thereby ensuring the election of one non- Democratic Senator. 252 The courts upheld that provision. 253 However, many would find that solution objectionable. 254 In November 1967, former U.S. Attorney General Ramsey Clark stated, "[Representation for the District] recognizes that the right to vote is the last we should ever withhold, because it can protect all others." Echoing that sentiment in June 1970, former Chief Justice of the United States Supreme Court William Rehnquist, then the Assistant U.S. Attorney General, stated that "[t]he need for an amendment [providing representation for the District] at this late date in our history is too self-evident for further elaboration; continued denial of voting representation from the District of Columbia can no longer be justified." 255 Additionally, Congressman Walter Fauntroy said, "The 1803 proponents of a return of voting rights to the District stated that the disenfranchisement was 'an experiment in how far free men can be reconciled to live without rights.' It is simply time to end this unfruitful experiment." 256

**C. Congress Can Grant Statehood to the District of Columbia**

Statehood is a viable solution for the District of Columbia. Under the District Clause, Congress has authority "[t]o exercise exclusive legislation in all cases whatsoever, over such District." 257 Article IV grants Congress the power to admit states into the Union. 258 The creation of a state would give District citizens ***32** political standing and sovereignty. 259 The only restriction is that Congress may not create a district "exceeding ten miles square." The 1846 Congress rejected the Fixed Form Argument. 260 Congress could again reduce the District by statute. 261 Immediately following the District Clause, it states, Congress shall "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." 262 This language inspires further dissent against the Fixed Form Argument. Congress commonly changes the form of forts, arsenals, etc., yet still retains plenary

power over these federal places. If Congress enjoys "like Authority" over the District, then it should be able to change the form of it without relinquishing its power. 263

A weaker, but perhaps more practical, variation of the Fixed Form Argument is the "Fixed Function Argument." 264 When drafting the Constitution, the Framers intended the District to function as a permanent location for the seat of government 265 and never meant for the District to become a state. The Framers' immediate concerns in the late eighteenth century were securing police authority over the District and addressing the limitations of federal power. 266 In the early twenty-first century, however, the federal government possesses substantial power over the armed forces 267 and the state militias. 268 Congress' inability to ward off a band of mutinous soldiers in 1783 Philadelphia 269 is inconceivable today. Like the National Capital Service Area, the District is an enclave inside a state. 270 Opponents to D.C. Statehood also cite the expected economic reliance of the National Capital Service Area on New Columbia as detrimental to the idea of independence for the Seat of Government. 271 However, the District already relies on a regional metropolis, extending beyond its boundaries, especially its transportation system. 272 Non-residents earn two-thirds of the income. 273 Surely, changing the size to the National Capital Service Area would not affect the existing interdependence. 274 Even in the unlikely event of encroachment, Congress still has the means to protect the functioning of the Seat of Government. 275 According to *Cohens v. Virginia*, 276 Congress retains the power to legislate against states impacting the independent functioning of the District. 277 Since the District Clause explicitly assigns Congress authority over the District, would the formation of New Columbia result in an abrogation of legislative power? If so, must the District Clause then be repealed? As the Supreme Court recognized in *Texas v. White*, statehood, once granted, can never be revoked. 278 Thus, this Abrogation of Power Argument proves weak under examination. 279 The multitude of court cases concerning Congress and the District of Columbia establish that the legislative authority in the District is truly "extraordinary and plenary." 280

According to the D.C. Circuit Court of Appeals, Congress can "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." 281 The broad language of the District Clause combined with the extensive judicial precedent illustrates the ability of Congress to control all aspects of District affairs. However, Representative Rodino explains that "if Congress cannot create a state out of the District, the authority must be less than exclusive, an interpretation which runs against the plain meaning of the 'exclusive' power clause." 282 An analysis of the differences between Congressional representation and electoral representation illustrates that a constitutional amendment is not necessary to provide statehood, even though a constitutional amendment was necessary to provide District residents with electors in the Electoral College. In the Constitution, provisions related to the Seat of Government are in Article I, while those related to electors are in Article II. 283 Article I reflects great deference to Congress by endowing the legislative branch with sweeping authority to "make all Laws which shall be necessary and proper for carrying into Execution" its various powers. 284 Among these powers is an "exclusive" authority over the Seat of Government. Article II is different. Although Congress determines the day on which the Electoral College votes, 285 it does not have any other authority. The election of the president and vice-president is precisely detailed and unalterable by simple legislation because the provisions concerning the Electoral College are found within the constrictive Article II. Additionally, legislating with respect to the Electoral College is outside the boundaries of Congress' broader Article I authority. Granting District residents the right to vote in presidential elections could not be achieved through statute. 286 Statehood, however, may be granted through statute because the Constitution specifically allows Congress to admit new states. 287 Opponents argue that repeal of the Twenty-Third Amendment is necessary because its provisions entitle any few remaining residents of the National Capital *35 Service Area three electoral votes. 288 These residents would be endowed with more influence in elections for President and Vice-President, a direct violation of the "one man, one vote" principle. 289 The creation of New Columbia would not be incompatible with the purpose of the Twenty-Third Amendment. 290 Congress intended the Amendment to "provide the citizens of the District of Columbia with appropriate rights of voting in national elections for President and Vice-President of the United States." 291 The few who might be in the National Capital Service Area would vote as residents of New Columbia. 292 As Raven-Hansen

states, "[w]hile no constitutional provision should ordinarily be read to yield a nullity, neither should any be read to yield an absurdity." 293 Philip Schrag, a Professor at Georgetown Law Center, reaches a similar conclusion. 294 According to Schrag, the Twenty-Third Amendment empowers Congress, not the District. 295 The Amendment provides the District with the power to appoint electors "in such manner as the Congress may direct," and allows Congress to "enforce [the] article by appropriate legislation." 296 Thus, if Congress decides that the residents of the National Capital Service Area must vote as residents in New Columbia in order to receive their constitutional right to representation in the Electoral College, Congress may pass this legislation without fear of violating the Constitution. 297 Finally, most states' cession clauses expressly provide for a reversion of ceded land upon the termination of federal use. Like those states, Virginia included an express reversion provision in its cession of Fort Monroe in 1824. 298 New York used a similar provision when ceding the Brooklyn Naval Yard, providing for federal government use only "as long as" the premise was used for the purposes for which jurisdiction was ceded, "and no longer." 299 Maryland, on the other hand, did not expressly provide for a reversion. In fact, the specific words "reversion" or "reverter" are not found in Maryland's cession. 300 The District of Columbia deserves full representation in Congress because the District has a larger population than Wyoming and a population on par with other states. 301 Opponents of D.C. Statehood argue that the District is too small to be on equal footing with larger states such as California, home to thirty-six million people, or Texas. The District has 591,833 citizens within its borders, 302 more numerous than Wyoming with 493,782, yet Wyoming is fully represented in Congress. 303 Six other states are on par with the District. 304 Again, those states are fully represented. 305 At points throughout its history, the District had 802,178 citizens; a population greater than ten other states. 306 Yet, statehood is not about size. The framers intended to accept large and small states into the Union. At the Federal Convention of 1787, Virginia proposed representation based on population, 307 while New Jersey advocated for equal representation for all states. 308 To create a Union with large and small states included, the Framers incorporated the 1787 compromise. 309 The result is a bicameral legislature with equal representation in the Senate and proportional representation in the House.

**D. Other Options to Democracy for D.C.**

No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right. 310 While giving the right to elect a local government in 1973, Congress imposed severe restraints. Congress must pass an appropriations bill for the District - as it does for every federal agency - thus, from the time the district government formulates a budget until the time it can spend the money often takes many months. The result of this congressional oversight mandate costs the District millions and millions of dollars each year. 311 Congress' power to enact laws on the District, while controlling the budget, is tantamount to "Taxation without Representation." Yet, while supporting Statehood, it is important to explore other ideas.

**E. The D.C. Voting Rights Amendment**

In his seminal book, Facing Mount Kenya, Jomo Kenyatta, the founding leader of independent Kenya, raised the rhetorical question, "Why can't I write about Africa? I am African." 312 Often this author feels the way Kenyatta felt. Many have written about the D.C. Voting Rights Amendment effort how it passed super majorities in Congress, yet failed to pass three-quarters of the state legislatures. However, I lived and breathed that issue in the critical time leading up to its passage and the seven-year ratification effort that followed. The passage of the legislation in Congress was a remarkable victory. When the measure cleared the House, Majority Leader Jim Wright (D-TX) took to the Floor and singled out Congressman Walter E. Fauntroy (D-DC) for praise. 313 Even more remarkable was the victory in the Senate, 314 where the resolution enjoyed unbelievable, bi-partisan support. 315 The President has no role in proposed amendments to the Constitution. 316 In sixteen of the fifty states, both houses simultaneously

ratified the Amendment within the seven-year period prescribed. 317 Had the proposed Amendment succeeded, District residents would have political standing, but would continue to lack sovereignty. 318 Other proposals include retrocession of most, or all, of the District to Maryland. 319

**F. Full and Partial Retrocession**

There are many views about retrocession and how it will work. In one form, retrocession would give the non-federal portion of the District back to Maryland. Maryland is the logical choice, based on historical and geographical considerations. 320 As Maryland surrounds the District on three sides, absorption would not be difficult. 321 The District and Maryland share many systems and are somewhat interdependent regarding matters of infrastructure. 322 Maryland is the only state with these connections; therefore, it is best for any proposed retrocession. 323 At the Davis Hearing, two retrocession proposals were presented. 324 H.R. 381, introduced by Congressman Regula, accords with the traditional retrocession concept and would cede the non-federal land on which the District sits back to Maryland, with the exception of the "National Capital Service Area." 325 H.R. 3709, introduced by Congressman Rohrabacher, calls for what in the past has been referred to as "partial retrocession," and would allow District citizens to vote in Maryland ***39** federal elections. 326 Except for their sponsors who testified, neither of these proposals received support during the Hearing. 327 Any retrocession legislation could be done by statute. 328 There is historical precedent based on the retrocession of Alexandria and Arlington in 1846. 329 The same thing could be done for the District. 330 Retrocession would also relieve the federal government of dealing with governing the city. 331 Retrocession would also eliminate the duplication of many services. 332 Yet, there are difficulties with retrocession. It may require the approval of the Maryland legislature and, quite possibly, a majority of the population of Maryland. 333 In the past, Maryland politicians have not endorsed such a proposal. 334 There is also concern that giving the District back to Maryland would destroy the unique character of the city. 335 The District is a source of distinction. 336 Finally, there is the idea of treating the District as we treat other federal enclaves. 337 Residents of federal enclaves vote in the states from which the enclave was carved. 338 The Supreme Court has held that giving Congress exclusive jurisdiction over that land could not deprive those living on the land of their rights. 339 Residents of the District could be treated the same as those from a state because District land was once part of Maryland. 340 By legislative enactment, Congress could assert that, as a federal enclave carved from Maryland, the District may vote in Maryland elections. 341 This method would arguably not require ***40** a constitutional amendment, 342 nor require approval of the Maryland legislature. 343 The Uniformed and Overseas Citizens Voting Rights Act of 1975 requires states to accept votes from people overseas, even though the people overseas are not technically residents of the state. 344 Replacing that Act, the Uniformed and Overseas Citizens Absentee Voting Act makes provisions for American citizens who reside outside of the United States to vote by absentee ballot. 345 Under provisions like this Act, District residents could vote in Maryland congressional elections without becoming Maryland citizens. 346 Some argue that Article I, Sections 2 and 3 of the Constitution are an impediment to this approach. 347 Under these provisions, membership in the U.S. House and Senate is limited to individuals elected by the people of the several states. 348 Arguably, because District citizens are not among the people of the several states, they cannot elect representatives and senators. On the other hand, the Fourteenth Amendment may allow Congress to enact partial retrocession as well as specifically grants Congress the power to enforce the amendment through legislation. 349 When the District was established, its residents still voted in Maryland elections. 350 Maryland's voting laws continued to be in force until Congress changed those regulations. 351 Congress has not passed any laws making the voting laws of Maryland inapplicable 352 to District residents. However, the addition of over 500,000 votes to a Maryland federal election would change the dynamics of Maryland elections and government. 353 It would be unfair to force this new voting scheme onto Maryland residents without input from them. 354 This potential conflict is just one of many matters that would have to be decided before District residents could vote in Maryland elections. 355

**V. Can the District Afford To Be a State**

This author believes the question is better posed if inverted - can the District afford not to be a state? Revenue foregone due to limitations imposed by its status significantly impacts the quality of life of District residents. Experts have addressed these limitations and what lifting them through Statehood could mean for District finances. 356 The District is economically viable as a state, independent of special federal government support. 357

**A. What Effect, if any, Will Statehood Have on Federal Payments to D.C.?**

For many years, the District of Columbia received a special payment - referred to as "The Federal Payment" - that ended when The District of Columbia Revitalization Act was enacted in 1998. 358 A recurring question has been what will become of federal contributions if the District becomes a state? The responses have been similar; many believe the federal contributions will not change. 359 Dr. Andrew Brimmer, as well as many other scholars, reached the ***42** same conclusion. 360 A lump-sum payment system was made permanent by the District of Columbia Revenue Act of 1939 and used until 1973, when the multiyear, lump sum system was established as part of the Home Rule Act. 361 That scheme remained until 1998, when Congress eliminated the federal payment. 362 The financial implications of achieving Statehood for the District are admittedly complex. As Senator Mary Landrieu (D-LA) stated, "The District faces economic challenges that no other city in the country has to meet." 363 The District is caught in limbo between being a state and a city. 364 Even so, numerous experts conclude that any foreseeable negative results of Statehood are moderate, while the possible benefits are immense. 365 The National Capital Revitalization and Self-Government Improvement Act of 1997 gave certain benefits to the District. 366 Dr. Alice Rivlin estimates that the loss of those benefits could cost the District roughly one billion dollars. 367 At the same time, New Columbia would gain roughly $2.26 billion from personal income tax, 368 earmarks, 369 increased budget efficiency, 370 commuter taxes and higher bond ratings. Currently, the local government lacks the sovereignty all states enjoy. 371 In the District, the federal government holds ultimate financial authority. 372 This unique status has long been recognized as having an adverse impact on the District's financial health. 373 Although the District has a larger population than the state of Wyoming and close to that of nine other states, 374 Congress determines its affairs.

**B. Will the State be Treated Differently than the Current Government for Purposes of Federal Grants and Loans?**

The District's entitlement to federal grants would be more secure as a state. 375 The basis for continued support from the federal government has not changed. 376 Again, expert opinions, spanning many years, tend to agree. 377 Due to its lack of statehood, the District of Columbia cannot lean on a state government to help with local funding. 378 If granted statehood, the District would be in a far better position to fund its needs and those of sixteen million yearly visitors. 379

**C. How Will Statehood Affect Taxing Authority?**

Approximately 70 percent of the District's workforce does not live within its physical boundary. 380 The District of Columbia is a city where 591,833 people reside 381 and more than 700,000 people work. 382 Congress prohibits the District from taxing income earned by nonresidents working within its boundaries; a limitation on taxing authority discussed extensively in a 1985 report prepared by Dr. Brimmer. 383 In her 2009 testimony, Dr. Rivlin noted: The District is extremely small ... [only 61.4 square miles] at the heart of a prosperous metropolitan area. Relatively affluent suburbs, many of whose residents work in the District, use its roads and parks and other services, but pay no income tax to the District, ring it. Indeed, two-thirds of the income earned in D.C. is earned by non-residents. 384 Correspondingly, Dr. Rivlin argues for such taxing authority. 385 In other large cities, such as New York City, a commuter tax is placed on those who enter the city to work. 386 Consequently, "[t]he District already charges some of the highest tax rates in the country. They have resorted to high rates in part because of restrictions on their tax base." 387 Another burden that residents of the District must bear is the inability to tax specific property in the area. According to Dr. Rivlin, "[f]ully 42 percent of the real and business property base is exempt from taxation, with the

federal government accounting for 28 percent." 388 Despite not paying taxes, these properties - foreign embassies, federal buildings, and non-profit organizations 389 - benefit from District services and infrastructure, including: fire, police, roads, and emergency services.

**D. What are the Expected Transition Costs of Statehood?**

Experts throughout the years have addressed this question with remarked similarity. 390 In 1984, a former Auditor for the District commented that transition costs would likely be low. 391 However, the city lacks the control and restraint necessary to lower its debt, which was created by high interest loans as a result of poor bond ratings. 392 The District's debt burden is considerably higher than recommended by the rating agencies: All three of the rating agencies (Moody's, Standard & Poor's, and Fitch) have indicated that ... the District's debt burden [is] relatively high. Such a high debt burden is a contributing factor to limitations on the potential for further bond rating upgrades forcing the city to continue to pay higher than necessary interest rates. Bond ratings have a direct financial effect ... of the amount of interest that the District must pay on its debt, and bond ratings also represent a broad indicator to investors and other stakeholders of ... current and long-term financial health. 393 The District of Columbia is forced to spend a significant percentage of the annual budget on interest alone - even during an economic or financial crisis when the city does not generate as much revenue as it normally does. 394 Additionally, the city is forced to prioritize paying debt, rather than financing education and health care. In recent years, there has been increasing attention to the District of Columbia's high debt levels, which are among the highest per capita when compared with other cities and states. [The District's] debt consumes nearly 12 percent of the operating budget, more than the 10 percent recommended by bond rating agencies. 395 Dr. Robert Ebel, the Deputy Chief Financial Officer for the District, has estimated that taxing personal income of nonresidents who work in the District would generate $2.26 billion annually. 396 Currently, the District is operating under a structural imbalance. The U.S. Government Accountability Office defines this as "the difference between its cost of providing an average level of services, and its total revenue capacity - the amount of revenue the District would have (including federal grants) if it applied average tax rates to its taxable resources." 397 Consequently, residents must compensate for the lack of revenue from the inability to tax 70 percent of the personal income generated within the city and 42 percent of real and business property. 398 Ed Lazere, Executive Director of the DC Fiscal Policy Institute, has argued that the only realistic way to address a projected revenue shortfall for 2009 is to tap into the city's $330 million emergency and contingency reserves because it is too late to sufficiently implement tax or fee increases. 399 Although borrowing from the emergency and contingency fund (often referred to as the "rainy day" fund) is the usual option to fill the shortfall, D.C.'s lack of control over its budget presents rigid obstacles. Congress has mandated that any money the District borrows from its rainy day fund must be paid back entirely within two years. 400 Because of its unique structure, the District is currently forced to operate like a state, but with the added burden of not taxing like a state. Even though the city has balanced its budget over the past eleven years, 401 it has done so at the cost of raising

taxes and eliminating essential services. Statehood would allow the structural changes that are necessary to pay off its large debt, 402 thus freeing desperately needed money to lower taxes and offer better services. Creating New Columbia would help fix the structural imbalance.

**VI. International Law and the District Of Columbia**

By denying representation in Congress to the people of Washington, D.C., the United States damages its authority to advocate for the spread of democracy abroad. 403 The United States is also potentially violating international law. Both formal treaties 404 and the behavior of nations 405 recognize full representation in the national legislature as a universal right to which all people are inherently entitled. The United States of America stands absolutely and totally alone as the only nation in the world with a representative democracy that denies to the citizens of its capital voting representation in the national legislature. However, domestic courts have held that they lack the authority and jurisdiction to create a judicial remedy to this issue, ruling in *Ballentine v. United States*, that "pursuant to Article I of the Constitution, only states are entitled to regular voting members [in Congress]." 406 Earlier courts have also

ruled on whether U.S. territories are entitled to membership in the Electoral College, concluding, "the franchise for choosing electors is confined to 'states' cannot be 'unconstitutional' because it is what the Constitution itself provides." 407 However, many courts have been sympathetic to the plight of U.S. citizens robbed of voting rights. 408 Nonetheless, there is mounting international pressure on the United States to resolve the incongruity between the voting and representational status of living in states and its citizens living elsewhere. 409 While some criticisms have been general or applicable to the District in a nonspecific fashion, 410 some have been aimed squarely at the city of Washington and its specific grievances--lack of self-determination and voting representation. 411

**A. Treaty Law**

International law comes from two primary and distinct sources--treaty and custom. 412 Treaties are straightforward; they are contracts between states, 413 and have a force equal to that of a Congressional statute granted under the Supremacy Clause of the United States Constitution." 414 The federal government could hardly conduct foreign policy if its treaties were unenforceable under state law. International law is thus a source of domestic law. 415 In practice, the status of treaties in domestic law is more complex. 416 The U.S. is a party to a number of treaties that are part of a growing framework of international human rights law. 417 In the years following the horrors of World War II, 418 the global community came together to recognize that all people are entitled with a corpus of rights that transcend any one nation or government. 419 The Universal Declaration of Human Rights, issued in 1948 by the United Nations Commission on Human Rights, is the first part of the International Bill of Human Rights; it does not create new rights, but rather restates "fundamental freedoms" recognized by the United States and other members of the international community as "inalienable" to all people. 420 "This Declaration may well become the international Magna Carta." 421 The views of the members of the Commission reflect this broad vision. 422 This is not to say there was unanimous agreement among all the delegates. 423 However, 48 out of 58 members of the United Nations, including the United States, supported it. 424 The International Covenant on Civil and Political Rights ("ICCPR") was created in 1966. 425 Article 1 and Article 25 of the ICCPR affirm the political rights in the Declaration: "All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development." 426 The ICCPR is a treaty and the United States is among 166 countries to have ratified it and is bound by its *51 terms. 427 The treaty covers the lack of self-determination in Articles 1.1 and 1.3. 428 Exclusion of non-self-governing territories from the auspices of the ICCPR would seem to run contrary to its intent and purpose. Some territories, however, have accepted their status. In *Igartua- De La Rosa v. United States*, the court stated that because Puerto Ricans "themselves acceded to their present Commonwealth status," they are not entitled to any further protection under treaties such as the ICCPR. 429 Article 25 of the ICCPR mirrors the language of Article 21 of the Declaration, and further supports the idea that the treaty does not accept the status of non-self-governing territories carte blanche. 430 Residents of the District of Columbia lack Article 25 rights because their powers are subordinate to the unelected masters in Congress. 431 A violation of the ICCPR raises the opportunity for one of the treaty partners to challenge the U.S. under the dispute resolution mechanism outlined in Articles 41 and 42. 432 Such an investigation could lead to a formal denunciation of the United States. 433 The United States is also a party to regional instruments emphasizing its obligation to full voting representation for its people. The Inter-American Democratic Charter ("IADC") was adopted in 2001. 434 In 2003, the Inter-American Commission on Human Rights, a body of the Organization of States ("OAS"), ruled against the United States. 435

**B. Customary Law**

The United States is also in defiance of customary international law. Custom has a legal force equal to that of treaties or Congressional statute; it can be analogized to common law. 436 Unlike treaty law, customary international law is based not on a single written document but on what the International Court of Justice defines this as "evidence of a general practice accepted as law." 437 There are two essential components in establishing custom. 438 The first component requires observing state practice through "interstate interaction and acquiescence." 439 Such practice must be "general and consistent." 440 A given practice need not be adhered to by all nations to

become custom. While the 9th Circuit Court ruled in 1994 that a norm must be "specific, universal, and obligatory," 441 the 2nd Circuit Court of Appeals has clarified that position stating, "[s]tates must not be universally successful in implementing the principle in order for custom to arise." 442 For a practice to become custom, it must be widespread and seen as legally mandated - a principle known as *opinio juris*. 443 In addition to its role as a source of international law, custom is also a part of American domestic law. 444 The traditional view is that custom should be based ***53** primarily on state practice, 445 with *opinio juris* being of secondary importance. 446 This view was given a forceful measure of support by the U.S. Supreme Court in *Sosa v. Alvarez*, 447 where Justice Souter stated for the majority that custom should be determined by three primary standards: "[a] norm of international character, accepted by the civilized world, and defined with a specificity comparable to the features of the 18th century paradigms we have recognized." 448 The exact structure of democratic governments may vary considerably. This point is raised by the court in *Igartua* 449 which refuted the plaintiff's claim that there exists no right in customary international law to vote for one's head of state holding, "[n]o serious argument exists that customary international law ... requires a particular form of representative government... If there exists an international norm of democratic government, it is at a level of generality so high as to be unsuitable for importation into domestic law." 450 The Court drew on the *Sosa* 451 ruling, which held that a "high level of generality" is insufficient for determining custom. 452 There may be many different forms of an elected government, yet there is only one real form of electing the legislatures inherent to that government - one citizen, one vote. Anyone seeking to contest this position must ask: is any other method practiced? 453

**C. State Practice**

Establishing state practice is relatively simple. Every state that holds elections for a national legislature grants the citizens of its capital full voting rights and representation, including all of the countries named in Appendix II. The United States is the sole exception. 454 The American military presence in Iraq and Afghanistan, ***54** with the goal of spreading democracy to that region, represents a willingness on the part of the United States government to strongly support those beliefs through action. Both Iraq and Afghanistan now hold elections in which all citizens vote to elect their national legislature. 455

**D. *Opinio Juris***

Establishing opinio juris is more complex. The declarations and treaties listed are evidence that states view those rights as legally binding custom. 456 On September 11, 2001, the United States adopted the IADC along with thirty-four countries in the Western Hemisphere. Secretary of State Colin Powell represented the United States at the treaty signing and upon hearing of the terrorist attacks that took place, stated: "It is important that I remain here for a bit longer in order to be part of the consensus of this new charter on democracy. That is the most important thing I can do ... I very much want to express the United States' commitment to democracy ... [and] to individual liberties." 457

**E. Implications of Custom**

Both state practice and *opinio juris* provide evidence that the right of all people to full representation in the national legislature is international custom. This argument meets the test set forth in Sosa. 458 In Igartua, Judge Toruella expressed that view in his dissent. 459 Because custom is a part of U.S. domestic law, it could be a possible mechanism to challenge the status of the District in federal court. Statehood should be pursued by primarily political means because no court, under either domestic or international law, has the authority to compel Congress to create a new state. 460 However, a legal challenge allows for the possibility to seek a judicial remedy that would grant some relief. 461

**VII. Conclusion**

Recent surveys have found that 78 percent of Americans believe District residents have the same Constitutional rights as other U.S. citizens, including equal voting rights in Congress. 462 When informed of the disfranchisement, 82 percent of those surveyed, including 87 percent of Democrats and 77 percent of Republicans, believe District citizens should have equal congressional voting rights. 463 Popular support of that magnitude is an important tool in persuading Congress to support Statehood. The issue is parochial. The District's status gives it little leverage to gain support for their cause. But voters from their home states can encourage Congress to support the District. The most important reason is that democracy is an American birthright. The quickest solution may be treating District residents the same way other enclave residents are treated. The problem is, assuming that action could be taken by statute, that those same rights can be taken away - a precarious situation. 464 If the goal is to secure for District residents the most rights, without the possibility of those rights being taken away, the solution is statehood. It gives the District the sovereignty that many of its residents desire. Some have said Congress should provide that no more than one Senator could be elected from any party, ensuring the election of a non-Democratic Senator. 465 The courts upheld that provision. 466 Many would find it objectionable. 467 The drive to achieve D.C. Statehood must be waged on several levels. They should not give up on the courts. Many considered America to have a binding agreement with the District at its founding. Equally, America has not met the terms of that agreement. This breach may be cognizable in the courts. Moreover, Congress has proven to be a place where, with hard work, sympathy can be found. It is time, once again, to put the issue squarely before them. Of course, world opinion may be the strongest asset. All of these strategies should be undertaken. Statehood for the people of the District of Columbia is inevitable. Through proper package and presentation, the impossible can become possible. I remain hopeful and optimistic that one day, in our lifetime, the invisible line one crosses when entering Washington, D.C. will make no difference to the matter of equal citizenship. Somewhere in the midst of a long, dark passageway, there is the tunnel's light. Statehood could finally mend the crack in the Liberty Bell, through which close to 600,000 citizens have fallen. Statehood for the District of Columbia is the only path to lasting political standing and sovereignty - equal footing - something all other citizens in America and many around the world enjoy, demand, and take for granted.

**Appendix I**

**Timeline:**

**209 Years of the District of Columbia's Efforts to Restore Self-Government**

1788 The General Assembly of the State of Maryland authorizes the cession of territory for the seat of government of the United States, "acknowledged to be forever ceded and relinquished to the Congress and Government of the United States, and full and absolute right and exclusive jurisdiction, as well of soil as of persons residing or to reside thereon, pursuant to the tenor and effect of the eighth section of the first article of the Constitution. . . And provided also, That the jurisdiction of the laws of this State over the persons and property of individuals residing within the limits of the cession aforesaid shall not cease or determine until Congress shall, by law, provide for the government thereof, under their jurisdiction, in manner provided by the article of the Constitution before recited." The Maryland Assembly passes supplementary acts of cession in 1792 and 1793 regarding the validity of deeds and sale of property in the new capital.

1789 The General Assembly of the Commonwealth of Virginia authorizes the cession of territory for the permanent seat of the General Government as Congress might by law direct and that the same 'was thereby forever ceded and relinquished to the Congress and Government of the United States, in full and absolute right, and exclusive jurisdiction. . . .' Like Maryland, Virginia's act of cession provides that Virginia law shall continue to apply until Congress, 'having accepted the said cession, shall, by law, provide for the government thereof, under their jurisdiction, in manner provided by the articles of the Constitution before recited.' (District clause).

1790 Congress accepts the territory ceded by the State of Maryland and the Commonwealth of Virginia to form the Seat of Government of the United States. It declares that on the first Monday in December 1800, the Seat of Government of the United States shall be transferred to such district and it authorizes the President to appoint three commissioners to survey and purchase land and prepare it for the new government which is to take up residence on the first Monday in December 1800.

1791 President George Washington issues several presidential proclamations defining and fixing the boundaries of the new District.

1790-1800 Qualified residents of the new District of Columbia continue to vote in elections of federal officers conducted in Maryland and Virginia, including Representatives ***58*** in Congress, even though Maryland and Virginia ceded the land to the Federal government and the District's boundaries had been drawn.

1800 The Seat of Government of the United States is transferred to the new District of Columbia.

1801 A lame duck Congress passes the Organic Act of 1801 on Feb. 27, 1801 and divides the District into two counties, the county of Washington (Maryland cession) and the county of Alexandria (Virginia cession). The Act creates a circuit court for the District of Columbia, authorizes the appointment of a U.S. Attorney, marshals, justices of the peace, and a register of wills for the District. It also provides that the Act shall not 'alter, impeach or impair the rights, granted by or derived from the acts of incorporation of Alexandria and Georgetown [incorporated cities in Virginia and Maryland prior to cession]. No longer in a state, District residents lose their state and national representation (senators were then elected by state legislatures) and their local self-determination to the extent they do not live in the two incorporated cities.

1802 Congress abolishes the board of commissioners and incorporates the City of Washington (formerly in the County of Washington) with a presidentially appointed mayor and a popularly elected council of twelve members with two chambers, one with seven members and the second with five members. The second chamber is to be chosen by all the members elected. All acts of the council must be sent to the Mayor for his approval. Suffrage is limited to 'free, white male inhabitants of full age, who have resided twelve months in the city and paid taxes therein the year preceding the election's being held.'

1804 Congress extends the 1802 charter fifteen years and provides for the direct election of both houses of the Council, each with nine members.

1812 Congress amends the charter of the City of Washington to enlarge the council, now consisting of an elected board of aldermen (eight members) and an elected board of common council (twelve members). The Mayor is to be elected by the two boards in a joint meeting. Congress also expands the corporation's taxing authority and authority to develop public institutions, although subject to the approval of the President (including the budget) since the Mayor will no longer be a Presidential appointee.

1812 Congress confers certain powers upon a levy court or board of commissioners for the County of Washington (part of Maryland cession not included in the city of Washington) primarily dealing with taxes for public improvements such as roads and bridges. The board has seven members designated by the President from existing magistrates in the county.

1820 Congress repeals the 1802 and 1804 acts and reorganizes the government of the City of Washington by providing for a popularly elected Mayor. Existing elected council continued.

1822 A Committee of Twelve, appointed "pursuant to a resolution of a meeting of the Inhabitants of the City of Washington," requests from Congress a republican form of government and the right to sue and to have federal representation "equal to citizens who live in States." "The committee confesses that they can discover but two

modes in which the desired relief can be afforded, either by the establishment of a territorial government, suited to their present condition and population, and restoring them, in every part of the nation to the equal rights enjoyed by the citizens of the other portions of the United States, or by a retrocession to the states of Virginia and Maryland, of the respective parts of the District which were originally ceded by those states to form it." Washington City residents were not interested in retrocession, however.

1825 On December 28, a Committee of Thirteen sends a ten-page Memorial to Congress "praying for an amelioration of their civil and political condition" and said they should be treated at least as well as territories.

1841 In his inaugural address, President William Henry Harrison says "Amongst the other duties of a delicate character which the President is called upon to perform is the supervision of the government of the Territories of the United States. Those of them which are destined to become members of our great political family are compensated hy their rapid progress from infancy to manhood for the partial and temporary deprivation of their political rights. It is in this District only where American citizens are to be found who under a settled policy are deprived of many important political privileges without any inspiring hope as to the future. . . 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. Being in the latter condition when the Constitution was formed, no words used in that instrument could have been intended to deprive them of that character."

1846 Congress, the Virginia Legislature and the City of Alexandria approve the retrocession of the county and town of Alexandria (what is now Arlington County and the City of Alexandria) back to Virginia, decreasing the size of the District by about forty percent. The referendum on retrocession passes 763 for to 222 against. Residents of Alexandria City approve the retrocession (734 for to 116 against), while residents of Alexandria County, disapprove it (29 for to 106 against).

1848 Congress reorganizes the government of the City of Washington, approving a new charter that allows voters to elect the Board of Assessors, the Register of Wills, the Collector, and the Surveyor. It abolishes the property qualifications for voting and extends voting rights to all white male voters who pay a one dollar yearly school tax.

1850 Congress ends the slave trade in the District.

1862 Congress abolishes slavery in the District (on April 16th, "Emancipation Day," nine months before the Emancipation Proclamation is issued) and establishes a school system for black residents.

1867 Congress grants the vote to every male person "without any distinction on account of color or race" who is not a pauper or under guardianship, is twenty-one or older, who has not been convicted of any infamous crime and has not voluntarily given "aid and comfort to the rebels in that late rebellion," and who has resided in the District for one year and three months in his ward. African Americans make up thirty-three percent of the District's population and wield considerable political power.

1871 Congress repeals the charters of the cities of Washington and Georgetown and creates the Territory of the District of Columbia. The Territory will have a Presidentially appointed Governor and Secretary to the District, subject to Senate confirmation, a bicameral legislature with a Presidentially appointed upper house and Board of Public Works, both subject to Senate confirmation, and a popularly elected twenty-two seat House of Delegates, and a nonvoting Delegate to the House of Representatives. Norton P. Chipman is the District's first nonvoting Delegate to the U.S. House of Representatives. However, the District's voters lose the right to elect its executive and the upper house of its legislature.

1874 Congress removes all elected Territorial officials, including the nonvoting Delegate in Congress, temporarily replaces the Territorial government with three presidentially appointed commissioners and places an officer of the

Army Corps of Engineers in charge, under the general supervision and direction of the commissioners, of public works in the District. The First and Second Comptroller of the Treasury are appointed to a board of audit to audit the Board of Public Works and Territorial Government's financial affairs.

1878 Congress passes the Organic Act of 1878 which declares that the territory ceded by the State of Maryland to Congress for the permanent seat of government of the United States shall continue to be the District of Columbia and a municipal corporation with three Presidentially appointed commissioners, one of whom shall be an officer of the Army Corps of Engineers, as officers of the corporation. The board of the metropolitan police, the board of school trustees, the offices of the sinking-fund commissioners, and the board of health are abolished and their duties and powers transferred to the Commissioners. Congress and the Secretary of the Treasury must approve the Commissioners' proposed annual budget. The federal payment is fifty percent of the budget Congress approves. Congress must also approve any public works contract over $1,000.

1888 Conservative newspaperman Theodore Noyes of The Washington Star launches campaign for congressional representation and strongly opposes real democracy. Noyes writes, "National representation for the capital community is not in the slightest degree inconsistent with control of the capital by the nation through Congress." Sen. Henry Blair of New Hampshire introduces the first resolution for a constitutional amendment for District voting rights in Congress and in the Electoral College, which fails to pass.

1899 A political scientist describes the Board of Trade--which supports congressional voting rights only--as providing District with the ideal form of local government through a "representative aristocracy."

1919 Congress reduces the federal payment to forty percent. The Board of Trade and the Chamber of Commerce advocate Congressional voting rights and oppose home rule.

1925 Congress abandons a fixed percentage federal payment and gives the commissioners authority to raise local taxes.

1935 The California legislature passes a resolution recommending Congress amend the Constitution to grant the District representation in Congress.

1940 Congress grants District residents the same access to federal courts as that available to residents of the states (diversity jurisdiction). The Supreme Court, in *National Mut. Ins. Co. v. Tidewater Transfer Co., Inc.*, 337 U.S. 582 (1949), upholds that act.

1943 Board of Trade appears before Senate Committee to support representation in Congress but opposes local self-government.

1952 President Truman transmits Reorganization Plan No. 5 of 1952 to Congress to streamline the District's government by transferring over fifty boards and commissions to the Commissioners. When transmitting the plan to Congress, he states "I strongly believe that the citizens of the District of Columbia are entitled to self-government. I have repeatedly recommended, and I again recommend, enactment of legislation to provide home rule for the District of Columbia. Local self-government is both the right and the responsibility of free men. The denial of self-government does not befit the National Capital of the world's largest and most powerful democracy. Not only is the lack of self-government an injustice to the people of the District of Columbia, but it imposes a needless burden on the Congress and it tends to controvert the principles for which this country stands before the world."

1960's Segregationist Rep. John McMillan, who favors a District vote for President and Vice President, says a struggle for home rule will cripple the campaign for the national vote. McMillan thinks the national vote should "satisfy" DC residents "at least for a while."

1961 Twenty-Third Amendment to the Constitution that gives the District a limited vote in the electoral college is ratified.

1964 District voters vote for the first time for President since the creation of the District in 1800, but only get "three fourths" of a vote since the District is limited to three electoral votes regardless of its population, which at the time would have merited two seats in the House.

1967 Thinking he might reduce tensions in the District and prevent riots like those occurring in other U.S. cities, President Lyndon Johnson transmits Reorganization Plan No. 3 of 1967 to Congress. It creates a Presidentially appointed Council of nine members and a Presidentially appointed Commissioner and Assistant Commissioner of the District of Columbia (Mayor and Deputy Mayor equivalents), eliminating the office held by an officer of the Corps of Engineers. He notes that the commissioner form of government was designed for a city of 150,000 people and that "(t)oday Washington has a population of 800,000. . . . I remain convinced more strongly than ever the Home Rule is still the truest course. We must continue to work toward that day - when the citizens of the District will have the right to frame their own laws, manage their own affairs, and choose their own leaders. Only then can we redeem that historic pledge to give the District of Columbia full membership in the American Union." He appoints Walter Washington "Mayor" and Thomas Fletcher "Deputy Mayor" and John Hechinger as Council Chairman.

1968 Congress authorizes an elected school board and the District residents vote for school board members, their first vote for any local body since the territorial government was dissolved in 1874.

1970 Congress passes a law authorizing a nonvoting delegate in House of Representatives for the District (the first since 1874). D.C. Statehood Party is formed with Julius Hobson its first candidate for nonvoting Delegate.

1971 District voters elect Walter Fauntroy as their second nonvoting Delegate to House of Representatives.

1973 Congress passes the D.C. Self-Government and Governmental Reorganization Act (Home Rule Act) providing for an elected Mayor, thirteen member Council and Advisory Neighborhood Commissions and delegating certain powers to the new government, subject to Congressional oversight and veto. The new government is prohibited from taxing federal property and nonresident income and from changing the federal building height limitation, altering the court system or changing the criminal code until 1977. Congress retains a legislative veto over Council actions and must approve the District's budget. All District judges are Presidential appointees. A "floating" federal payment is retained. A mixture of District and Federal agencies governs planning and zoning.

1974 District voters elect Walter Washington as their first elected Mayor since 1870 and their first elected Council, headed by Chairman Sterling Tucker, since 1874.

1978 Congress amends the Home Rule Act to add recall, initiative and referendum provisions and makes a number of changes to address the problems of delay and federal intrusions into purely local decisions.

1978 Congress passes a Constitutional amendment to give the District full Congressional voting rights (two senators and representatives) and full representation in the Electoral College. The states have seven years to ratify it.

1979 An initiative to hold a Statehood Constitutional Convention is filed. Congress rejects the Council's bill on the location of chanceries, an example of the federal interference in local land use decisions.

1980 District voters overwhelmingly approve the initiative to hold a Statehood Constitutional Convention.

1981 District voters elect forty-five delegates to the Statehood Constitutional Convention. Congress rejects the Council's revision to the District sexual assault law.

1982 The convention, of which D.C. Statehood activist Charles Cassell is elected President, completes its work in three months. In November, voters approve a statehood constitution for the State of New Columbia and elect two "Shadow" Senators and a Representative to promote statehood (the latter not implemented until 1990).

1983 A petition for statehood, including the 1982 constitution ratified by the voters, is sent to Congress, where no action is taken on it.

1985 The 1978 constitutional voting rights amendment dies after only sixteen states ratify it.

1987 The District Council revises the Constitution for the State of New Columbia and transmits it to both Houses of Congress.

1990 District residents elect their first statehood senators and representative. The positions were first authorized in 1982 when the statehood constitution was approved.

1992 The House of Representatives, with a new Democratic majority, grants a limited vote in the Committee of the Whole

to the District Delegate.

1993 The House District Committee favorably reports a statehood bill out of committee; in first full House vote on statehood ever, but it fails (153 to 277).

1995 The District Delegate's vote in the House Committee of the Whole is revoked. Congress authorizes the President to appoint the District of Columbia Financial Responsibility and Management Assistance Authority (Control Board), which replaces the elected school board with an appointed board. The law also creates the Office of Chief Financial Officer for the District of Columbia.

1997 Congress strengthens the Control Board by giving it total control over the District's courts, prisons and pension liabilities (much of that $5 billion in unfunded liabilities is from the pre-Home Rule era), increased control over Medicaid and removes nine agencies from the Mayor's authority. The Federal Payment provisions are repealed. Locally elected officials can regain authority after four consecutive balanced budgets.

1998 Voters vote on a medical marijuana initiative (Initiative 59), but the Barr Amendment prohibits spending money to even count the ballots. U.S. District Court Judge Richard Roberts rules in 1999 that ballots can be counted (69% of the voters favored the initiative), but Congressional riders prohibit implementing the initiative.

1998 Twenty District citizens (*Adams v. Clinton*) sue the President, the Clerk and Sergeant At Arms of the U.S. House of Representatives, and the Control Board seeking declaratory judgments and injunctions to redress their deprivation of their democratic right (1) to equal protection or "the right to stand on an equal footing with all other citizens of the United States," (2) to enjoy republican forms of government, (3) to be apportioned into congressional districts and be represented by duly elected representatives and Senators in Congress, and (4) to participate through duly elected representatives in a state government insulated from Congressional interference in matters properly with the exclusive competence of state governments under the 10th Amendment.

1998 Another lawsuit, *Alexander v. Daley*, is filed by fifty-seven District residents and the District government against the Secretary of Commerce, the Clerk and Sergeant of Arms of the U.S. House of Representatives, and the Secretary and Sergeant of Arms of the U.S. Senate alleging violations of their equal protection and due process rights and privileges of citizenship and seeking voting representation in both houses of Congress.

1999 President Bill Clinton vetoes H.R. 2587, the "District of Columbia Appropriations Act, 2000" because it contains numerous riders that "are unwarranted intrusions into local citizens' decisions about local matters."

Specifically, the bill prohibits (1) the use of federal and District funds for petition drives or civil actions for voting representation in Congress; (2) limits access to representation in special education cases; (3) prohibits the use of federal and District funds for abortions except where the mother's life was in danger or in cases of rape or incest; (4) prohibits the use of federal and District funds to implement or enforce a Domestic Partners Act; (5) prohibits the use of federal and District funds for a needle exchange program and District funding of any entity, public or private that has a needle exchange program, even if funded privately; (6) prohibits the D.C. Council from legislating regarding controlled substances in a manner that any state could do; and (7) limits the salary that could be paid to D.C. Council Members.

2000 A three judge panel of the U.S. District Court for the District of Columbia, in the consolidated lawsuit of *Adams v. Clinton* and *Alexander v. Daley*, finds it has authority to only rule on the issue of apportionment and representation in the House and holds that inhabitants of the District are not unconstitutionally deprived of their right to vote for voting representation in the House. The court remands the issues of voting representation in the Senate and Adams' challenge to the existence of the Control Board to the single District Judge with whom the cases were originally filed, and that judge dismisses both claims. Adams' claim regarding the right to an elected state government insulated from Congressional interference is not directly addressed. In his dissent, Judge Louis Oberdorfer finds the people of the District of Columbia are entitled to elect members of the U.S. House.

2000 A D.C. Superior Court jury finds Statehood activists Anise Jenkins and Karen Szulgit not guilty of "Disruption of Congress" when they spoke out on July 29, 1999 in the House of Representatives against passage of the Barr Amendment that prohibited the implementation of D.C. Initiative 59. Ben Armfield was acquitted of a similar charge earlier in the year. Ms. Szulgit reflected on their 7-month ordeal saying: "Freedom isn't free. I look forward to the day when we stand together—all the D.C. democracy advocates, our locally elected officials, and every member of Congress--and finally address the unfinished business of the civil rights movement."

2000 On the 40th anniversary of the founding of SNCC, the Unemployment and Poverty Action Committee (UPAC), of which James Foreman is president, petitions Congress to "grant immediate Statehood to the majority part of the District of Columbia."

2001 The D.C. Democracy 7 are acquitted. They were arrested on July 26, 2000 for "Disruption of Congress" in the House of Representatives Visitors' Gallery for allegedly chanting "D.C. Votes No! Free D.C.!" during a Congressional vote on the D.C. Appropriations Bill. Their first trial ended in a hung jury and mistrial.

2001 The Control Board officially suspends its operations and transfers home rule authority back to the elected Mayor and Council (although upon certain conditions occurring, the Control Board can be reactivated in the future).

2001 The Inter-American Commission on Human Rights of the Organization of American States (OAS) rules on a 1993 charge brought by the Statehood Solidarity Committee and finds that the denial to District citizens of equal political participation in their national legislature and the right to equality before the law is a violation of their human rights.

2002 At the Second World Social Forum in Porto Alegre, Brazil, the D.C. Statehood Green Party presents a petition calling for Statehood, democracy, and full rights under the U.S. Constitution for residents of the District of Columbia.

2004 The Inter-American Commission on Human Rights issues a report finding that the United States Government violates District residents' rights by denying them participation in their federal legislature.

2004 The demand for D.C. Statehood is dropped from the Democratic Party platform at the suggestion of D.C. Delegate Eleanor Holmes Norton, vice-chair of the DNC Platform Committee.

2005 The Parliamentary Assembly of the Organization for Security and Cooperation in Europe (OSCE) passes a resolution calling on Congress to support equal voting rights legislation for District residents.

2005 The U.S. Court of Appeals for the District of Columbia holds in Banner v. United States that in prohibiting a commuter tax on nonresidents working in the District, Congress was merely exercising the power that "the legislature of a State might exercise within the State" and does not violate the Equal Protection or the Uniformity Clause of the Constitution.

2006 The U.N. Human Rights Committee finds that the District's lack of voting representation in Congress violated the International Covenant on Civil and Political Rights, a treaty ratified by more than 160 countries, including the United States.

2007 The Organization for Security and Cooperation in Europe's Office of Democratic Institution and Human Rights finds the District's lack of equal congressional voting rights inconsistent with United States' human rights commitments under the OSCE Charter.

2008 D.C. Statehood continues to be missing from the Democratic Party platform.

2009 Congress considers granting the District a vote in the House of Representatives; extraneous gun rights amendments threaten to kill the bill. Despite having a Democratically controlled House and Senate, an amendment that would prohibit the District from providing money to any needle exchange program that operates within 1,000 feet of virtually any location where children gather is added to the House version of its 2010 appropriation bill.

2009 The D.C. Council creates a new Special Committee on Statehood and Self-Determination chaired by Council Member Michael A. Brown. The Committee begins an extensive series of hearings on statehood and its ramifications. Led by Council Chair Vincent Gray, nine members of the D.C. Council attend the 2009 Legislative Summit of the National Conference of State Legislatures in Philadelphia and promote statehood.

"We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness - that to secure these rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed. . . ."

-- Preamble, Declaration of Independence, July 4, 1776

**Appendix II**

**Table: A list of countries whose capitals receive full representation in their national legislature**

| | | |
|---|---|---|
| Albania Tirane | Barbados Bridgetown | Cameroon Yaounde |
| Algeria Algiers | Belgium Brussels | Canada Ottawa |
| Andorra Andorra la Vella | Belize Belmopan | Cape Verde Islands Praia |
| Antigua St. Johns | Botswana Gaborone | China Beijing |
| Argentina Buenos Aires | Brazil Brasilia | Colombia Bogota |
| Australia Canberra | Bulgaria Sofia | Cook Islands Auarua |
| Austria Brussels | Burma Rangoon | Costa Rica San Jose |
| Bahamas Nassau | Cambodia Phnom-Penh | Cyprus Nicosia |

Czech Republic Prague

Denmark Copenhagen

Djibouti Djibouti

Dominica Roseau

Dominican Republic Santo Domingo

Egypt Cairo

El Salvador San Salvador

Equatorial Guinea Malabo

Fiji Suva

Finland Helsinki

France Paris

Gabon Libreville

Gambia Banjul

Germany Berlin

Greece Athens

Grenada St. George's

Guatemala Guatemala City

Guinea Conakry

Guyana Georgetown

Haiti Port-au-Prince

Hungary Budapest

Iceland Reykjavik

India New Delhi

Indonesia Djakarta

Iran Tehran

Ireland Dublin

Israel Jerusalem

Italy Rome

Ivory Coast Abidjan

Jamaica Kinston

Japan Tokyo

Kenya Nairobi

Korea (North) Pyongyang

South Korea Seoul

Liberia Monrovia

Liechtenstein Vaduz

Luxembourg Arlon

Macao Macao

Madagascar Antananarivo

Malawi Lilongwe

Malaysia Kuala Lumpur

Maldives Male

Malta Valletta

Mauretania Nouakchott

Mauritius Port Louis

Mexico Mexico City

Monaco Monaco-Ville

Mongolia Ulan Bator

Morocco Rabat

Nauru Yeran: Administrative District

Netherlands Amsterdam

New Zealand Wellington

Nicaragua Managua

Nigeria Abuja

Norway Oslo

Pakistan Islamabad

Panama Panama City

Papua New Guinea Port Moresby

Paraguay Asuncion

Philippines Manila

Poland Warsaw

Portugal Lisbon

Romania Bucharest

San Marino San Marino

Senegal Dakar

Sierra Leone Freetown

Singapore Singapore City

South Africa Cape Town (Legislative)

Russia Moscow

Slovakia Bratislava

Spain Madrid

Sri Lanka Columbo

Surinam Paramaribo

Sweden Stockholm

Switzerland Bern

Syria Damascus

Tanzania Dar es Salaam

Tonga Nukualofa

Trinidad and Tobago Prot of Spain

Turkey Ankara

| | | |
|---|---|---|
| United Kingdom London | West Samoa Apia | Zambia Lusaka |
| Venezuela Caracas | Yugoslavia Belgrade | Zimbabwe Harare |
| Vietnam Hanoi | Zaire Kinshasa | |

**Footnotes**

The Author wishes to acknowledge the early assistance of the following law students: Lauren O. Ruffin, Howard University Law School; Sue-Yun Ahn, Columbia Law School; and Dekonti Mends-Cole and Justin Hansford, both of Georgetown University Law Center; as well as more recent assistance from: Michael Liszewski, University of the District of Columbia, David A. Clarke School of Law; Chantal Khalil, New York University; Richard Cuthbert, American University's Washington College of Law; Michael Greenwald, Washington University in St. Louis; Daniel Fitzgerald University of California at Santa Cruz; Sarah Ramuta, University of Illinois at Urbana-Champaign; Bertram Lee, Haverford College; Ian Cooper, Trachtenberg Scholar at The George Washington University; Fidel Castro, University of the District of Columbia, David A. Clarke School of Law; and Amy Menzel, University of Utah. Attorney Ann Loikow, Chair of the D.C. Statehood Yes We Can Coalition organized Appendix I. The Author also wishes to acknowledge the invaluable guidance given in early writings by Professor Jason Newman of the Georgetown University Law Center as well as Congressman Walter E. Fauntroy (D-DC), a giant in this struggle, whose singular efforts for Home Rule and D.C. Voting Rights are unmatched in history and who gifted all of us with hope from the tunnel's light. Finally, the author wishes to thank his daughter, Sia Tiambi Barnes, for her genius-like editorial support.

1 Political standing in this context is equal participation; voting representation in a nation's governing body. "[E]qual representation for equal numbers of people" is a fundamental goal. *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964).

2 Sovereignty is "[s]upreme dominion, authority, or rule," independence. Black's Law Dictionary 1430 (8th ed. 2004).

3 In fact, many federal nations that extend the rights of representation to the residents of the capital have molded their governments after our own. Yet, on this basic issue of representation, they have taken the lead and surpassed the United States. A full discussion of the status of the District of Columbia in the context of other capital cities around the world is presented in International Law and the District of Columbia, infra, with excerpts from a wider discussion prepared and presented by the author in the booklet, If You Favor Freedom: You Must Favor Statehood for the District of Columbia, published in October, 1986, when he served as Chief of Staff toformer Congressman Walter E. Fauntroy (D-D.C.). If You Favor Freedom was preceded by another booklet prepared and presented by the author in 1978, A Simple Case of Democracy Denied, published when he served as Counsel to Congressman Fauntroy. Interestingly, nothing changed between 1978 and 1986 regarding the District of Columbia's standing compared to other world capitals and nothing has changed to this date. See generally Office of Congressman Walter E. Fauntroy, If You Favor Freedom: You Must Favor Statehood for The District Of Columbia (Johnny Barnes, ed., 1986), reprinted in H.Rep. No. 100-1 (1987), available at http://
www.dcvote.org/trellis/struggle/1986favorfreedomstatehood.cfm, [hereinafter If You Favor Freedom].

4 U.S. Const. amend. XVII, provides that, "[t]he Senate of the United States shall be composed of two Senators from each State, elected by the people thereof ..." Prior to the adoption of the Seventeenth Amendment, Senators were elected by state legislatures. U.S. Const. art. I, § 3, cl. 1.

5 U.S. Const. art. I, § 2, cl. 1 provides, "The House of Representatives shall be composed of members chosen every second Year by the people of the several States." There are 435 Representatives in the House. That number was set by Congress in 1911 and is not a Constitutional mandate. The number has varied, over the years. Initially, each state

had one Representative in a Unicameral Body. Election of Senators and Representatives, Pub. L. 62-5, 37 Stat. 13, 14 (codified as 2 U.S.C. § 2 (1911)).

6 Timothy Cooper, Executive Director of the World Rights Organization and D.C. Statehood enthusiast and activist who has traveled around the world, has reported that, "On December 30, 2003, the Organization of American States' (OAS) Inter-American Commission on Human Rights issued Rep. No. 98/03 in case 11.204--Statehood Solidarity Committee v. United States. That report reads in part: 'The Commission hereby concludes that the State is responsible for violations of the Petitioners' rights under Articles II and XX of the American Declaration by denying them an effective opportunity to participate in their federal legislature...'" Statehood Solidarity Comm. v. United States, Case Rep. No. 98/03 Inter-Amer. Comm. H.R. (2003); Inter-American Comm'n. on Human Rights, Org. of Am. States, Rep. No. 09/03 § 117 (2003), http:// www.cidh.org/annualrep/2003eng/USA.11204a.htm. The Inter-American Commission on Human Rights recommended to the United States that it "[p]rovide the Petitioners with an effective remedy, which includes adopting the legislative or other measures necessary to guarantee to the Petitioners the effective right to participate, directly or through freely chosen representatives and in general conditions of equality, in their national legislature." *Id.* at § 119. Moreover, the Organization for Cooperation in Europe (OSCE), both the Office for Democratic Institutions and Human Rights (ODHIR) and the Parliamentary Assembly call "on the Congress of the United States to adopt such legislation as may be necessary to grant the residents of Washington, D.C. equal voting rights in their national legislature in accordance with its human dimension commitments." Organization for Security and Cooperation in Europe, Washington, D.C. Declaration on Democracy, Human Rights and Humanitarian Questions § 58 (July 5, 2005). A fuller discussion of the implications of America's denial of voting rights to its own citizens and the impact of such denial on America's standing in the world community is presented in International Law and Politics supra.

7 Kennedy Introduces Bill Urging Statehood for D.C., Wash. Post, Jan. 25, 1985, available at http://www.washingtonpost.com/wpdyn/content/article/2009/03/18/AR2009031802555.html.

8 U.S. Const. amend. X provides, "The 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."

9 U.S. Const. art. I, §8, cl. 3 states that, "The Congress shall have the Power To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes ..."

10 New York v. United States, 505 U.S. 144, 181 (1992) (emphasis added).

11 U.S. Const. amend. XIV provides that, "no state shall ... deny to any person within its jurisdiction the equal protection of the laws." Known as the "Equal Protection Clause," this provision of the Constitution makes clear and true America's promise that "all men [and women] are created equal." Id. The protections of the Fourteenth Amendment were extended to the people of Washington, D.C. in *Bolling v. Sharpe*, 347 U.S. 497 (1954), a companion case to the landmark school desegregation case, *Brown v. Board of Education*, 347 U.S. 483 (1954). The Court in Sharpe relied on the Fifth Amendment in reaching its decision regarding the District of Columbia. *Sharpe*, 347 U.S. at 497 (1954).

12 Mark A. Graber, Enumeration and Other Constitutional Strategies for Protecting Rights: The View From 1787/1791, 9 U. Pa. J. Const. L. 357, 360-63 (2007). The Federalists would have preferred a document that merely outlined the structure of the government. The anti-Federalists distrusted centralized authority such as had been experienced under the British Crown. To secure passage of the Constitution, the Federalists had to agree to add amendments incorporating basic rights. *Id.*

13 There are many scholarly works, discussing this period of our history and the creation of our government. See American Civil Liberties Union, The Bill of Rights: A Brief History (2004), http://www.aclu.org/crimjustice/gen/10084res20020304.html. See also Eugene W. Hickock, Jr., The Bill of Rights:

Original Meaning and Current Understanding (1991); Richard E. Labunski, James Madison and the Struggle for the Bill of Rights (2006); Creating the Bill of Rights: The Documentary Record from the First Federal Congress (Helen E. Viet et al. eds., Johns Hopkins University Press 1991); The District of Columbia: Its History, Its Government, Its People (Johnny Barnes, ed., 3d ed. 1975).

14 1 Stat. 491 (1796) (emphasis added).

15 U.S. Const. art. IV, §. 3, cl. 1.

16 Escanaba Co. v. City of Chicago, 107 U.S. 678, 689 (1883). See also *Pollard's Lessee v. Hagan*, 44 U.S. 212 (1845); *Permoli v. First Municipality*, 44 U.S. 589, 609 (1845); *Pound v. Turck*, 95 U.S. 459 (1877).

17 *Escanaba*, 107 U.S. at 689.

18 *Coyle v. Smith*, 221 U.S. 559, 567 (1911) (affirming an earlier decision by the Court in *Texas v. White*, 74 U.S. 700 (1869)).

19 *Id.*

20 *United States v. Texas*, 339 U.S. 707, 716 (1950) (emphasis added).

21 *Utah Div. of State Lands v. United States*, 482 U.S. 193, 196 (1987).

22 *United States v. Medenbach*, 116 F.3d 487 (9th Cir. 1987) (state consent is not a prerequisite to federal regulation of federal land

pursuant to the Property Clause). See also *United States v. Gardner*, 107 F.3d 1314, 1319 (9th Cir. 1997).

23 *Pollard v. Hagan*, 44 U.S. 212, 223 (1845).

24 *Van Brocklin v. Tenn.*, 117 U.S. 151, 167 (1886).

25 *Wilson v. Cook*, 327 U.S. 474, 487 (1946).

26 *Permoli v. First Municipality*, 44 U.S. 589, 609 (1845).

27 *Boyd v. Nebraska*, 143 U.S. 135, 170 (1892) (emphasis added).

28 District of Columbia Delegate Act, Pub. L. No. 91-405, 84 Stat. 845 (1970).

29 U.S. Const. amend. XXIII, § 1 ("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 ..."). *Id.*

30 District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973) (codified as D.C. Code § 1-221 (1973)), renamed "The Home Rule Act" as part of The District of Columbia Revitalization Act, Title XI of the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997) .

31 See The District of Columbia Revitalization Act, Title XI of the Balanced Budget Act of 1997, Pub. L. No. 105-33, III Stat. 251(1997). Also referred to and recently formally renamed as the "Home Rule Act," its stated purpose is, in part, "to the greatest extent possible ... relieve Congress of the burden of legislating upon essentially local District matters." Id. at § 102(A). The Act provides for a locally elected Mayor and thirteen-member D.C. Council.

Id. at §§ 401(A), 421(A). As is clear, however, Congress really did not relieve itself of the burden of legislating on local matters.

32 See If You Favor Freedom, supra note 3. This document was produced at the introduction of H.R. 51, a D.C. Statehood Bill.

33 Under the Home Rule Act, Congress can exercise a Line Item veto and thereby considers each expenditure the District proposes to make. District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973) (codified as D.C. Code § 1-221 (1973)).

34 See Id. In a recent D.C. Appropriations Bill, Congress placed as many as seventy limitations on the District of Columbia's ability to spend its own money. See District of Columbia Appropriations Act, S. 1446, 109th Cong. (2006). Some of those limitations, such as not using federal funds to pay for abortions or banning needle exchange programs, are placed every year in D.C. appropriations bills. Whatever the limitation, the citizens of other states are not similarly bridled.

35 Office of the Clerk, U.S. House of Representatives, The Electoral College, http://clerk.house.gov/art_history/house_history/electoral.html (last visited Nov. 9, 2009). In the case of an Electoral College deadlock or if no candidate receives the majority of votes, a 'contingent election' is held. The election of the President goes to the House of Representatives. Each state delegation casts one vote for one of the top three contenders to determine a winner. *Id.*

36 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. 107-56, 115 Stat. 272 (2001) (codified throughout the United States Code).

37 Federal taxation was implemented through U.S. Const. amend. XVI; the first draft was implemented through the Selective Service Act, Pub. L. No. 65-12, 40 Stat. 76 (1917).

38 District of Columbia Appropriations Act of 2005, Pub. L. 108-335, 108th Cong. (2004).

39 See If You Favor Freedom, supra, note 3, at 1-5 (providing a good, non-technical examination of many of the issues surrounding D.C. Statehood).

40 See section 603 of the District of Columbia Self-Government and Governmental Reorganization Act. Congress through this section controls "the borrowing, spending and budgetary process..." for the District of Columbia. Jason I. Newman & Jacques B. DePuy, Bringing Democracy to the Nation's Last Colony: The District of Columbia Self-Government Act, 24 Am. U. L. Rev. 537, 550 (1975).

41 See Constance McLaughlin Green, Washington: A History of the Capital, 1800-1950 (1962).

42 Daniel A. Smith, Tax Crusaders and the Politics of Direct Democracy 21-23 (1998). The statement, "Taxation without representation is tyranny," was a rallying cry that helped to shape attitudes leading to the American Revolution. Its origin is unclear, however, it is often attributed to a Harvard Trained Lawyer, James Otis, Jr., who lived in Massachusetts and believed strongly, when the British passed the Stamp Act, that the Parliament had no right to tax the colonies that were without representation in that body. *Id.*

43 See If You Favor Freedom, supra note 3.

44 *District of Columbia v. Heller*, 554 U.S. ___, 128 S.Ct. 2783 (2008).

45 District of Columbia Personal Protection Act, H.R. 1288, 109th Cong. (2005).

46 *Id.*

47 H.R. 4922, 101st Cong. (1991).

48 National Commission for a Human Life Amendment, Pro-life Legislation in Congress 2000 9 (2000). "On July 11, 2000, the District of Columbia City Council...approved the Health Insurance Coverage for Contraceptive Act of 2000 (D.C. Bill 13-399), a measure that mandated contraceptive ...coverage in health insurance plans. On July 13, 2000, the subcommittee approved the FY 2001 D.C. Appropriations Bill ... with the provision that the proposed D.C. Council law 'shall not take effect.'" *Id.*

49 District of Columbia Appropriations Act of 1999, H.R. 4380, 105th Cong. (1998). On October 21, 1998, Rep. Robert L. Barr Jr. (R-GA.) attached an amendment to the above-noted 1999 D.C. appropriations bill. The so-called "Barr Amendment" prohibited the District from spending money on any initiative that would legalize or reduce the penalties for users of marijuana. The measure passed along with the D.C. spending bill.

50 Drug Free Century Act, S. 5, 106th Cong. § 3005(a) (1999). "Notwithstanding any other provision of law, none of the amounts made available under any federal law for any fiscal year may be expended, directly or indirectly, to carry out any program of distributing sterile needles or syringes ..." Id. See also Makebra Anderson, Needle Exchange Program Sticks with Addicts, Minn. Spokesman- Recorder, Mar. 7, 2005, http:// www.spokesman-recorder.com/news/article/article.asp? NewsID=3814&sID=3&ItemSource=N. ("Because of its unique relationship with the federal government, D.C. is the only city in the U.S. that has been barred from using local tax dollars to fund needle exchange programs.").

51 The D.C. Council initially passed a bill allowing for health benefits, among other things, for persons in a "caring relationship," but not necessarily married. District of Columbia Appropriations Act, 2006, H.R. 2546, 104th Cong. (1994). While this bill was not vetoed during the Congressional review period, Congress added a rider to the bill prohibiting the use of federal or local funds to implement the bill. Id. In a later D.C. appropriations bill, Congress reversed itself in part and did not insert language prohibiting the use of local funds for such purposes. District of Columbia Appropriations Act, 2001, H.R. 4942, 106th Cong. (2000). This reversal is hailed as a victory among some Home Rule proponents.

52 H.B. 3170 passed the United States House of Representatives on July 24, 2009. H.R. 3170, 111th Cong. (2009); see also H.R. Rep. No. 111-202 (2009). See also D.C. Appleseed Center, HIV/AIDS in the Nation's Capital 19-23, 88 (2005), http://www.dcappleseed.org/projects/publications/HIV.pdf. In 2005, Washington, DC had the highest rate of AIDS cases in the country, 128.4 per 100,000 vs. 19.7 per 100,000, nationally - nearly 1 out of every 50 residents has AIDS, and it is estimated that nearly 1 out of every 20 is infected with HIV. Id. In Washington, DC, intravenous drug use is directly responsible for 35 percent of the all AIDS cases and 54 percent of AIDS cases in women since the beginning of the epidemic. *Id.*

53 Oversight and Regulation of Public Buildings, H.R. 2068, 107th Cong. § 3103(a) (2001); Act of July 29, 1970, Pub. L. No. 91-0358, §802, 84 Stat. 667 (amending D.C. Code §22-1117 (1967)).

54 D.C. Code §§ 5-131.01-.05 (2001).

55 D.C. Code §§ 3-321 to -330 (2001).

56 There are many sources from which to draw for information, including Judith Best, National Representation for the District of Columbia 17 (1984); Constance McLaughlin Green, Washington: Village and Capital, 1800-1878 11 (1962); Kenneth R. Bowling, The Creation of Washington D.C.: The Idea and Location of the American Capital 30 (1993); Robert Fortenbaugh, The Nine Capitals of the United States 9 (1948); 2 The Records of the Federal Convention of 1787, at 127-28 (Max Farrand ed., 1911), cited in Kenneth D. Merin, Congressional Research

Service, Statehood for the District of Columbia (1977); Eugene W. Hickock, Jr., The Bill of Rights: Original Meaning and Current Understanding (1991).; Richard E. Labunski, James Madison and the Struggle for the Bill of Rights (2006); Creating the Bill of Rights: The Documentary Record from the First Federal Congress (Helen E. Viet et al. eds.,1991).

57 The District of Columbia: Its History, Its Government, Its People (Johnny Barnes, ed., 3d ed. 1975).

58 Fortenbaugh, supra note 56 at 9.

59 *Id.*

60 Bowling, supra note 56, at 30. As the summer of 1783 approached, hundreds (more than 200) mutinous soldiers (their numbers grew from roughly 30) from Pennsylvania who fought for the Continental Army converged upon the Pennsylvania State House – which was also then located at Independence Hall - seeking payment from the Pennsylvania State Executive Council. It is noteworthy here, that the soldiers made their demand upon the City of Philadelphia and the state of Pennsylvania, not upon the Congress as many have believed in the past. Congress in fact had earlier simply referred their demands to the Secretary of War. *Id.*

61 Id. at 14-72. When the City of Philadelphia and the state of Pennsylvania refused to come to the aide of the State Executive Council, the members of the Confederation Congress fled to Princeton, New Jersey. *Id.*

62 H.P. Caemmerer, Washington: The National Capital, S. Doc. No. 71-332, at 17 (3d Sess. 1932), cited in Kenneth D. Merin, Congressional Research Service, Statehood for the District of Columbia (1977); Congressional Research Service, The Constitution of the United States: Analysis and Interpretations, S. Doc. No. 99-16, (1st Sess. 1987). George Washington, who served as the First President of the United States, was tasked with surveying the land to create Washington, D.C. from land offered by Maryland and Virginia. *Id.* at 365.

63 Barbara Silberdick Feinberg, The Articles of Confederation 10-25 (2002); Le Baron Bradford Prince, The Articles of Confederation vs. The Constitution 43 (1867). The Articles of Confederation preceded the Constitution as the document governing the original thirteen states. It was adopted by Congress on November 15, 1777, and ratified by all of the states on March 1, 1781. Unlike the Constitution, the Articles reposed power in the states, with limited power in the central government. Because it was felt the Articles did not accomplish the goals of unifying the states, the Constitution replaced them on March 4, 1789. *Id.*

64 *Id.*

65 Peter Raven-Hansen, Congressional Representation for the District of Columbia: A Constitutional Analysis, 12 Harv. J. on Legis. 167, 169-72 (1975); See also Bowling, supra note 56, at 76-77.

66 Judith Best, National Representation for the District of Columbia, 17 (Univ. Publishers of Am. 1984). See also Green, supra note 41, at 11 (1962).

67 2 The Records of the Federal Convention of 1787, at 127-28 (Max Farrand ed., 1911), cited in Kenneth D. Merin, Congressional Research Service, Statehood for the District of Columbia (1977).

68 Whit Cobb, Democracy in Search of Utopia: The History, Law, and Politics of Relocating the Nation's Capital, 99 Dick. L. Rev. 527, 529-31 (1995).

69 *Id.*

70 U.S. Const. art. I, § 8, cl. 17 provides that: "The Congress shall have power...To exercise exclusive Legislation in all Cases whatsoever, over such a District (not exceeding ten Miles square) as may, by Cession of particular States,

and the acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings..."

71 H.P. Caemmerer, Washington: The National Capital, S. Doc. No. 71-332, at 17 (3d Sess. 1932), cited in Kenneth D. Merin, Congressional Research Service, Statehood for the District of Columbia (1977).

72 *Id.*

73 Id. Virginia offered the entire City of Williamsburg, with its colonial capitol, governor's palace, public buildings, 300 acres of additional land, a cash payment of up to 100,000 pounds and a contiguous district. *Id.*

74 Fortenbaugh, supra note 56, at 9.

75 *Id.*

76 Cobb, supra note 68, at 534-36.

77 Green, supra note 41, at 11. See also 2 The Records of the Federal Convention of 1787, at 127-28 (Max Farrand ed., 1911), cited in Kenneth D. Merin, Congressional Research Service, Statehood for the District of Columbia (1977);

78 Green, supra note 41, at 11.

79 Pelatiah Webster, Essay on the Seat of the Federal Government and the Executive Jurisdiction of Congress over a Ten Miles District, in Political Essays on the Nature and Operation of Money, Public Finances and Other Subjects 376-402 (1789), quoted in Bowling, supra note 56, at 131; Cobb, supra note 68, at 535.

80 Bowling, supra note 56, at 10-11.

81 Green, supra note 41, at 8-9.

82 Cobb, supra note 68, at 537. Congressional Research Service, The Constitution of the United States: Analysis and Interpretations, S. Doc. No. 99-16, at 365 (1st Sess. 1987).

83 An Act for Establishing the Temporary and Permanent Seat of the Government of the United States, 1 Stat. 130 (1790).

84 *Id.*

85 Christopher Shortell, Rights, Remedies and the Impact of State Sovereign Immunity 28-31 (2008). It should be noted that the debts incurred by the Northern states were considerably higher than the debts incurred by those in the Southern states. *Id.*

86 An Act for Establishing the Temporary and Permanent Seat of the Government of the United States, 1 Stat. 130 (1790).

87 See Green, supra, note 41, at 23.

88 *Id.*

89 Mark David Richards, The Debates Over Retrocession, 1801-2004," Wash. Hist., Spring/Summer 2004, at 57.

90 The District of Columbia Fair and Equal House Voting Rights Act, Hearing on H.R. 5388 Before the H. Comm. on the Judiciary, 110th Cong. 3 (2006) (statement of the Am. Bar Ass'n.).

91 The District of Columbia Organic Act of 1801 incorporated the District of Columbia and placed it under the exclusive control of Congress. An Act of Feb. 27, 1801, ch. 15, 2 Stat. 103 (concerning the District of Columbia).

92 Richards, supra note 89, at 58.

93 Malcolm X, Speech on The Ballot or the Bullet (Mar. 29, 1964).

94 *Id.* at 57.

95 T.W. Noyes, Our National Capital and its Un-Americanized Americans 60 (1951). Noyes, who was the publisher of the Washington Star newspaper, notes that in a pamphlet published in 1801, Augustus B. Woodard, a Virginia lawyer who moved to the District wrote, "This body of people is as much entitled to the enjoyment of the rights of citizenship as any other part of the people of the United States. There can be no necessity for their disfranchisement ... they are entitled to a participation in the general codicils on the principles of equity and reciprocity." Id.

96 Richards, supra note 89, at 57-58. (statement of Representative John Smilie (R-PA)).

97 Representative Smilie stated, Here the citizens would be governed by laws, in the making of which they have no voice - by laws not made with their own consent, but by the United States for them - by men who have not the interest in the laws made that legislators ought always to possess – by men also not acquainted with the minute and local interests, coming...from distances of 500 to 1,000 miles.

*Id.*

98 In 1 Annals of Cong. 864 (Joseph Gales, ed., 1789), Madison stated, "The seat of Government is of great importance, if you consider the diffusion of wealth that proceeds from this source ... Those who are most adjacent to the seat of Legislation will always possess advantages over others. An earlier knowledge of the laws, a greater influence in enacting them, better opportunities for anticipating them, and a thousand other circumstances will give a superiority to those who are thus situated." Madison could not have been more wrong.

99 Cobb, supra note 68, at 532 (citing 1 Annals of Cong. 896 (Joseph Gales, ed., 1789)).

100 *Id.*

101 The Federalist No. 43 (James Madison). The Federalists Papers are a series of 85 articles, written by James Madison, Alexander Hamilton, John Jay and John Adams, advocating the ratification of the United States Constitution. Number 43, published on January 23, 1978, related to "The Powers Conferred by the Constitution Further Considered." *Id.*

102 Cobb, supra note 68, at 532 (citing The Federalist No. 43, at 280).

103 Statement by Representative John Baptiste Charles Lucas, reprinted in Richards, supra note 89, at 59, citing 1 Constance M. Green, Washington: A History of the Capital 1800-1950, 30 (1976).

104 A compact is a contract, a covenant between parties. Black's Law Dictionary (Westlaw 8th ed. 2004).

105 Cobb, supra note 68, at 529-31.

106 *Id.* at 529. Stating eight reasons, that D.C. would be a, "national commons in which the representatives of the nation would govern the district with the federal interest at heart and in which, in exchange for federal patronage, the citizens of the district would surrender their suffrage." *Id.*

107 Id. at 529-31, 545-546.

108 *Id.* at 545. As Cobb puts it, "the issue that seemed most consistently on the minds of the members was related to the capital compact: whether the proposed removal to Philadelphia amounted to a 'breach of contract." Id.

109 *Id.*

110 Whit Cobb, Democracy in Search of Utopia: The History, Law, and Politics of Relocating the Nation's Capital, 99 Dick. L. Rev. 527, 546 (1995).

111 *Id.* at 545-46.

112 U.S. Const. art IV, § 3, cl. 1. Congress has the sole and exclusive power to grant statehood to a land area. It is the position of proponents of statehood for the District of Columbia that political standing and sovereignty, resulting in equal footing, is achieved through statehood.

113 A convenant is, "a formal agreement or promise, usually in a contract;" while an agreement is, "a mutual understanding between two or more persons about their relative rights and duties regarding past or future performances; a manifestation of mutual assent by two or more persons." Black's Law Dictionary (8th ed. 2004) (emphasis added).

114 U.S. Const. art. IV, § 3, cl. 1.

115 4 U.S.C. §§ 71-72 (2006).

116 4 U.S.C. § 72 (2006).

117 Richards, supra note 89, at 60.

118 Neither the Pentagon or the CIA or any federal facilities for that matter, had been constructed in Virginia at that time. See generally David Alexander, The Building: A Biography of the Pentagon 6 (2008) (the plans for the Pentagon originated between the end of World War I and U.S. entry into World War II); Central Intelligence Agency, The CIA Campus: The Story of Original Headquarters Building, https://www.cia.gov/news-information/featured-story-archive/2008-featured-storyarchive/original-headquarters-building.html (In 1955, President Eisenhower signed legislation for a new CIA headquarters building in Langley, VA); Federal Bureau of Investigation, Timeline of FBI History, http://www.fbi.gov/libref/historic/history/historicdates.htm (On May 8, 1972, the FBI opened its new training facility in Quantico, VA).

119 Cobb, supra note 68, at 532 (citing Recession of Alexandria, Daily Nat'l Intelligencer Mar. 6, 1846 at 1).

120 Richards, supra note 89, at 61.

121 *Id.*

122 *Id.* at 62.

123 *Id.* at 67.

124 *Id.* at 68.

125 Richards, supra note 89, at 68.

126 Id. at 68. The strongest evidence to suggest that some oppossed retrocession was a petition signed by over 300 individuals, however, it was specifically against, "retrocession without relief."

127 An Act to Retrocede the County of Alexandria, in the District of Columbia, to the State of Virginia, 9 Stat. 35 (1846).

128 *Phillips v. Payne*, 92 U.S. 130, 131 (1875).

129 *Id.* at 133.

130 U.S. Const. art. I, § 8, cl. 17. An Act For Establishing the Temporary and Permanent Seat of the Government of the United States, 1 Stat. 130 (1790). See also Retrocession of Alexandria to Virginia, House Committee on the District of Columbia, H.R. Rep. No. 29-325, at 3-4(1846).

131 *Phillips*, 92 U.S. at 133.

132 See id. at 132. According to Peter Raven-Hansen, a Constitutional Law Professor at George Washington University Law School, "The true construction of this clause, U.S. Const. art. I, § 8, cl. 17, would seem to be that Congress may retain and exercise exclusive jurisdiction over a district not exceeding ten miles square; and whether those limits may enlarge or diminish that district, or change the site ... the end is to attain what is desirable in relation to the seat of government." Peter Raven-Hansen, The Constitutionality of Statehood, 60 Geo.Wash. L. Rev. 160, 169 (1991). If it were unconstitutional, it must follow that the Court would have required the County of Alexandria to cede the land back to the District. Thus, the example of Phillips is instructive in terms of the perceived impediments to statehood in two regards. First, it shows Congress has the authority, by statute, to reduce the size of the District to that which is less than the "10 Miles square" ceiling. Second, it confirms the existence and scope of the Compact between the Congress and the District.

133 Cobb, supra note 68, at 575-586.

134 *Id.* at 584.

135 *Id.* at 584-587.

136 *Id.* at 585.

137 *Id.* at 588 (citing Alfred Goldberg, The Pentagon: The First Fifty Years (1992) (If the District were permitted to build such structures, the office and residential space arguments would lose much of their sheen. Over 5,000 acres of land was available.)).

138 Interestingly, Virginia already had a Constitutional question put before the Supreme Court on severing part of its land in the creation of West Virginia. In that case, Congress no longer viewed the Richmond government (which admittedly has announced cessation from the Union) as the seat of government in Virginia, and considered a competing government seated in Wheeling to be the recognized capital. Vasan Kesavan & Michael Stokes Paulsen, Is West Virginia Unconstitutional?, 90 Cal. L. Rev. 291, 299-302 (2002). The Wheeling government conducted the electoral and legislative processes that led to the creation of West Virginia, achieved by severing state west of the Appalachian foothills. Id. The Supreme Court affirmed the validity of this act in *Virginia v. West Virginia*, 78 U.S. 39 (1870). Ironically, it would be in Arlington where perhaps the most egregious breach of the eapital Compact would take place. The War Department, expanding swiftly, desired a building suitable to its needs. Without such facilitates readily available in the District, and with the nation at war, plans for the $35,000,000 Pentagon were expedited. *Id.* This violation of the Compact was not without its critics. Cobb, supra note 68, at 590-591.

139 See Cobb supra note 68, at 590-591.

140 *Id.* at 591.

141 See generally id.

142 Kenneth Starr also served as U.S. Solicitor General, Independent Counsel for the Whitewater matter and is now Dean of Pepperdine University Law School. Kenneth Starr - Meet the Faculty, http://law.pepperdine.edu/academics/faculty/default.php

143 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. Reform, 108th Cong. 75-85 (2004) [hereinafter Common Sense].

144 The Common Sense hearing did not initially include any witnesses opposing the Davis proposal. I first presented a memorandum to Chairman Davis to raise some of the concerns with the Davis Proposal and to present another side. Subsequently, I was invited to testify as the only witness opposing the Davis Bill. Interestingly, while I was allowed to testify and to submit testimony for the record, my testimony does not appear among the witnesses at the Committee's website. All of the testimony that appears is in support of the Davis proposal, a most unfortunate practice by the Committee. I rely a great deal on first-hand information in the construction of this Article. I was in the room. I was an eyewitness for much of this history. There are, however, many resources available for a deeper probing of the matters discussed in this Article. For example, see Fauntroy, supra note 3; The District of Columbia, Its History, Its Government, Its People (Johnny Barnes ed., 3d ed. 1975); Green, supra note 41; Lawrence M. Frankel, National Representation for the District of Columbia: A Legislative Solution, 139 U. Pa. L. Rev. 1659 (1991): Peter Raven-Hansen, Congressional Representation for the District of Columbia: A Constitutional Analysis, 12 Harv. J. on Legis. 167 (1975); Peter Raven-Hansen, The Constitutionality of D.C. Statehood, 60 Geo. Wash. L. Rev. 160 (1991).

145 U.S. Const. art. I, § 8, cl. 17.

146 Common Sense, supra note 143, at 75 (statement of the Hon. Kenneth Starr) (emphasis in original); Dinh & Charnes, infra note 193, at 4 (agreeing with Judge Starr, We conclude that Congress has ample constitutional authority to enact the District of Columbia Fairness in Representation Act. The District Clause, U.S. Const. art. I, § 8, cl. 17, empowers Congress to 'exercise exclusive Legislation in all Cases whatsoever, over such 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 aecess to federal courts through diversity jurisdiction, notwithstanding that the Constitution grants such jurisdiction only 'to all Cases ... between Citizens of different States."'). Cases like, *Adams v. Clinton*, 90 F. Supp. 2d 35, 50 n. 25 (D.D.C. 2000) (per curiam), 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).

147 A detailed analysis of this view from the Court can be found in Dinh and Chames, infra, note 193, at 9-16.

148 *District of Columbia v. Carter*, 409 U.S. 418, 420 (1973).

149 *Nat'l. Mut. Ins. v. Tidewater Transfer*, 337 U.S. 582, 603 (1949).

150 *Hepburn v. Ellzey*, 6 U.S. 445, 453 (1805).

151 *Nat'l Mut. Ins.*, 337 U.S. at 604.

152 *Id.* at 614 (Rutledge, J. concurring).

153 *Carter*, 409 U.S. at 418.

154 *Id.* at 424, n.9.

155 42 U.S.C. § 1983, amended by Pub. L. No. 96-170, 93 Stat. 1284 (1979).

156 U.S. Const. art. I, § 8, cl. 17.

157 *Loughborough v. Blake*, 18 U.S. 317 (1820).

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

159 *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100 (1953).

160 *Loughran v. Loughran*, 292 U.S. 216, 228 (1934), reh'g denied, 292 U.S. 615 (1934); De Geofroy v. Riggs, 133 U.S. 258 (1890).

161 *Loughran*, 292 U.S. at 228.

162 *De Geofroy*, 133 U.S at 271-72.

163 U.S. Const. art. I, § 8, cl. 17.

164 *Adams v. Clinton*, 90 F. Supp.2d 35, 72 (D.D.C. 2000), aff'd per curiam, 531 U.S. 941 (2000).

165 *Id.*

166 *Id.* at 48.

167 See generally *Hepburn v. Ellzey*, 6 U.S. (1 Cranch) 445 (1805); Adams, 90 F. Supp. 2d at 35.

168 U.S. Const. amend. XXIII.

169 *Id.*

170 H.R. Rep. No. 83-1698, at 2 (1960).

171 *Id.* at 3.

172 Adam H. Kurland, Partisan Rhetoric, Constitutional Reality, and Political Responsibility: The Troubling Constitutional Consequences of Achieving D.C. Statehood by Simple Legislation, 60 Geo. Wash. L. Rev. 475 (1992).

173 U.S. Const. amend. XXIII.

174 Certainly the multitude of court cases concerning Congress and the District of Columbia establish that the legislative authority in the District is truly "extraordinary and plenary..." *United States v. Cohen*, 733 F.2d 128, 140 (D.C. Cir. 1984).

175 According to the D.C. Circuit Court of Appeals, Congress can "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." *Nields v. District of Columbia*, 110 F.2d 246, 250-251 (D.C. Cir. 1940).

176 In fact, in later testimony, Chairman Peter Rodino stated, "If Congress cannot create a state out of the District, the authority must be less than exclusive, an interpretation which runs against the plain meaning of the 'exclusive' power clause." H.R. Rep. No. 100-305, at 46-47 (1987).

177 *Adams v. Clinton*, 90 F. Supp. 2d 35 (D.D.C. 2000), aff'd 531 U.S. 941 (2000). The above case was consolidated with *Alexander v. Daley*, another matter involving constitutional deprivation of voting rights in the District of Columbia.

178 *Banner v. United States*, 303 F. Supp. 2d 1 (D.D.C. 2004).

179 Constitution for the State of New Columbia Approval Act of 1987: Hearing on Bill 7-154 Before the D.C. Council (1987) (statement of Mary Jane DeFrank, Executive Director, ACLU-National Capital Area).

180 Jamin B. Raskin, Domination, Democracy, and The District: The Statehood Position, 39 Cath. U. L. Rev. 417, 435-436 (1990). On February 8, 1980, the necessary petitions are filed to place a statehood initiative comparable to the "Tennessee Plan" on the ballot in D.C. Id. On November 4, 1980, 151,000 voters approve an Act that activates the statehood admission process. Id. On November 2, 1982, D.C. voters again overwhelmingly ratify the D.C. Statehood Constitution written by elected delegates. *Id.*

181 U.S. Const. art. IV, § 3.

182 See H.R. 2482, 102nd Cong. (1991). See also New Columbia Admission Act, H.R. 51, 100th Cong. § 16 (1987).

183 *Id.*

184 United State House of Representatives, Representative Offices, http://www.house.gov/house/MemberWWW_by_State.shtml. The District of Columbia, like Puerto Rico, the Virgin Islands, Guam and American Samoa currently has one non-voting Delegate in the House of Representatives. *Id.*

185 *Id.*

186 Indeed in passing the Home Rule Act, Congress indicated that its purpose was to relieve Congress of the burden of legislating for the District of Columbia. District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, § 102(A), 87 Stat. 774 (1973) [hereinafter Governmental Reorganization Act].

187 See If You Favor Freedom, supra note 3, (emphasis added) (providing a good examination of many of the issues surrounding D.C. Statehood).

188 New Columbia Admission Act, H.R. 51, 100th Cong. § 16 (1987).

189 Those edifices are distinctly federal in nature and that character should not be destroyed. When Congress uses its exclusive control over the District to reduce the size of the federal district and to create the territory of New

Columbia, Congress can then use its constitutional power under Article IV, Section 3 to admit that land area into the Union. U.S. Const., art. IV, § 3.

190 U.S. Const., art. I, § 8, cl. 17. The seat of Government shall "not [exceed] ten miles square." Id. Obviously, it can be less than that as it is now, with the return of part of D.C. to Virginia by Act of Congress in 1846. Act of July 9, 1846, ch. 35, § 1, 9 Stat. 35 (as amended at 29 Cong. ch. 35) (providing for the retrocession of the County of Alexandria, in the District of Columbia, to the State of Virginia).

191 Indeed Congress defined and adopted the boundaries for this reduced Federal Enclave when it passed the District of Columbia Self Government and Governmental reorganization Act. See Sec. 739 of Pub. L. No. 93-198 (1973). Referred to as the National Capital Service Area, it will become the District of Columbia, consisting of the Mall and the principal federal monuments, the White House, the Capitol Building, the United States Supreme Court Building and the Federal Office Buildings adjacent to the Mall, housing the offices of the executive, legislative and judicial branches. Id.

192 R. Hewitt Pate, The Heritage Foundation, D.C. Statehood: Not Without A Constitutional Amendment (1983), https://www.policyarchive.org/bitstream/handle/10207/12663/92076_1.pdf?sequence=1.

193 See Off. of Legal Policy, U.S. Dep't. of Justice, Report to the Attorney General: The Question of Statehood for the District of Columbia (1987) [hereinafter Report to the Attorney General]. This report continues to be cited as authority by opponents of D.C. Statehood and was most recently cited during the Davis Hearings by Judge Kenneth Starr and also as part of the follow-up study by Professor Viet Dinh. See also Viet D. Dinh & Adam H. Charnes, Report to The House Comm. on Govt. Reform on The Authority of Congress to Enact Legislation to Provide the District of Columbia with Voting Representation in the House of Representatives, 108th Cong., 2d Sess. 2 (2004) [hereinafter Dinh & Charnes].

194 See Report to the Attorney General, supra note 193, at 25-27, 56-58.

195 See generally 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 (1788), reprinted in D.C. Code, 2001 Ed. An Act Authorizing Cession from MD (West 2009).

196 U.S. Const. art. I, § 8, cl. 17 (reading "[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 Government of the United States...")

197 Hearing Before the House Subcom. on Fiscal Affairs and Health, Comm. on the District of Columbia, 100th Cong. (1987) (statement of Professor Jason Newman): "Although Article I, Section 8, Clause 17, raises a number of interesting questions concerning the seat of the Federal Government, it does not prohibit Congress from creating a new state out of parts of the present District of Columbia.)" .

198 See U.S. Const. art I, § 2, cl. 1..

199 S. Con. Res. 259, 29th Cong., 9 Stat. 35 (1846).

200 *Id.*

201 *Phillips*, 92 U.S. 130 (1875).

202 U.S. Const. art. 1, § 8, cl. 17.

203 See *Phillips* supra note 201.

204 See *Phillips* supra note 132.

205 See Report to the Attorney General, supra note 193, at 61.

206 Act for the Admission of West Virginia, 37th Cong., (1862).

207 U.S. Const. art. IV, § 3, cl. 1. This Article and Clause provides in relevant part that, "...no new State shall be formed or erected within the jurisdiction of any other State." *Id.*

208 Report to the Attorney General, supra note 193, at 61. However, if Congress could create a state out of land over which a state had control, it seems incongruous to say the District could not be a state, having been ceded from Maryland for over 200 years.

209 U.S. Const. art. I, § 8, cl. 17; U.S. Const. amend. XXIII.

210 Report to the Attorney General, supra note 193, at 23-25.

211 *Id.* at 72.

212 Peter Raven-Hansen, The Constitutionality of D.C. Statehood, 60 Geo. Wash. L. Rev 160 (1991).

213 Green, supra note 41, at 173-176.

214 Law of July 9, 1846, ch. 35, § 1, 9 Stat. 35 (providing for the retrocession of the County of Alexandria, to the State of Virginia).

215 *Id.*

216 See generally H.R. Rep. No. 100-305 (1987). See also Hearing on H.R. 3861 Before the Subcomm. on Fiscal Affairs and Health of the Comm. on the District of Columbia, 98th Cong. 36-50 (to provide for the admission of the state of New Columbia into the Union, May 15, 1986). See *Van Ness v. City of Washington*, 29 U.S. (4 Pet.) 62, 70 (1830) (a private grant of land for the creation of the District "for use of the United States forever" vests "an absolute unconditional fee-simple in the United States.").

217 R. Hewitt Pate, The Heritage Foundation, D.C. Statehood: Not Without A Constitutional Amendment (1983), https://www.policyarchive.org/bitstream/handle/10207/12663/92076_1.pdf?sequence=1.

218 Constitution for the State of New Columbia Approval Act of 1987: Hearing on Bill 7-154 Before the D.C. Council (1987). On November 4, 1980, more than 150,000 D.C. voters voted in an election to activate the statehood admission process. H.R. Rep. No. 100-305, at 14 (1987). That vote was reaffirmed on November 2, 1982, when over 110,000 voters participated in a referendum to ratify the statehood constitution that had been drafted by duly elected delegates to a constitutional convention. Id.

219 Report to the Attorney General, supra note 193, at 5-6.

220 *Id.* at 3-4.

221 H.R. Rep. No. 100-305, at 12 (1987). The House Committee found that, "[w]ithin the District of Columbia, earnings by industry are very diverse and rank higher than many states in several categories. In finance, in insurance, real estate activities, the District of Columbia ranks higher than 14 states. In hotel and lodging, it ranks higher than 27 states of the Union. In business services, it ranks higher than 41 states...There are 1,800 trade associations in the District of Columbia; 18-20 million tourists visit the District of Columbia every year. The benefit to the District of

Columbia from tourism is larger than the federal payroll." See also Can the District Afford to be a State infra Part V exploring financial implications of D.C. Statehood.

222 District of Columbia Appropriations Act of 2005, H.R. 4850, 108th Cong. (2004). The D.C. Appropriations Bill makes appropriations for the government of the District of Columbia and other activities chargeable in whole or in part against the revenues of said District for the fiscal year ending September 30, 2005, and for other purposes. Id.

223 *Id.*

224 H.R. Rep. No. 100-305, at 46-47 (1987).

225 See infra Part V, at 50.

226 Hearing on H.R. 3861 Before the Subcomm.on Fiscal Affairs and Health of the H. Comm. on the District of Columbia, 100th Cong. (1987) (statement of Sen. Edward M.Kennedy).

227 See H.R. Rep. No. 100-135, at 32.

228 See If You Favor Freedom, supra note 3, at 21.

229 But see Report to the Attorney General, supra note 193, at 18 n.72, 19, in which the argument is made that when Congress accepted the land from Maryland and Virginia, the boundaries were declared "finally fixed." Id. This argument is addressed in Raven-Hansen, supra, note 212, as well as by a parade of scholars with a different view. The position discussed there was that of the Justice Department under a single U.S. President and would not likely be the view under the current administration. Both President Obama and Attorney General Holder have expressed support for D.C. Statehood.

230 *Id.* at 22.

231 Raven-Hansen, supra, note 212, at 189.

232 Letter and Memorandum from Robert F. Kennedy, Attorney General, to Rep. Basil L. Whitener (1963), reprinted in Report to the Attorney General, supra note 193, at 128.

233 District of Columbia Voting Rights Act of 2009: Before the Comm. of the Judiciary, Subcomm. On the Constitution, Civil Rights and Civil Liberties of the H.R. at 3 (Jan. 2009) (statement of Viet D. Dinh, Professor, Georgetown University Law Center).

234 Raven-Hansen, supra, note 212 at 179.

235 *Id.* at 172-73.

236 This again seems to debunk the "fixed form" argument because that Act of Congress rendered the form no longer fixed. See Act to Retrocede the County of Alexandria, in the District of Columbia, to the State of Virginia, ch. 35, 9 Stat. 35 (1846).

237 If You Favor Freedom, supra note 3, at 22 (statement of Chairman Peter W. Pidino).

238 U.S. Const. amend. XXIII, § 1.

239 Kurland, supra note 172, at 476-79. The weight of authority indicates that repeal of the Twenty-Third Amendment is simply unnecessary Passage of the Twenty-third Amendment in 1961 granted Congress the authority to direct the appointment of electors to the Electoral College in the District of Columbia. This authority allows

District residents to participate in elections for President and Vice-President. Although valuable, the Twenty-third Amendment fails to endow District residents with all the rights of citizenship. District residents still cannot vote for Senators, cannot vote for Representatives (with the exception of one non-voting delegate), and cannot be accorded with more electors than the least populous state. The Twenty-Third Amendment might narrow the divide between people living elsewhere in the United States and the world, but full statehood for D.C. remains the best option for eliminating that divide. *Id.*

240 See If You Favor Freedom, supra note 3, at 25-26.

241 Raven-Hansen, supra note 212, at 183-90, n. 114 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)).

242 Examples of this are in the U.S. Constitution Article I, Section 9; Article II, Section 1; Article IV; Article V; and the Twelfth Amendment.

243 Kurland, supra note 172, at 486.

244 *Coyle v. Smith*, 221 U.S. 559 (1911).

245 *Permoli v. City of New Orleans*, 44 U.S. 589 (1845).

246 Constitutional and Economic Issues Surrounding Statehood for the District of Columbia: Hearing Before the Subcomm. on Fiscal Affairs and Health of the H. Comm. on the District of Columbia, 99th Cong. (1986) (statement of Prof. Cochran) (citing *Permoli v. First Municipality*, 44 U.S. 589, 594 (1845))

247 *Id.*

248 See U.S. Const. art. IV, § 3, cl. 1.

249 U.S. Census Bureau, U.S. Dept. of Commerce, Resident Population of the 50 States, the District of Columbia, and Puerto Rico: Census 2000 (Dec. 28, 2000), http://www.census.gov/population/www/cen2000/maps/files/tab02.pdf The population of the District of Columbia was 572,059 at the time of the U.S. Census in 2000. Alaska reported 626, 932 residents, North Dakota reported 642, 200 residents, Vermont reported 608, 827 residents, and Wyoming reported 493,782.

250 U.S. Census Bureau, U.S. Dept. of Commerce. Estimated Daytime Population and Employment-Residence Ratios: 2000 (2000), http:// www.census.gov/population/socdemo/daytime/2000/tab01.xls. According to the Census Bureau, the District's daytime population is estimated at 982,853. The influx of over 410,000 workers into Washington on a normal business day comprises a seventy-two percent increase of the capital's normal population. That is the largest increase percentage-wise of any city studied and the second-largest net increase, behind only New York City. *Id.*

251 U.S. Census Bureau, U.S. Dept. of Commerce, District of Columbia: Race and Origin 1800-1990 (2002), http:// www.census.gov/population/www/documentation/twps0056/tab23.pdf. In 1970, the population of the District of Columbia was 756,510 and in 1980, the population was 638,333. *Id.*

252 District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, § 401, 87 Stat. 774 (1973) (codified as D.C. Code § 1-221 (1973)). The Act provides:

(a) [t]here is established a Council of the District of Columbia; and the members of the Council shall be elected by the registered qualified electors of the District. (b) (1) [t]he Council established under subsection (a) shall consist of thirteen members elected on a partisan basis. The Chairman and four members shall be elected at large in the District, and eight members shall be elected one each from the eight election wards established, from time to time,

under the District of Columbia Election Act .... The term of office of the members of the Council shall be four years, except as provided in paragraph (3), and shall begin at noon on January 2 of the year following their election. (2) [i]n the case of the first election held for the office of member of the Council after the effective date of this title [January 2, 1975], not more than two of the at-large members (excluding the Chairman) shall be nominated by the same political party. Thereafter, a political party may nominate a number of candidates for the office of at-large member of the Council equal to one less than the total number of at-large members (excluding the Chairman) to be elected in such election. (emphasis added) *Id.*

253 *Hechinger v. Martin*, 411 F. Supp. 650, 654-55 (D.D.C. 1976), aff'd, 429 U.S. 1030 (1977).

254 The people of Washington, D.C. have made their preference clear through votes. See Constitution for the State of New Columbia Approval Act of 1987, Act 7-19, D.C. Council (1987), 34 D.C. Reg. 3057-3110.

255 D.C. Vote - Republicans and D.C. Voting Rights, http://
www.dcvote.org/pdfs/congress/dcvrarepublicans0807.pdf

256 Congressman Walter Fauntroy, Preface to If You Favor Freedom, supra note 3.

257 U.S. Const. art. 1, § 8, cl. 17.

258 U.S. Const. art. IV, § 3. Congress's power to create states reads: "New States may be admitted by the Congress into this Union; but no new States shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress." Using this "exclusive" authority, Congress can reduce the size of the federal district to include only certain federal buildings and national monuments, the icons of democracy. At the same time, Congress with the remaining government buildings, businesses and residential can admit that territory into the Union as the state of New Columbia. *Id.*

259 See Governmental Reorganization Act, Pub. L. No. 93-198 § 102(A), 87 Stat. 774 (1973). The District of Columbia currently has one non-voting delegate in the House.

260 An Act to Retrocede the County of Alexandria, in the District of Columbia, to the State of Virginia, ch. 35, 9 Stat. 35 (1846).

261 Johnny Barnes, The Ones the Voting Rights Act Left Behind: Options for Restoring Full Voting Right in the District of Columbia (2006), 19-20 (on file with the author).

262 U.S. Const. art. 1 § 8 cl. 17.

263 Raven-Hansen, supra note 212, at 168.

264 Id. Proponents of the Fixed Function Argument concede that Congress may adjust the size of the District, but assert that any changes to the district cannot affect its function.

265 Kennedy Letter, supra note 235.

266 Report to the Attorney General, supra note 193, at 25.

267 U.S. Const. art. 1, § 8, cl. 15.

268 *Perpich v. Department of Defense*, 496 U.S. 334 (1990).

269 See Barnes, supra note 261, at 8. In 1783, Pennsylvania militiamen surrounded the building in Philadelphia where the Founders were meeting to discnss the new Constitution. Id. The militiamen, demanding payment, refused to let the Founders leave. Id. Congress called on Pennsylvania for help, but members of the Pennsylvania government sided with their militiamen. Id. Seeing no other option for escape, the Founders were forced to sneak out the back door of the building under the cover of darkness. *Id.* This seemingly minor incident convinced the Founders that the seat of the federal government needed to be independent from state control. *Id.*

270 Raven-Hansen, supra note 212, at 166. Proponents of D.C. statehood, however, do not propose to eliminate the district comprising the seat of government. Instead, they propose to shrink it to an enclave of federal buildings and installations called the National Capital Service Area, and then to admit the balance of what is now D.C. as the new state of New Columbia. Id. See also 40 U.S.C. § 8501(a)(1) (2009), which currently defines the National Capital Service Area as: "The National Capital Service Area is in the District of Columbia and includes the principal federal monuments, the White House, the Capitol Building, the United States Supreme Court Building, and the federal executive, legislative, and judicial office buildings located adjacent to the Mall and the Capitol Building, ..."

271 An argument proposed and then refuted by Raven-Hansen. See generally Raven-Hansen, supra note 212.

272 Raven-Hansen, supra note 212, at 170.

273 If the Distriet of Columbia Becomes a State: Fiscal Implications, Hearing Before Special D.C. Council Comm. on Statehood and Self Determination, 18th Council Period 2 (2009) (statement of Dr. Alice M. Rivlin, Special D.C. Council Comm. on Statehood and Self Determination).

274 See Roy P. Franchino, The Constitutionality of Home Rule and National Representation for the District of Columbia, Part II, 46 Geo. L. J., 387 (1958).

275 Raven-Hansen, supra note 212, at 171-72.

276 *Cohens v. Virginia*, 19 U.S. 264, 347 (1821).

277 Id. at 428. (stating that "the power vested in Congress as the legislature of the United States, to legislate exclusively within [the District], carries with it, as an incident, the right to make the power effectual").

278 *Texas v. White*, 74 U.S. 700 (1868), overruled by Morgan v. United States, 113 U.S. 476, 496 (1885).

279 See Pate, supra note 194, at 4.

280 *United States v. Cohen*, 733 F.2d 128, 140 (D.C. Cir. 1984).

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

282 H.R. Rep. No. 100-305, at 46-47 (1987).

283 Dinh & Charnes, supra note 193, at 19-20.

284 U.S. Const. art. I, § 8, cl. 18.

285 U.S. Const. art. II, § 1, cl. 4.

286 Dinh & Charnes, supra note 193, at 20.

287 U.S. Const. art. IV, § 3. The creation of New Columbia and reducing the District implicates Article I powers, which not only allow Congress to legislate in manners deemed "necessary and proper" for the United Sates in

general, but also allows Congress to legislate in "all Cases whatsoever" for the District in particular. U.S. Const. art. I, § 8.

288 Kurland, supra, note 172, at 487.

289 U.S. Const. amend. XIV, § 1.

290 Raven-Hansen, supra note 212, at 187.

291 U.S. Const. amend. XXIII.

292 Constitution for the State of New Columbia, Bill No. 7-154, D.C. Council (1987).

293 Raven-Hansen, supra note 212, at 184.

294 Philip G. Schrag, The Future of District of Columbia Home Rule, 39 Cath. U. L. Rev. 348-49 (1990).

295 See 106 Cong. Rec. 12, 561 (1960) (statement of Rep. Whitener).

296 U.S. Const. amend. XXIII.

297 Schrag, supra note 298, at 348-49.

298 Such an omission is indicative that a reversion was not intended. See Crook Horner & Co. v. Old Point Comfort Hotel Co., 54 F. 604, 606-08 (E.D. Va. 1983) (discussing the the March 1, 1821 Act of the Virgina Assembly ceding lands). The cession stated that, "should the said United States at any time abandon the said lands and shoal, or appropriate then to any other purpose than those indicated in the preamble to this act ... the same shall revert to and revest in this Commonwealth." *Id.* at 606. When reviewing a statement of purpose stating that if the grant was used for any other purpose than intended, it "shall at once become void," the Maryland Court of Appeals refused to find a reverter because the provision did not expressly state that the grant was only effective "so long as" it was used as provided, *McMahon v. Consistory of St. Paul's Reformed Church*, 75 A.2d 122, 125 (Md. 1950).

299 *Palmer v. Barrett*, 162 U.S. 399, 403 (1896) (quoting the language of the cessation of jurisdiction to the United States).

300 See U.S. Census Bureau, supra note 249.

301 *Id.*

302 *Id.*

303 *Id.*

304 *Id.* Vermont, North Dakota, and Alaska have populations of 608,827, 642,200, and 626, 932, respectively. Montana, Delaware, and South Dakota each have a population of less than a million people. *Id.*

305 United State House of Representatives, Representative Offices, http://www.house.gov/house/MemberWWW_by_State.shtml

306 U.S. Census Bureau, U.S. Dep't. of Commerce, Population of Counties by Decennial Census: 1900 to 1990 (1995), available at http:// www.census.gov/population/www/censusdata/cencounts/index.html.

307 Yale Law School The Avalon Project, Note of James Madison; May 30, 1787, available at http://avalon.law.yale.edu/subject_menus/madispap.asp.

308 Yale Law School The Avalon Project, Note of James Madison; June 15, 1787, available at http://avalon.law.yale.edu/subject_menus/madispap.asp.

309 Yale Law School The Avalon Project, Note of James Madison; July 16, 1787, available at http://avalon.law.yale.edu/subject_menus/madispap.asp.

310 *Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964).

311 See infra Part V of this Article. This blight on America exists despite the fact that over 95 percent of D.C.'s budget is from local tax dollars.

312 Jomo Kenyatta, Facing Mount Kenya 5 (1938).

313 H.R. J. Res. 554, 92 Stat. 3795, 94th Cong., 124 Cong. Rec. 5272 (1978). The resolution was approved by a vote of 289 to 127. *Id.* Eighteen members did not vote. Id.

314 H.R. J. Res. 554, 92 Stat. 3795, 94th Cong.,124 Cong. Rec. 27260 (1978). The Senate took up the House Bill, literally by-passing the Senate Judiciary Committee, and approved it by a vote of 67 to 32; thus paving the way for consideration by the state legislatures. *Id.*

315 Id. Senate Republican supporters included Strom Thurmond (SC), Barry Goldwater (AZ), Bob Dole (KA) and Howard Baker (TN) who was later President Reagan's Chief of Staff.

316 U.S. Const. art. V.

317 H. R. Rep. No. 111-22, at 24 n. 14 (2009). The sixteen states that ratified the 1978 amendment within the seven-year timeframe were: New Jersey, Michigan, Ohio, Minnesota, Massachusetts, Connecticut, Wisconsin, Maryland, Hawaii, Oregon, Maine, West Virginia, Rhode Island, Iowa, Louisiana and Delaware. Id. An extension was not possible, as was done with the Equal Rights Amendment, because the seven-year limit was placed in the Article of Amendment itself. The United States Supreme Court, in *Dillon v. Gloss*, 256 U.S. 368, 371-374 (1921), held that Article V of the Constitution implies that amendments must be ratified, if at all, within some reasonable time after their proposal. Id. The Court also stated that Congress, in proposing an amendment, may fix a reasonable time for ratification, and that the period of seven years, fixed by Congress in the resolution proposing the Eighteenth Amendment was reasonable. Id. at 375-376.

318 The lesson learned is that, with proper packaging and presentation, both Democrats and Republicans in Congress can be persuaded to support equal footing for the people of the District of Columbia.

319 A plan then-Attorney General Robert F. Kennedy deemed impractical and unconstitutional. See supra note 235.

320 See District of Columbia-Maryland Reunion Act, H.R. 381, 108th Cong. § 3 (2003).

321 Printable Maps - Reference, bttp:// nationalatlas.gov/printable/reference.htmlMaryland (last visited Dec. 1, 2009).

322 Common Sense, supra note 144, at 161 (statement of Ted Trabue, Reg. V.P. for Dist. of Columbia Affairs, PEPCO; Greater Wash. Bd. of Trade). This hearing did not initially include any witnesses opposing the Davis proposal. I first presented a memorandum to Chairman Davis to raise some of the concerns with the Davis Proposal and to present another side. Subsequently, I was invited to testify as the only witness opposing the Davis Bill. Interestingly, while I was allowed to testify and to submit testimony for the record, my testimony did not appear among the witnesses at the Committee's website. All of the testimony that appears is in support of the Davis proposal - a most unfortunate practice by the Committee. I rely a great deal on first-hand information in the

construction of my presentations on this issue because I was in the room when a great deal of the relevant activity occurred. I was an eyewitness to much of this history.

323 *Id.* at 12-14 (statement of Ralph Regula, Member, House of Representatives, State of Ohio).

324 *Id.* at 3, 12 (statement of Dana Rohrbacher, Member, House of Representatives, State of California; statement of Ralph Regula, Member, House of Representatives, State of Ohio).

325 H.R. 381, 108th Cong. (2004).

326 H.R. 3709, 108th Cong. (2004).

327 See generally Common Sense, supra note 144. No single proposal enjoyed overwhelming support throughout the testimony by many representatives of groups with positions on the D.C. statehood/voting rights issue. Id. The Committee members, throughout the testimony, gave no indication of support for any one position. *Id.*

328 See supra note 321.

329 John Hammond Moore, Alexandria and Arlington "Come Home" - Retrocession, 1846, 3 N. Va. Heritage 3, 3-9 (1981); Dean C. Allard, When Arlington Was Part of the District of Columbia, 6 The Arlington Hist. Mag. 36, 36-45 (1978).

330 *Id.* (statement of Linda Cropp, Chair, D.C. Council).

331 Common Sense, supra note 144, at 60.

332 *Id.*

333 Dinh & Charnes, supra note 193 at 2.

334 See supra note 321, at 22.

335 Common Sense, supra note 144, at 16.

336 Id. at 31 (statement of Anthony Williams, Mayor, Dist. of Columbia).

337 U.S. Const. art. I, § 8, cl. 17. See also Paul v. United States, 371 U.S. 245 (1963) (a state may not legislate with respect to a federal enclave unless it reserved the right to do so when it gave its consent to the purchase by the United States and only state law existing at time of acquisition remains enforceable).

338 *Evans v. Cornman*, 398 U.S. 419 (1970).

339 Id. at 426.

340 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 D.C. Code, 2001 Ed. An Act Authorizing Cession from MD. (West 2009).

341 Common Sense, supra note 144, at 65.

342 *Id.*

343 See Dinh & Charnes, supra note 323, at 9.

344 Unified and Overseas Citizens Voting Rights Act of 1975, 42 U.S.C. § 1973, repealed by Uniformed and Overseas Citizens Absentee Voting Act, Pub. L. No. 99-410, 100 Stat. 924 (1986).

345 Uniformed and Overseas Citizens Absentee Voting Act, Pub. L. No. 99-410, 100 Stat. 924 (1986).

346 Common Sense, supra note 144, at 65.

347 U.S. Const. art. I, § 2,3.

348 *Id.*

349 U.S. Const. amend. XIV, § 5.

350 Organic Act, ch. 15, 2 Stat. 103 (1801) (eliminating the right of District residents to vote for Senators and Representatives). Prior to passage of the Organic Act, from 1790 to 1801, District residents fully participated in federal elections as voters in Virginia and Maryland, the two states that ceded land in order to create the District of Columbia. Id. See 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 D.C. Code, 2001 Ed. An Act Authorizing Cession from MD. (West 2009).; see also Act for the Cession from the State of Virginia, 13 Va. Acts Ch. 32, reprinted in D.C. Code, 2001 Ed. Aet of Cession from the State of Virgina (West 2009).

351 See Jason I. Newman & Jacques B. DePuy, Bringing Democracy to the Nation's Last Colony: The District of Columbia Self-Government Act, 24 Am. U. L. Rev. 537, 540 (1975).

352 *Id.*

353 Report to the Attorney General, supra note 193, at 19-31.

354 *Id.*

355 *Id.* This plan would keep the District out of state government, but there would be times when District representation would be essential. Should the District send representatives to draw boundaries? State governments decide districting issues. The District would deserve a say. In Maryland, the Governor fills vacancies in the Senate. Would this require District residents to vote for Governor? If not, one would represent the District in the federal government for whom they did not vote. That would make no sense. Last, should District residents vote in Maryland primary elections? If they have a say in the final decision, should they not have a say in the earlier decision?

356 If You favor Freedom, supra note 3, at 32-42.

357 Admission of the State of New Columbia into the Union: Hearing on H.R. 51 before the H. Comm. on the District of Columbia, 100th Cong., 1st Sess. (1987) (statement of Matthew Watson, Former Auditor, Dist. of Columbia); See also If You favor Freedom, supra note 3, at 33.

358 Balanced Budget Act of 1997, Pub. L. No.105-33, 111 Stat. 251 (1997). The Act has an impact on eight major areas of the District Government: 1) retirement funds for certain classes of D.C. employees; 2) financing the accumulated deficit; 3) reforming the criminal justice system; 4) management reform; 5) privatization of tax collections: 6) improving bond financing; 7) reform of the regulatory process; and 8) elimination of the federal payment. *Id.*

359 Admission of the State of New Columbia into the Union: Hearing on H.R. 51 Before the H. Comm. on the District of Columbia, 100th Cong., 1st Sess. (1987) (statement of Matthew Watson, Former Auditor, Dist. of Columbia). Although not legally compelled to, the President has supported and the Congress has regularly

appropriated federal payments for the District of Columbia. Upon admission as a state, the District would have no greater or lesser entitlement to receive continued payments. But, there is no reason to believe that the payments would not continue. While I believe that the District is financially viable as a state even without the continuance of the federal payment, there would certainly be some decline in the quality of services if the District does not receive some contribution from its major property owner. Such a decline in the quality of life in the nation's capital is not likely to be acceptable to the federal interest. *Id.*

360 The Economic and Financial Impact of DC Statehood: Public Oversight Hearing Before the Special Comm. on Statehood and Self-Determination, D.C. Council (July 2009) (statement of Dr. Andrew Brimmer, Former Chair, Dist. of Columbia Fin. Resp. and Mgmt. Asst. Auth.). "A review of the history of the federal payment and an examination of its logical and practical basis suggests that the state of New Columbia would probably receive some form of federal payment." *Id.*

361 Subcomm. Consideration and Mark-up of H.R. 2637 Before the H. Comm. on the Dist. of Columbia, 98th Cong. (1983) (statement of Congressman Walter E. Fauntroy, Chairman, Subcomm. .on Fiscal Affairs and Health). Following enactment of the Home Rule Act, the payment experienced a steady decline; from 27.3 percent in 1975 to well below 20 percent in the years that followed. *Id.*

362 Balanced Budget Act of 1997, Pub. L. No.105-33, 111 Stat. 251 (1997) [hereinafter Balanced Budget Act].

363 Press Release, Sen. Mary Landrieu, Report Confirms Fiscal Imbalance in D.C.: Identifying the Problem is First Step in Reaching a Solution (Jun. 5, 2003), available at http://www.dcwatch.com/govern/budget030605.htm. See also U.S. Gov't. Accountability Off.Rpt. no. 03-666, District of Columbia: Structural Imbalance and Management Issues (May 2003), available at http://www.gao.gov/new.items/d03666.pdf. (last visited Nov. 8, 2009).

364 Home Rule Act, Pub. L. No. 93-198, 87 Stat. 774 (1973) (codified as D.C. Code §§ 1-201.01-207.71 (2001)). Under this Act, the District must bear the burden of state-like responsibilities while relying on Congress to agree to its budgetary and legislative decisions, a process that can take up to eighteen months. *Id.*

365 The Economic and Financial Impact of DC Statehood: Public Oversight Hearing Before the Special Comm. on Statehood and Self-Determination, D.C. Council (July 2009) [hereinafter Economic and Financial Impact].

366 See Balanced Budget Act, Pub. L. No. 105-33, 111 Stat. 251 (1997).

367 See supra note 365, (statement of Alice Rivlin, Former Chair, Dist. of Columbia Fin. Resp. and Mgmt. Asst. Auth.).

368 See supra note 365. (statement of Robert Ebel, Deputy Chief Fin. Off., Dist. of Columbia).

369 Id. (statement of Robert Ebel, Deputy Chief Fin. Off., Dist. of Columbia and Walter Smith, Exec. Dir., D.C. Appleseed Ctr.).

370 *Id.* (statement of Walter Smith, Exec. Dir., D.C. Appleseed Ctr.).

371 U.S. Const. art. IV, §3, cl. 1.

372 Home Rule Act, Pub. L. No. 93-198, 87 Stat. 774 (1973) (codified as D.C. Code §§ 1-201.01-207.71 (2001)).

373 "The District faces unique hurdles including its status as a combination 'city-state,' and even county, if you will, its special relationship to the Federal Government and to Congress in particular." District of Columbia Bond Authorization Act: Hearing on H.R. 1807 before the Subcomm. on Fiscal Affairs and Health of the H. Comm. on the Dist. of Columbia (1981) (statement of Hyman Grossman, V.P., Standard & Poor's Corp.). Mr. Fauntroy detailed

seven reasons upon which the special federal payment was justified. Id. Those reasons remain unchanged to this date and include 1) revenue foregone due to nontaxable commercial and industrial property utilized by the federal government; 2) revenue foregone due to nontaxable business income; 3) revenue foregone due to federally imposed exemptions from District taxes; 4) the cost of providing services to corporations doing business only with the Federal Government; 5) the cost of direct services to the Federal Government; 6) unique expenditure requirements mandated by the Federal Government; and 7) the relative tax burden placed upon District residents. *Id.*

374 U.S. Census Bureau, U.S. Dep't. of Commerce, Annual Population Estimates 2000 to 2008 (Dec. 22, 2008), available at http://www.census.gov/popest/states/NST-ann-est.html (last visited Jul. 27, 2009).

375 Constitutional and Economic Issues Raised by D.C. Statehood: Hearing on H.R. 325 Before the H. Comm. on the District of Columbia, 99th Cong., 2nd Sess. (1986) (statement of Matthew Watson, Former Auditor, Dist. of Columbia).

376 Hearing and Mark-Up of H.R. 2637, 98th Cong. (1983) (statement of Congressman Walter E. Fauntroy, Chairman, Subcomm. On Fiscal Affairs and Health).

377 If You Favor Freedom, supra note 3, at 32-42. Dr. Andrew F. Brimmer, noted economist, stated: A comprehensive examination of the District government's receipts under major federal government programs was undertaken. The results indicate that - if the District of Columbia were to become a state - it would neither gain nor lose any significant level of Federal funds. At the present time, the District of Columbia receives federal funding as follows: Where funding is available to local governments only, the District is funded as a local government - e.g., the Department of Housing and Urban Development, Community Development Block Grant Program. Where funding is available to state governments only, the District is designated by the statute or regulations to receive Federal funds along with the 50 states and U.S. territories or is treated as if it were a state. Where federal funding is available to state and local governments or to local governments through the state, the District generally is treated as a state. On balance, then, the District of Columbia is presently treated as a state. There are few, if any, major funding sources that would become available to the District as a result of statehood. The major programs funded to local governments generally have provisions for state funding where the local government is not an applicant. *Id.*

378 Structural Imbalance of the District of Columbia: Hearing Before the S. Subcomm. of the Comm. on Appropriations, 108th Cong. 4 (2004) (statement of Anthony Williams, Former Mayor, District of Columbia). "The D.C. Public Schools have prepared a 10-year modernization program for all facilities in need of repair, and to execute it would cost $250 million per year over the next 6 years." *Id.*

379 Washington D.C. Visitors and Convention Assoc. - DC City Fact Sheet, http://washington.org/planning/meeting-planners/dc-in-abox/dc-city-fact-sheet.

380 See supra note 378, at 5.

381 *Id.* at 4.

382 *Id.*

383 If You Favor Freedom, supra note 3, at 32-42 Discussing the economics of the District's taxing authority, Dr. Andrew F. Brimmer noted: The Government of the District of Columbia collects revenues from taxes, fees, grants under Federal programs, and other miscellaneous sources, in much the same way as other states and local governments within the United States. Its position differs from that of other jurisdictions because of (1) the Federal payments it receives to compensate for costs associated with the presence of the Federal Government, and (2) the Federal restrictions placed on its taxing authority and on its budgetary discretion ... Although the Federal payment is a small part of total revenue for the District of Columbia, the Congress has authority to appropriate the entire

District budget. Further, the District of Columbia is prohibited from taxing (1) earnings of workers residing outside of the District, (2) property owned by the Federal Government, or (3) property owned by certain organizations, such as the National Geographic Society, the National Academy of Sciences, and others exempted from taxation under Federal laws ... Property taxes and income taxes are the leading sources of tax revenues, followed closely by sales taxes. These, along with several minor tax sources, have been providing over 70% of total general fund revenues in recent years. The remaining revenue sources include the Federal payment. Miscellaneous charges and fines, including licenses and permits, service charges, etc., provide about 5% of total revenue, and the net receipts form the lottery now amount to nearly 2% of total general fund revenues.

*Id.*

384 See supra note 367.

385 *Id.* Including non-resident income in the tax base would give the District the option of cutting its income tax rates in half and still raising substantial additional revenue to improve public services. Better services and lower income tax rates would make the District a more attractive place to live and might precipitate substantial in-migration, especially of upper income people whose location decisions are sensitive to income tax rates. *Id.*

386 Paul Gessing, Nat'l. Taxpayer's Union Found., Commuter Taxes: Milking Outsiders for All They're Worth 141 (2003), http://www.ntu.org/main/press_papers.php?PressID=148&org_name=NTUF.

387 See supra note 383.

388 Structural Imbalance of the District of Columbia: Hearing Before the S. Subcomm. of the Comm. on Appropriations, 108th Cong. 24 (2004) (statement of Dr. Alice Rivlin, Director, Brookings Institution Greater Washington Research Program).

389 Union Station Redevelopment Corp. Payment in Lieu of Taxes Act of 2009: Hearing on Bill 18-220 Before the D.C. Comm. On Fin. and Revenue, D.C. Council (2009) (statement of Ed Lazere, Exec. Dir., D.C. Fiscal Policy Inst.), available at http://dcfpi.org/wp-content/uploads/2009/05/5-21-09unionst.pdf (last visited Nov. 9. 2009).

390 Constitutional and Economic Issues Raised by D.C. Statehood: Hearing on H.R. 325 Before the H. Comm. on the District of Columbia, 99th Cong., 2nd Sess. (1986) (statement of Dr. Lucy Reuben, Vice President, Financial Research Associates, Inc. and Associate Professor of Finance, George Mason University). "With respect to the cost of statehood, clearly the costs of statehood will be proportionate to any added responsibilities of statehood. At present, however, the District already bears many of these costs through its full-scale legislative and executive systems. Presumably, additional fiscal responsibilities will be paid for through the additional fiscal flexibility of any incremental powers of statehood." *Id.*

391 *Id.* (statement of Matthew Watson, Former Auditor, Dist. of Columbia). Transition costs, of themselves, are likely to be minimal, and should be of no concern in making a determination as to whether to approve statehood. However, although the District now performs at its own expense almost all activities which it would be required

to perform as a state, several programs which the state would be required to take over from the Federal Government would have cost implications which are not merely transition costs, but which would continue indefinitely. *Id.* Although the District of Columbia has encountered many financial obstacles, it has managed to balance its budget for the past eleven years as well as create an emergency and contingency reserve. See infra note 392.

392 Moody's - Ratings Policy & Approach, http://v3.moodys.com/ratings-process/Ratings-Policy-Approach/002003. Any city or state in the U.S. borrows money from the private sector via bonds and agrees to pay a certain amount of interest depending on how high or low their bond-ratings are. *Id.*

393 Letter from Natwar M. Ghandi, Chief Fin. Off. for the Dist. of Columbia to Adrian M. Fenty, Mayor, Dist. of Columbia and Vincent C. Gray, Chair, Council of the Dist. of Columbia 3-4 (Jul. 8, 2008), available at http://cfo.dc.gov/cfo/frames.asp?doc=/cfo/lib/cfo/debt_letter_070908_.pdf (last visited Nov. 9, 2009).

394 *Id.*

395 Union Station Redevelopment Corp. Payment in Lieu of Taxes Act of 2009: Hearing on Bill 18-220 Before the D.C. Comm. On Fin. and Revenue, D.C. Council (2009) (statement of Ed Lazere, Exec. Dir., D.C. Fiscal Policy Inst.), available at http://dcfpi.org/wp-content/uploads/2009/05/5-21-09unionst.pdf (last visited Nov. 9. 2009).

396 *Id.* (statement of Robert Ebel, Dep. Chief Fin. Off., Dist. of Columbia).

397 U.S. Gov't. Accountability Off.Rpt. no. 03-666, District of Columbia: Structural Imbalance and Management Issues 7 (May 2003), available at http://www.gao.gov/new.items/d03666.pdf. (last visited Nov. 8, 2009).

398 *Id.*

399 Ed Lazere, DC Fiscal Policy Inst., Filling DC's Newest Revenue Hole (2009), available at http://dcfpi.org/?p=603 (last visited Nov. 9, 2009).

400 *Id.*

401 Public Oversight Roundtable on the Economic and Financial Impacts of District of Columbia Statehood: Hearing Before the Spec. Committee on Statehood and Self-Determination, D.C. Council (2009) (testimony of Ed Lazere, Exec. Dir., DC Fiscal Policy Inst.), available at http://dcfpi.org/?p=693 (last visited Nov. 9, 2009).

402 *Id.*

403 See supra note 6. Such efforts are necessarily weakened by the dissonance between American foreign policy and domestic action.

404 Known as "Treaty Law," Sean D. Murphy, Principles of International Law 66 (2006) [hereinafter Murphy].

405 Known as "Customary Law." *Id.* at 78.

406 *Ballentine v. United States*, 486 F.3d 806, 811 (3d Cir. 2007) (citing *Adams v. Clinton*, 90 F.Supp.2d 35, 48-49 (D.D.C.2000)), *aff'd* 531 U.S. 941 (2000).

407 Id. at 811 (quoting *Igartua-De La Rosa v. United States*, 417 F.3d 145,147 (1st Cir. 2005)). Separation of powers makes it impossible for any court to simply order Congress to create a new state in order to grant a group of people representation. *Id.*

408 See generally *Igartua-De La Rosa v. United States*, 417 F.3d 145 (1st Cir. 2005) (Torruella, J. and Howard, J. dissenting).

409 See supra note 6.

410 Press Release, Special Comm. Decolonization, Special Comm. on Decolonization Adopts Text Calling United States to Expedite Self-Determination Process for Puerto Rican People (June 9, 2008), http:// www.un.org/News/Press/docs/2008/gacol3176.doc.htm. The United Nations Special Com-mittee on Decolonization adopted text calling on the United States to Expedite Self-determination Process for Puerto Rican People. *Id.*

411 See supra note 6. Statehood Solidarity Comm. v. United States, Case Rep. No. 98/03 Inter-Amer. Comm. H.R. (2003); Inter-American Comm'n. on Human Rights, Org. of Am. States, Rpt. No. 09/03 § 117 (2003), http:// www.cidh.org/annualrep/2003eng/USA.11204a.htm.

412 Statute of the International Court of Justice, art. 38 § 1 (June 26, 1945). [hereinafter ICJ Statute])

413 See supra note 406.

414 U.S. Const. art. VI, § 2.

415 *Id.*

416 The courts have established a bifurcated system for their integration into law. This system, first articulated by Chief Justice John Marshall in Foster v. Neilson, 27 U.S. 253, 314 (1829), defines a treaty as either self or non-self-executing. Self-executing treaties become American law as soon as they are ratified, while non-self-executing treaties require Congress to pass implementing legislation before they are actionable in domestic courts. Justice Marshall wrote: Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court. *Id.*

417 Including, but not limited to: the UN Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Inter-American Democratic Charter and the American Declaration of the Rights and Duties of Man.

418 Atlantic Charter, U.S.-U.K., August 14, 1941, 55 Stat. 1600; EAS 236; 3 Bevans 686, available at www.state.ga/documents.organization/65515.pdf. Less than six months before the United States entered into World War II, President Franklin Roosevelt and Prime Minister Winston Churchill of Britain signed the Atlantic Charter "to make known certain common principles" they were determined to defend in the face of Nazi aggression. Among those principles were a commitment to "respect the rights of all peoples to choose the form of government under which they will live," and to "see sovereign rights and self-government restored to those who have been forcibly deprived of them." *Id.* The Atlantic Charter was an articulation of American foreign policy to no longer fight for territory but to protect and encourage freedom and democracy.

419 The International Bill of Human Rights is the most comprehensive enumeration of those political rights, and speaks directly to the specific rights denied to residents of Washington, D.C. It consists of several components, including the U.N. Universal Declaration of Human Rights (Declaration), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESC), and two optional protocols to the ICCPR. The Declaration and the ICCPR both explicitly support the case for D.C. statehood. Article 21 of the Declaration states: "Everyone has the right to take part in the government of his country, directly or through freely chosen representatives." United Nations Universal Declaration of Human Rights, G.A. Res. 217 A (III), at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948)). "The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall

be by universal and equal suffrage," Id. Article 21 echoes similar, Hobbesian language found in the Declaration of Independence, which famously states that "[governments derive] their just powers from the consent of the governed." Declaration of Independence para. 2 (U.S. 1776). Both of these documents are inherently reflective of American values - values applied to the vast majority of American citizens, but not to the residents of the District.

420 Social, Humanitarian and Cultural Questions: Universal Declaration of Human Rights, 1947-8 U.N.T.B. 573, available at http://unyearbook.un.org/unyearbook.html?name=194748index.html. (last visited Nov. 9, 2009).

421 International Human Rights Treaties: Hearing Before the S. Comm. on Foreign Relations, 69th Cong. 1 (1980) (statement of Claiborne Pell, Chair, S. Comm. On Foreign Relations).

422 United Nations Yearbook Summary, 1948, http:// www.udhr.org/history/yearbook.htm. One Member of the Commission stated, "[i]t was imperative that the peoples of the world should recognize the existence of a code of civilized behavior which would apply not only in international relations but also in domestic affairs." Id. at B(1)(a). Another took the view that "by making human rights international, the United Nations Charter had placed upon States positive legal obligations." Id. Still another was even more emphatic, stating "the primary purpose of the Declaration was...to enable man, all over the world, to develop his rights and, in consequence, his personality...Man should feel confident that [government] powers could not impair his fundamental rights." *Id.*

423 *Id.* For example, "[t]he representative of New Zealand, the Union of South Africa, Saudi Arabia, the USSR, Poland, the Byelorussian SSR, the Ukrainian SSR, Yugoslavia, and Czechoslovakia criticized the draft Declaration."

424 *Id.*

425 International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976), available at http:// www1.umn.edu/humanrts/instree/b3ccpr.htm (last visited Nov. 9, 2009). The ICCPR is designed to give judicial force to the Declaration.

426 *Id* at art. I, cl. 1.

427 *Id.* at art. 1, cl. 3. "The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations." *Id.*

428 *Id.*

429 *Igartua-De La Rosa v. United States*, 417 F.3d 145, 149, n. 5 (1st Cir. 2005). In its opinion, the court quoted a U.N. General Assembly Official Record from 1953 that states "when choosing their constitutional and international status, the people of the Commonwealth of Puerto Rico have effectively exercised their right to self-determination." Id. (quoting G.A. Res. 748 (VIII), U.N. GAOR, 8th Sess., 459th plen. mtg. at 26 (1953)).

430 See GA. Res. 748 (VIII), U.N. GAOR, 8th Sess., 459th plen. mtg. at 25. Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: a) To take part in the conduct of public affairs, directly or through freely chosen representatives; b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; c) To have access, on general terms of equality, to public service in his country. *Id.*

431 Jimmy Carter, the Carter Ctr., U.S. Finally Ratifies Human Rights Covenant (1992), available at http:// www.cartercenter.org/news/documents/doc1369.html (last visited Nov. 9, 2009). The Senate, which ratified the ICCPR in 1992, did not make any reservations or declarations; a clear indication the Senate saw the scope of those provisions as acceptable and appropriate. However, the Senate did declare the ICCPR to be a non-self-executing treaty, which precludes District residents from suing the federal government for violating the terms of the ICCPR.

432 See supra note 430, at art. 41, 42. The U.N. Human Rights Committee would have original jurisdiction over the claim; and, it would also have the authority to appoint an ad hoc Commission to further investigate. Id.

433 *Id.*

434 Organization of American States, Inter-American Democratic Charter, Sept. 11, 2001, http://www.oas.org/charter/docs/resolution1_en_p4.htm. The Inter-American Democratic Charter (IADC) was adopted in 2001 and contains language on political rights similar to that of the Declaration and the ICCPR. The IADC is a binding resolution of the General Assembly of the Organization of American States (OAS), and was based on the American Declaration for the Rights and Duties of Man (American Declaration), a precursor to the U.N. Universal Declaration of Human Rights.

435 See supra note 6. The Commission stated that the United States, "... has failed to justify the denial to the [residents of the District of Columbia] of effective representation in their federal government, and consequently, that [they] have been denied an effective right to participate in their government, directly or through freely chosen representatives and in general conditions of equality, contrary to Articles XX and II of the American Declaration." Inter-American Comm'n. on Human Rights, Org. of Am. States, Rpt. No. 09/03 § 109 (2003), http:// www.cidh.org/annualrep/2003eng/USA.11204a.htm.

436 See Murphy, supra note 407, at 78.

437 ICJ Statute, supra note 416, at art. 38 § 1(b).

438 Frederic L. Kirgis, Jr., Appraisals of the ICJ's Decision: Nicaragua v. United States (Merits), 81 Am. J. Int'l L. 144, 146 (1987).

439 Anthea Elizabeth Roberts, Traditional and Modern Approaches to Customary International Law: A Reconciliation, 95 Am. J. Int'l L. 757, 758 (2001).

440 *Id.*

441 In re Estate of Ferdinand Marcos, Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994).

442 *Flores v. S. Peru Copper Corp.*, 406 F. 3d 65, 80 (2nd Cir. 2003). "States need not be universally successful in implementing the principle in order for a rule of customary international law to arise. If that were the case, there would be no need for customary international law. But the principle must be more than merely professed or inspirational." *Id.*

443 See supra Roberts note 439, at 757.

444 See The Paquete Habana, 175 U.S. 677, 686 (1900). The Supreme Court, ruling in Paquete Habana famously stated: "International law is part of our law, and must be ascertained and administered by the courts ... For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations." Id.

445 See Roberts supra note 439, at 758.

446 *Id.*

447 *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (referencing examples of international custom when the Alien Tort Statute was enacted in 1789, including prohibitions against piracy and diplomatic immunity).

448 Id. at 725 (discussing that claims based on present-day laws of nations must be based on accepted norms).

449 *Igartua*, 417 F.3d at 151.

450 *Id.*

451 *Sosa*, 542 U.S. at 737, n. 27.

452 *Id.*

453 See U.S. Const. art. I, § 3, cl. 1. American Congressional districts do vary somewhat in size and Senate representation is not proportionate to population. Id. However, the basic principle remains that every citizen has the right to be represented under the same system as their fellows.

454 Arjun Garg, A Capital Idea: Legislation to Give the District of Columbia a Vote in the House of Representatives, 41 Colum. J. L. & Soc. Prob. 1 (2007). Opponents of statehood for the District have often argued it has a unique status as the seat of the federal government that must be preserved. However, six foreign capitals, Canberra (Australia), Brasilia (Brazil), New Delhi (India), Mexico City (Mexico), and Caracas (Venezuela) were all initially conceived of as federal districts mirroring the American model. *Id.* at 9-10. All six have since attained full voting representation in their national legislatures; no other disenfranchised capital enclaves now exist. *Id.*

455 See Constitution of Afghanistan Ch. III art. 61 and Ch. V art. 83-84, http://www.servat.unibe.ch/law/icl/af00000_.html; Constitution of Iraq Chap. II art. 10 & art. 20, Chap. IV art. 30 and Ch. V art. 36, http:// portal.unesco.org/ci/in/files/20704/11332732681iraq_constitution_en.pdf.

456 *Igartua-De La Rosa* 417 F.3d at 176. Judge Toruella wrote, "The ICCPR, the UDHR, the American Declaration, the ACHR and the IADC are all evidence of the emergence of a norm of customary international law with an independent and binding juridical status." *Id.*

457 *Id.* at 172. (emphasis added).

458 *Sosa*, 542 U.S. at 716. (discussing the three-part standard for what constitutes a "custom": "[a] norm of international character; accepted by the civilized world; and defined with a specificity comparable to the features of the 18th century paradigms").

459 *Igartua-De La Rosa* 417 F.3d at 176, (Tortuella, J. dissenting). "The right to equal political participation, as evidenced by these international treaties, covenants, and declarations, is reinforced by what has become the overwhelming practice worldwide ... While the system of democratic government may differ from country to country, the fundamental right of citizens to participate, directly or indirectly, in the process of electing their leaders is at the heart of all democratic governments." Id.

460 *Id.* at 152-153.

461 28 U.S.C. § 2201(a). Under the Declaratory Judgment Act, "in a case of actual controversy within its jurisdiction...any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." *Id.*

462 KRC Research, DC Vote, U.S. Public Opinion on D.C. Voting Rights 11 (Jan. 2005), http://www.dcvote.org/trellis/research/polljan2005.pdf. KRC Research surveyed 1,007 U.S. adults by telephone. *Id.* at 3.

463 *Id.* at 7, 11.

464 H.R. Rep. No. 100-305, at 46 (1987). The true benefit of statehood is that it is permanent. Id. At one time, Hawaii, Alaska and Minnesota were territories of the United States. Id. It is obvious that they cannot now be returned to such a status, nor could the District of Columbia, should it become a state. Statehood gives the citizens of a particular state sovereignty. *Id.*

465 D.C. Code § 1-221 (1973). The Act provides: (a) [t]here is established a Council of the District of Columbia; and the members of the Council shall be elected by the registered qualified electors of the District. (b) (1) [t]he Council established under subsection (a) shall consist of thirteen members elected on a partisan basis. The Chairman and four members shall be elected at large in the District, and eight members shall be elected one each from the eight election wards established, from time to time, under the District of Columbia Election Act ... The term of office of the members of the Council shall be four years, except as provided in paragraph (3), and shall begin at noon on January 2 of the year following their election. (2) [i]n the case of the first election held for the office of member of the Council after the effective date of this title [January 2, 1975], not more than two of the at-large members (excluding the Chairman) shall be nominated by the same political party. Thereafter, a political party may nominate a number of candidates for the office of at-large member of the Council equal to one less than the total number of at-large members (excluding the Chairman) to be elected in such election.

*Id.* (emphasis added).

466 *Hechinger v. Martin*, 411 F. Supp. 650, 654-655 (D.D.C. 1976), aff'd 429 U.S. 1030 (1977). A provision in the Home Rule Act requires that no more than one at large councilmember may be from any one political party. Id.

467 Constitution for the State of New Columbia Approval Act of 1987, Act 7-19, D.C. Council (1987), 34 D.C. Reg. 3057-3110. The people of Washington, D.C. have made their preference clear through votes. Id.

Respectfully Submitted,

/s/

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**DATED: 15 September 2014**

# WORLD RIGHTS

Human Rights Advocacy Worldwide

September 15, 20014

Senate Committee on Homeland Security and Governmental Affairs
SD-342, Dirksen Senate Office Building
Washington, D.C. 20510

RE: Testimony on the Implications of the New Columbia Admission Act
Presented to the Senate Committee on Homeland Security and Governmental Affairs
by Timothy Cooper, Executive Director, World Rights

Honorable Thomas R. Carper, Honorable Tom Coburn, and other distinguished members of the Committee,

We write in support of the passage of the New Columbia Admission Act. Our position is non-partisan and based entirely on legal grounds, most particularly pertaining to international human rights law.

The continuing denial of equal congressional voting rights to the citizens of Washington, DC is a serious human rights violation, and places the Government of the United States of America in contravention of numerous international human rights treaties and other international agreements, chief among which is the *International Covenant on Civil and Political Rights (ICCPR).*

This international human rights treaty was ratified by the Senate in 1992; its ratification by the Senate and subsequent signing by the President makes its provisions, except for those where reservations were attached, legally binding on the United States. The U.S. State Department has recognized this fact. The Senate made no reservations with regard to the right to representation. The treaty therefore obligates the U.S. to guarantee all its citizens, including D.C. residents, equal political participation in their national legislature through duly elected representatives.

While the U.S. Constitution appears to sanction the denial of congressional voting rights to Washingtonians, the U.N. Committee maintains that there is no reasonable modern-day justification for the continuing curtailment of equal congressional voting rights to District of Columbia residents under the terms of the treaty.

Indeed, as recently as March 2014, the U.N. Human Rights Committee reiterated its "concern that residents of the District of Columbia are denied the right to vote for and election of voting representatives to the U.S. Senate and House of Representatives."

The Committee cited articles 2, 10, 25, and 26 of the ICCPR that pertain to a guarantee of voting rights in the national legislature to all citizens as well as to the right to equality before the law for all people.

The Committee went on to make its recommendation to the United States that it "provide for the full voting rights of residents of Washington, D.C."

The U.N.'s most recent position is consistent with the position taken by every major international human rights monitoring body in the world, including the Organization for American States (OAS) and the Organization for Security and Cooperation in Europe (OSCE).

The issue of equal DC voting rights and statehood has already been exhaustively reviewed by the Inter-American Commission on Human Rights. In 2003, it released its final report and issued recommendations, which called for equal congressional voting rights for D.C. residents. We wish to direct the Committee's attention to the Commission's report in the case of "Statehood Solidarity Committee v. the United States," which may be found at:

http://cidh.org/annualrep/2003eng/USA.11204.htm

The OSCE's Parliamentary Assembly (PA) as well as its Office of Democratic Institutions and Human Rights (ODIHR) has also repeatedly noted that the position of the United States regarding D.C.'s disenfranchisement is inconsistent with its obligations under the 1990 Copenhagen Document, which defines the civil and political rights each member state of the OSCE is obligated to guarantee its own citizens, including equal representation in their own national legislature.

In light of the US's recognized human rights obligations, undertaken freely by the United States and supported in full measure by the U.S. Senate, we ask the Senate Committee on Homeland Security and Governmental Affairs to support equal congressional voting rights for the residents of America's capital city and to seek final passage of all necessary legislation to secure these rights to District of Columbia residents in perpetuity.

With kind regards,

Timothy Cooper

Executive Director

3335 Wisconsin Ave., NW

Washington, DC 20016

TESTIMONY of Nathan Ackerman, DC Resident

HEARINGS on S. 132 "THE NEW COLUMBIA ADMISSION ACT of 2013"
"Equality for the District of Columbia: Discussing the Implications of S.132

September 14, 2014

Thank you for recognizing the importance of holding a hearing to discuss the ongoing disenfranchisement of District of Columbia residents. My name is Nathan Ackerman, and I'm a founder of the DC Voting Rights Project (DCVRP), a newly formed entity affiliated with the Committee for the Capital City (CCC). The CCC is a non-profit, non-partisan organization that has been researching and proposing ways to restore voting rights to the residents of the District of Columbia for nearly two decades. However, the following testimony is my own. I have been a resident of Washington since 1997 when I left ABC NEWS to join the communication team of the Senate Democratic Leadership. I've spent most of the last 20 years working on behalf of candidates and causes at the local and national level.

Too much time has passed since Congress addressed this enduring inconsistency in our national identity as a people dedicated to the basic democratic rights of all. And too many elections have been held under a system that keeps those living closest to Congress in its shadow. Indeed, our "shadow" Representative and our "shadow" Senator will testify today. But voting rights will never be restored to us until this injustice is consistently drawn out of the shadows and into the light of day. May this forum serve that purpose—at least for a news cycle or two—to help elevate this issue from the parochial to a discussion of what we stand for as Americans.

Increased public awareness is critical. After decades of lip service, a resident of Anacostia is still no more likely than a tourist from Australia to find a member of Congress representing them here in the Dirksen building. And after decides of advocacy, the most meaningful way a President has driven the issue forward is with a Taxation Without Representation license plate on a White House vehicle. While our nation has been slow to deliver on its promise of participatory democracy, it eventually lives up to its own guiding principles, with landmark accomplishments like the Nineteenth Amendment and the Voting Rights Act of 1965. Our struggle for voting rights is part of this long march toward "a more perfect union" and it is my hope that the familiar obstacles of party politics, stasis and racism that have stained this debate will ultimately fade away again.

The state of the District today justifies this hope. Its economic strength, sound fiscal management, and shifting demographics nullify some of the most pervasive arguments against self-determination. And while DCVRP is here today in support of The New Columbia Admissions Act, S.132, the District's improved stature may open other paths to full and equal representation.
One of the most promising of these was described in testimony provided to the Senate Committee on Government Affairs by CCC board member Betty Ann Kane in 2002.

> "We believe that reunion of most of the territory of the District of Columbia with the State of Maryland is the most just and practical solution for full democracy for District residents for several reasons. First, history is on our side. As you know, the District was originally created with land ceded for that purpose from the states of Maryland and Virginia. The

portion ceded by Virginia was returned to that state in 1846. The reason given for that retrocession was that it 'was not needed' by the national government. It is difficult to see in the year 2002 how any continuing national interest is served by Congress retaining ultimate sovereignty over anything other than a small federal enclave in the remaining portion of the District.

Second, while we do not underestimate the political challenges, the process of reunion would be relatively simple. As was the case with the Virginia portion, no Constitutional amendment would be required, and no prolonged process of ratification by multiple state legislatures. The Constitution requires only that there be a District 'not exceeding ten miles square' as the seat of the federal government. As long as there remained a small federal enclave, the change in legal status could be brought about by a simple act of Congress returning the Maryland portion to that state, and by a simple act of the Maryland legislature accepting the return of the territory."

In other words, if the Congress taketh away, the Congress can giveth back. If the city of Washington was re-admitted to the State of Maryland as a unique home-rule city:

- Washington would retain its unique status as the nation's "Capital City." Its residents would continue to live within the city's existing borders, elect its Mayor and Council and enjoy its vibrant neighborhoods and local civic involvement.

- As a unique political subdivision within the state of Maryland, DC residents would gain the representation of two US Senators, a Representative in Congress, the ability to vote for five elected state-wide leaders including the Governor, as well as the addition of potentially four Maryland state senators and twelve Maryland state delegates to Annapolis. These twenty-four new elected representatives for each DC resident would create political representation, participation, and accountability equal to that of all other Americans.

- Joining Maryland would lead to many additional benefits as these two entities combine their resources and realize numerous cost savings and efficiencies.

- DC residents would gain full voting rights and home-rule equivalent to that of all other Americans. The days of "taxation without representation" would be over and DC would no longer be a ward of the federal government.

- The State of Maryland would gain an extra electoral vote in the Presidential elections and an additional member of its Congressional delegation.

- Congress would continue to exercise exclusive legislation and control over key federal properties in Washington (the National Capital Service Area described in the DC Home Rule Act) in addition to its other Maryland-based holdings, such as the National Institutes of Health, the Social Security administration, and the National Security Agency. This control would be identical to the exclusive control it has over its Pentagon, CIA, and other assets in Virginia.

There is a bill currently in the House that provides full federal voting rights for the residents of the District of Columbia. This legislation, which is also supported by the Committee for the Capital City, is H.R.299, the "District of Columbia Voting Rights Restoration Act of 2013", introduced by Rep. Dana Rohrabacher (R-CA). H.R.299 restores the rights of DC residents to vote as part

of the Maryland electorate solely for the purposes of federal voting rights. The city of Washington was originally a part of Maryland when the nation was formed. Even after Maryland ceded the land to the federal government, DC residents continued to vote in Maryland's federal elections until Congress took away that right by a statute when it established a local government in DC with the passage of the "Organic Act of 1801." H.R.299 seeks to restore this right to a federal vote and allows DC residents to be fully represented in Congress as residents of Maryland for federal election purposes only. The current DC Delegate would become a real Representative, and DC residents would be represented as well by the two Maryland Senators. DC residents would be eligible to run for all three elected positions but would have no vote or representation in the Maryland state government. Because federal elections are under the exclusive control of Congress, Congress could take this step unilaterally.

These proposals alone make it clear that the intractability that has defined this subject isn't due to a lack of well-considered solutions. It's because not enough members of Congress have made ending our second-class status a priority. And why would you? We aren't your constituents. No voting member of Congress considers District residents *their* constituents. We're political orphans. Escaping this catch 22—in order to *get* representation, we must already *have* representation—requires more than a handful of members to take action. Indeed, if members of Congress like Senator Paul act to strip away our gun control laws under the auspices of protecting the Second Amendment, surely others can act to restore voting rights afforded us by the Fifteenth and Nineteenth Amendments: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state...".

Further, Article 21 of the Universal Declaration of Human Rights states: "The will of the people shall be the basis of the authority of government." That leaves residents of the District wondering how a Congress that rules the District of Columbia does not operate with the consent of the governed derives its legitimacy? And what greater hypocrisy is there than the United States of America trumpeting democracy abroad while denying the citizens of its own capital their basic rights? Injuries to the ideals of self-determinism and equal treatment under the law might heal faster if a portion of the 100-million-dollar annual allocation to the National Endowment for Democracy/National Democratic Institute for promoting democracy abroad were devoted to promoting democracy here in Washington, DC. It would allow us to amplify support like President Obama's endorsement of statehood—"I'm for it"—and Attorney General Holder's statement that all Americans should be full participants in democracy, "including the more than 600,000 taxpayers, who, like me, live in the District of Columbia and still have no voting representation in Congress."

But as long as political self-preservation is allowed to be an acceptable reason for compromising our core democratic values, these words won't be backed by change. Some Democrats fear supporting statehood will be mistaken for a power grab back home. Republicans aren't running to empower a slice of the country that votes 92% Democratic. When Hubert Humphrey's negotiations with Fannie Lou Hamer over seating the Freedom Democrats at the National Convention deteriorated (he made the stakes about his own political ambition), she asked "Do you mean to tell me that your position is more important than four hundred thousand black people's lives?" Fifty years later Congress needs to ask itself if self-preservation and political calculation is worth disenfranchising 640,000 District residents. We arrived at the right answer fifty years ago and evolved as a nation. DC residents, and every American who believes "nobody is free until everybody's free" is waiting for Congress to find the right answer once again.

**Testimony on the Implications of the New Columbia Admission Act**
**Presented to the Senate Committee on Homeland Security and Governmental Affairs**
**September 15, 2014**
**Anne Anderson, Washington, DC**

I have lived in Washington, DC, since 1964, this first year that we were allowed to vote for President. Back then it seemed like things were looking up and that Congress would continue the process of fixing the unequal status of DC citizens that was created with the creation of the District of Columbia in 1801. There have been many attempts since then to do that, and so far we are still in essentially in the same unequal status in relation to the rest of the nation, subject to the whims, political agendas, prejudices, and perceptions of Congressmen and Senators who come here and find themselves fully in charge of DC, affecting some 645,000 people who have no effective say in the process of governing DC.

As far as I am concerned the implications of admitting the non-Federal portions of DC to the Union as the 51st state are the following:

Once and for all, this inequity is eradicated. We get to join the Union as the smallest state in terms of land mass, but already with more population than two states and on par with several.

The citizens of Washington, DC, will be able to hold their elected officials accountable in new ways, since there will be no "will of Congress" to hide behind. Those with the responsibility to govern transparently, effectively, and honestly will have the full authority to do. The buck will stop with our state officers, like it does with the other 50 states. What a relief that will be!

At the national level, we will be able to fully join the important, critical, discussions and decision-making that are the business of our national legislature. If I have a concern about our national security, I will have a voting representative and two senators to talk to who are there to represent my views and those of my fellow citizens. If I want to express my views on taxes, on the role of national government in our country, I have someone to go to, who may or may not agree with me, but I will have a chance to be heard. My human rights will be protected, and the several Human Rights Commissions of various international bodies will no longer be able to cite the United States of human rights violations on my behalf. That will also be a relief!

I understand that making this change will imply dealing with many details, much reorganization of how things work in DC. Clearly, there will still be a need for ongoing regional cooperation to protect federal, state, and local interests. I am an American who believes in the values of democracy and feels deeply about the importance of having a well-functioning government at all levels of our federal system. I believe that granting statehood to the commercial and residential portions of DC, and shrinking the District of Columbia, will enhance our capacities to meet the needs of our citizens here in DC, improve the functioning of the Federal government by reducing the burden of managing DC, and enhance the status of the United States in the world by proving that we abide by our principles of democracy in both word and deed.

Testimony on the Implications of the New Columbia Admission Act
Presented to the Senate Committee on Homeland Security and Governmental Affairs
September 15th, 2014

I am submitting this testimony to the Senate Committee on Homeland Security and Governmental Affairs to urge the Committee and Congress to pass the New Columbia Admission Act. The people of the District of Columbia have spent too many years living in this country without the same representation in the national legislature that the rest of us enjoy. At the same time the burden of governing the local issues of a complex, modern city falls upon the national legislature rather than the city itself? That makes no sense at all. Congress should not spend its precious time considering the pot holes of Washington, D.C. There are too many other pressing issues in need of the attention of Congress. I urge the Committee and Congress to pass the New Columbia Admission Act with due speed and move on to other matters.

Respectfully submitted,

Kelley Anderson
[redacted]
Pittsburgh, PA 15228

It is unconscionable that the district of Columbia residents do not have the vote. The estimated population of the district for 2013 is higher that Vermont or Wyoming. Why can't they vote? They pay taxes, but have no say in the governance of the country or of their own territory. This must not go on. Over 200 years without being able to vote in a country which espouses democratic ideas is nonsense. Now is the time for change. Now is the time for the district of Columbia citizens to become citizens of the United States of America.

Marla Bottesch
[redacted]
Norridgewock, ME 04957

**Senate Committee on Homeland Security and Governmental Affairs**
**Senator Thomas Carper, Chairman**
[redacted]

**Hearing on S-132, The New Columbia Admission Act,**
**September 15, 2014, Dirksen Office Building, 3:00 - 6:00 pm**

Testimony by Janet Welsh Brown
[redacted]
Washington, DC 20006

I want to share with the Members of this Committee the many ways in which I am affected by my second-class status as a DC resident.

When I moved here in 1957 to get married, I already knew from my political-science text books that I would no longer have a vote nor any representation in Congress. But when, in November 1978, national elections came around and we were listening, as usual, late in the evening to the returns coming in from every state, it hit me that there would not be any from the residents of DC. It was a slap in the face. *I felt like my country had struck me.*

Every two years when I go to vote in local elections – which I take very seriously – I think, "Wouldn't it be great if I had two Senators and a real Representative to vote for?" And *I feel like a child who is being punished for something she didn't do.*

When some issue-oriented organization of which I am a member asks me to call or write my Senators and Congressperson, *I am frustrated and impatient with their ignorance of our situation in DC.*

A few days ago when I received a fund-raising call from the Democratic National Committee that assumed I had two Senators and a real Representative, *I was furious.*

Every time I hear one of our political leaders refer to the United States as "the leader of the Democratic World", when we are, in fact, the only democratic country in the world where the citizens who reside in their nation's capital are not represented in their national legislature. *I am ashamed for my country.*

When I hear – sometimes even in the halls of the Senate and the House – that DC receives federal subsidies that states don't get, that we are somehow "on the dole," *it makes me angry.* In fact, DC residents pay the highest average *per capita* federal income tax of any state. Also, we actually subsidize our neighboring states of Maryland and Virginia by a total of more than $2 billion annually because we cannot tax commuters

cont'd.

where they work. In spite of this, both Maryland and Virginia – especially Maryland – are strong supporters of DC Statehood.

When I look at the make-up of this Committee I realize you have an unusual number of small states represented here, and *I am jealous* of your constituents who are all so well represented in Congress. The District has more residents (over 650,000) than Senator Enzi's Wyoming (563,626). And we are gaining on North Dakota (672,591), Alaska (710,231), and not so far behind the Committee Chairman's home state of Delaware (897,924).

When I donate money to support candidates running for the Senate and House – as I do more and more often these days – *I wonder whether the law makers receiving these political contributions think about our less-than-equal status?* And mostly I'm left wondering. But I don't have any doubts about the attention Members of this Committee pay to the affairs of the District, and I appreciate your involvement.

*I am proud of the District of Columbia.* We are in good shape – fiscally sound, well run. Our Council members work hard, full-time all year round, longer than most state legislators do. Most do a good job of oversight of the city's agencies, which are professionally staffed and serve their constituents well. Personnel procedures are well established. Policies and practices are clear, and publicly reviewed annually. Agencies are open to scrutiny. Debate, over everything, is vigorous. There is a high level of public interest and participation. While our social policies are progressive and caring of the disadvantaged, our fiscal practices are conservative, our budgets balanced, and our debts under control.

**We want and deserve to be a state.**

**Of Course Republicans Should Support Statehood for DC**

**Reason #1: Because it's the right thing to do.** Only Statehood[1] can give the 650,000 tax-paying citizens of our nation's capital the same democratic rights enjoyed by citizens of all other fifty states, that is, full and equal representation in our national government and local self-government.

**Reason #2: DC Statehood is in Republicans' self-interest.** Only with Statehood and the possibility of two more Senate seats opening up and another permanent seat in the House will DC develop a vibrant State Republican Party and a healthy two-party political system. When the District of Columbia becomes the state of New Columbia and there are two more Senators and a Representative to be elected here, politically ambitious young Republicans will think also twice. A politically small jurisdiction like the District, with its attractive media and endless candidate forums, is easy and inexpensive to campaign in.

DC has never been a completely Democratic Party town. We've had two respected Republicans, Carol Schwartz and David Catania, elected and re-elected, city-wide, to Council Members-at-large. Other Republican residents raise large amounts of money for the National Party and candidates. Some vote by absentee ballot in other states, some don't vote at all. If Republicans want to get into politics in the District, they can run in non-partisan contests such as elections for School Board. Or they can run for higher offices as "Independents." Some have been known to register as Democrats, just to vote in the Primary, where the final winner is usually selected. And we've had some "Blue Dog" Democrats win public office as well.

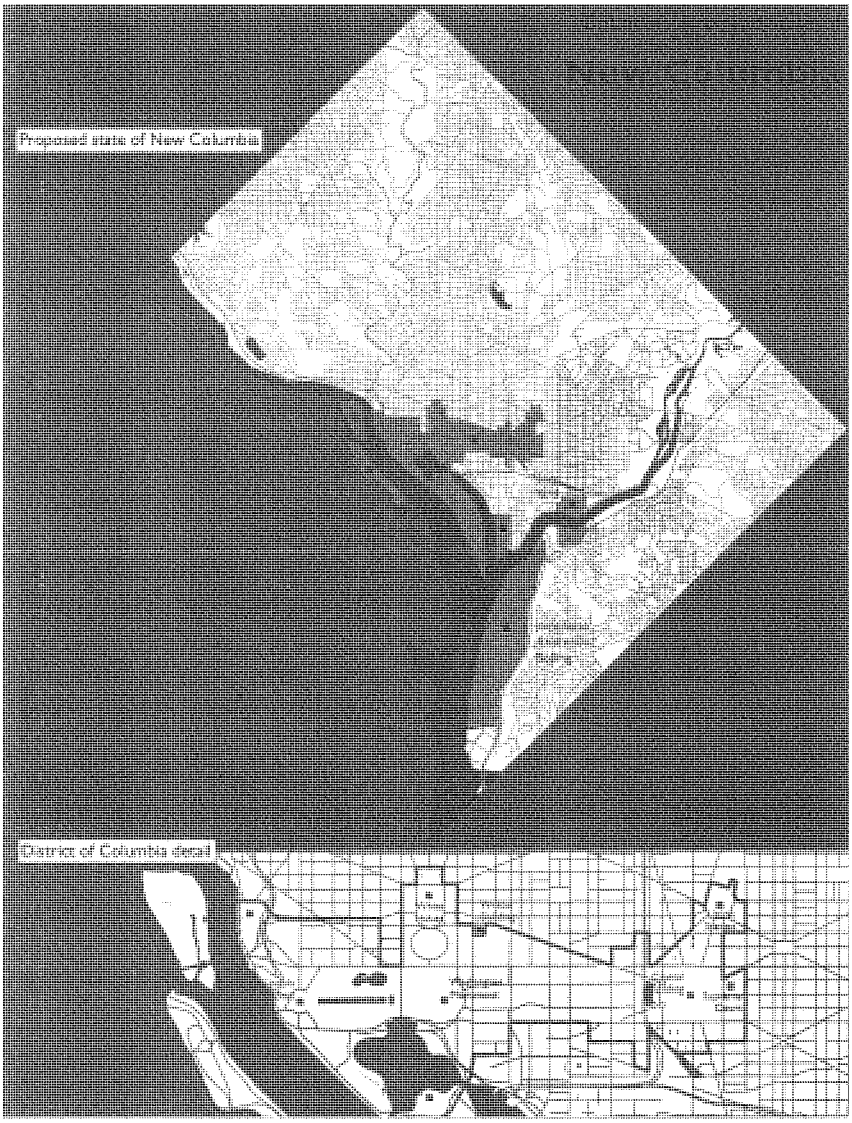
Some of us observe that the District has slowly but steadily become more Republican over the last generation. Income levels have risen, along with housing prices and the environmental convenience and pleasures of urban living. Our elected leaders have become more fiscally conservative.

All of us who struggle to get Statehood for DC need to remember that when Congress voted to admit Alaska and Hawaii to the Union in the 1950's, Alaska was a solidly Democratic Party stronghold, and Hawaii was equally Republican. Within ten years, both states had flipped their party allegiances. Four years, Alaska has voted mostly Republican and Hawaii Democratic. It could happen in the District as well!

DC Statehood could also achieve equal representation for "Maryland" in Maryland. The Marylanders do not want us, and it is not clear the Congress could constitutionally force Maryland to accommodate us against their [redacted]

For further information, contact Janet Brown, [redacted]

JWB 01/13/14


Proposed state of New Columbia
District of Columbia detail

Testimony on the Implications of the New Columbia Admission Act
Presented to the Senate Committee on Homeland Security and Governmental Affairs
September 15th, 2014

My name is Leah Anne Brown. My Address is [redacted].

I was born in Washington in 1958, and grew up in Shepherd Park. When I was 18 I moved to Massachusetts. For 35 years I had all the rights that should be enjoyed by all Americans. I had 2 US Senators, one Representative in Congress, a Governor, and a Senator and Representative in the state legislature – in addition to a Mayor and a city Council.

Two years ago I came home. I am happy to be back, but I have not recovered from the shock of having had to give up most of my civil rights in order to return to my beloved home town.

With all due respect, you should not be asking yourselves whether Washington should become a state. You only have to ask yourselves, what moral and ethical justification can there possibly be to continue to deny civil rights to your neighbors here in Washington?

At Shepherd Elementary School, my teachers taught me: "Taxation without representation is tyranny."

Surely you learned that also?

Thank you.

# Equality for the District of Columbia: Discussing the Implications of S. 132, the New Columbia Admission Act of 2013

*Written Testimony Submitted by Joshua Burch, District of Columbia*

September 15, 2014

Chairman Carper, Ranking Member Coburn, & Members of the Committee,

The New Columbia Admission Act is a bill predicated on fulfilling the promise of the American Revolution to those of us who live in the shadows of the US Capitol and I urge you all to support it and pass it. My name is Joshua Burch and I was born and raised in the District of Columbia and I am now raising a family of my own here. This is where my heart is, this is where my family lives, and this is where we deserve to be treated equally as American citizens within the 51st state in the union.

We in the District work hard, pay taxes, serve in the military, and fulfill all obligations of citizenship yet are denied the same political rights and privileges as our neighbors in the 50 states. Over 200 years ago when our country was founded our founders had valid reasons for creating a 10 mile square federal district but those reasons are no longer valid and there is no reasonable justification for disenfranchising over 646,000 American citizens (more than the states of Vermont & Wyoming).

At our country's founding there was concern about the federal district being unduly influenced by any one state but with 50 states in the union now and a democracy over 200 years old surely that time has passed. The new state would have no more influence on the federal government than Virginia, Maryland, Oklahoma, Kentucky, Wyoming or any of the other states who all have a vested interest in making the union work. If proximity to the Capitol equals influence over government then why are the citizens of Rosslyn granted representation in Congress while I am not as they are both closer to the White House and Capitol than I? The idea that proximity to government equals influence over it is a poor justification for denying my family and me fair and equal treatment.

I have also heard that our status is simply "how the founders intended." That may be the case but we should never, never yield the moral high ground to our founders. While they created a country based on the promise of a democratic society let us not forget that at our nation's founding only white male property owners over the age of 21 were allowed to vote. Our past history of denying full civil and political rights to large segments of society is shameful and we should not concede to any argument predicated on the phrase "our founders intended..." Our founders intended to remain silent on slavery and thus allow the system to exist which was morally wrong. Our founders intended to deny women the right to vote which was morally wrong. While their vision for the foundation democratic government was good they left lots of work to be done on the practical implementation of it. Statehood for the people of the District of Columbia is simply a continuation of the pursuit to "form a more perfect union."

As much as this bill is about our nation's founding, the Constitution, and democracy it is fundamentally about people. It's about 646,000+ people who fulfill all obligations of citizenship. It's about my family and our neighbors. This bill is our bill. This bill is our entry pass into American democracy and I urge you to support it. As a lifelong citizen of the District of Columbia this is the only bill that will make me an equal American citizen. As a father this is the only bill that will give my children what they rightly deserve: equality.

We in the District of Columbia are tired of being the exception to the promise of America. We are the place people point to when espousing the virtues of democracy yet failing to mention that those of us who live here have no say in national legislation and do not have the final say over how our local tax dollars are spent. We are no different than you yet we are treated differently. We live in single family homes, row houses, and apartments. We work in the private sector, the public sector, and for non-profits trying to do good for our community and our country. We enjoy life and we overcome life's challenges. We believe in the promise of America; we believe that we all are created equal; we believe in rule of law; and we believe in a government of, for, and by the people.

Our government, however, repeatedly tells and shows us that it has no place for us. We pay federal taxes but have no say on how that money is spent. We send our children off to war yet are denied representation to vote on issues of war or peace. Those whom we do not elect to the House and Senate can override the most basic decisions of our own locally elected officials. We fulfill all of the obligations of American citizenship yet we are denied its most basic tenets. We know that the great American democratic experiment cannot be complete until the people who live in the shadows of the U.S. Capitol are granted full and equal representation within it. I urge you all to support this legislation, vote it out of committee and bring it to the Senate floor for a vote before the end of this Congress.

The statehood bill at its core is about fairness and equality and what could be more American than that? I urge you all to support statehood for the people of the District of Columbia in order to help create a more perfect union that finally includes my family and neighbors.

Thank you,

Joshua Burch

Brookland

District of Columbia

## S. 132 Testimony

I am an American who has no Senator, no Congressional Representative, no voting registration representation in Congress at all. I was born here, lived here for my entire 63 years, raised children here—and until 10 years ago voted every four years, sometimes for a Democrat and sometimes for a Republican.

What happened? I moved. Not even out of the country (then I could vote!) Nope, I moved to Washington, D.C., almost within sight almost of our beautiful Capitol. I moved here so that I would not have to drive 30 miles each way to my job, working for Gallaudet University, which was founded 150 years ago in the northeast part of the city to further the education of students who are Deaf and hard of hearing.

When we moved here, I didn't realize I would lose my right to vote.

In an age way before television, before the Internet, before this Earth turned into the village we call "a small world," our nation's first elected representatives felt proximity to the Congress would yield residents too dangerous to enfranchise. Until 1964, DC residents could not even vote for President.

Our Congress has made this issue political because sadly my city has been dominated by a single political party. So deep is our Congressional Reps ugly cynicism about this, that a few years ago they promised us a minimum representation, if at the same time the opposite political party received an additional Congressional representative. This they called "balance." But even that was thwarted when they tried to make new laws (yes, they tried to impose some new law on us as they partly enfranchised us), and this destroyed even this incomplete nod to democracy in the heart of our nation's homeland.

To me the issue is moral. As Americans, my neighbors and I should have the same right as other Americans—3 votes, given our population (which is a bit more than the populations of Wyoming or Delaware) in our nation's legislature. Unlike the other disenfranchised Americans who live in Puerto Rico, in DC we do pay taxes to the federal government in which we are not represented. This is what has given rise to the words on our license plates: "taxation without representation."

We live at the heart of a country that calls itself the greatest democracy in the world—and this heart is disenfranchised.

Please change this.

Cathryn Carroll
Washington DC 20004

[redacted]

I am fully supportive of statehood for New Columbia, and I urge the Senate to pass this bill. DC is a colony. The federal government takes our tax money, sends our young people off to war and expects us to obey all federal laws, yet we have no vote in the national legislature which decides tax rates, military policy and passes laws. Shrinking the District of Columbia retains a District of Columbia as the federal seat of government. And that satisfies the constitutional requirement that Congress shall have jurisdiction over the federal capital. There is no federal interest in governing the non-federal parts of DC. Congress even has final say over our local budget for things like trash removal and filling potholes. That is completely unnecessary, and is more the action of a colonial power than one pledged to freedom and self-determination. I'm sure the Founding Fathers never contemplated that over 600,000 people would live in a place where they would have no vote in the legislature that governs them. Taxation without representation is still tyranny.

Sincerely,
Bob Dardano
[redacted]
Washington, DC 20002

Testimony on the Implications of the New Columbia Admission Act
Presented to the Senate Committee on Homeland Security and Governmental Affairs
September 15th, 2014

I am in support of the New Columbia Act because residents of the District of Columbia deserve the same rights for electing their local and national officials as enjoyed by other Americans.
This interest in self-determination has been reflected in a vote there in the 1980's as you know.

Thank you,
Stephen Fabick

Testimony on the Implications of the New Columbia Admission Act
Presented to the Senate Committee on Homeland Security and Governmental Affairs
September 15th, 2014

I am submitting this testimony to the Senate Committee on Homeland Security and Governmental Affairs to urge the Committee and Congress to pass the New Columbia Admission Act. The people of the District of Columbia have spent too many years living in this country without the same representation in the national legislature that the rest of us enjoy. At the same time the burden of governing the local issues of a complex, modern city falls upon the national legislature rather than the city itself? That makes no sense at all. Congress should not spend its precious time considering the potholes of Washington, D.C. There are too many other pressing issues in need of the attention of Congress. I urge the Committee and Congress to pass the New Columbia Admission Act with due speed and move on to other matters.

Respectfully submitted,

Michael William Farb
Pittsburgh, PA

**S. 132 Testimony**

This year on September 9th, we celebrated the 164th anniversary of California's admission into the Union as a free state. Californians began the push for statehood a year before their admission in 1850, and after a protracted fight in Congress, they succeeded.

Citizens of the District of Columbia deserve nothing less than to stand on equal footing with our fellow Californians and Americans. The time to end the last system of taxation without representation on our shores is long overdue, and we are asking for your support for D.C. statehood.

Statehood for the District of Columbia could be relatively simple. Article I of the Constitution designates a capital city for the United States with an upper limit of "ten miles square" in size. No mention of a lower limit for that size exists. By simply shrinking the federal district to a space encompassing the Capitol, White House, Supreme Court, and nearby related buildings, the rest of the current District would be free to become the 51st state (see a map representing this at http://the51st.org/contact-congress/).

We were residents of the District of Columbia for nearly 10 years before moving to San José in the spring of 2014. We spent years lobbying for equal rights and statehood for us and our neighbors. Today, there are over 650,000 citizens in D.C. who are disenfranchised, and that number grows every day.

Just like you, those citizens live in single-family homes, townhouses, and apartments. They work in the private sector, the public sector, and for non-profits trying to do good for the community and our country. They believe in the promise of the United States, that we all are created equal, the rule of law, and in a government of, for, and by the people. The only difference is that we can now shape that government with our votes, while the residents of D.C. cannot.

We urge you to show your support for D.C. statehood via S. 132, the "New Columbia Admission Act." Citizens of the District of Columbia deserve nothing short of statehood because:

- The District of Columbia is the only political and geographical entity within the United States of America whose citizens bear the responsibilities of citizenship, including taxation and Selective Service registration, without sharing in the full rights and privileges of citizenship.
- In fiscal year 2012, District residents and businesses paid $20.7 billion in federal taxes; this is more than the taxes collected from 19 states and the highest federal taxes per capita.
- The Congress has final approval on all local District laws, unlike any other jurisdiction in the country. This fundamental difference in local control is fundamentally unfair.
- Congress can repeal the Home Rule Act of 1973 and D.C.'s limited self-governance, but it could not redefine or repeal statehood.
- Statehood is the only way to grant and guarantee the citizens of the District irrevocable and inalienable rights to full citizenship.

With our sincere regards,

Jaime Fearer and Geoffrey Hatchard
San José, California

The population of the District of Columbia, like all others in the United States, deserves true representation in Congress and the true right to vote and participate fully in our democracy.

It has a population larger than the lowest population states, it has people who are overwhelmingly American citizens and should have all the rights of an American citizen, and the general propositions of democracy and "no taxation without representation", so often quoted, should make it a no-brainer for the residents to have the same representation and rights as other Americans.

We would hope that the reason that it hasn't happened is the strong possibility of providing the U.S. with more African-American representation in Congress. Yet, that is what we suspect, sadly, to be the case. African-Americans very much to have meaningful representation in Congress. They are heavily underrepresented yet in an era in which so many deride immigrants they are one of the cornerstones of American democracy, the group in my view most entitled to proper representation other than Native Americans. They have provided many of the basic building blocks of our society and their proper representation and political voice is one of the main measures of a true democracy in the U.S.

We hope that Congress will proceed to a positive vote on the entitlements of the District of Columbia to representation, like other American citizens.

Thank you.

Michael C. Ford
Richard B. Marks
Watsonville, California 95076, USA

Joseph Gorin, Ph.D. & Associates, LLC

Psychotherapy
Couples Therapy
Neuropsychological Assessment
Psychoeducational Assessment
Forensic Assessment

September 24, 2014

I have a small business in Washington DC with the equivalent of four full-time employees. I have been in business in DC since 1995.

The issue of home rule is very important in me. I grew up in Boston, where the history of the Revolutionary War is local history. I learned that taxation without representation was one of the many fundamental reasons that we, as a nation, decided to break our chains with the colonial power that ran out lives. It is not understandable to me how, in a great democrac such as ours, we allow the anti-democratic policy of taxation without representation to continue to be an official policy.

When my wife and I moved to this area, we were debating between living in Washington, DC and living in the Maryland suburbs. The lack of voting representation in congress was one of the primary reasons we decided against living in DC. We wanted to feel that we could have a voice in governing ourselves and Washington DC did not, and still does not, allow that.

Respectfully,

Joseph Gorin

# Testimony on the New Columbia Admission Act

Presented to the Senate Committee on Homeland Security and Governmental Affairs

By Elinor Hart

September 15th, 2014

My name is Elinor Hart, I live [redacted] in Ward 1 of the District of Columbia. Thank you, Senator Carper and members of the Committee for your attention to the injustice that the residents of our nation's capital have endured for over 200 years. The injustice of denying to the residents of the District of Columbia rights enjoyed by people in the 50 states will continue until Congress passes the New Columbia Admission Act. And Statehood advocates will continue to urge you to champion our cause until we become residents of the 51st state. We know that cannot happen in the 113th Congress. But we believe that it will be possible to have your Committee send S.132 to the full Senate during this session. We pledge to do all we can to make that happen, and we are counting on you to do the same. We thank you and look forward to the mark up.

Please enter into the record that I strongly support the New Columbia Admissions Act.

I've lived in Washington DC close to 34 years, all of them on Adams Mill Road. My neighborhood is like a small town, where I greet neighbors, know many faces, and feel so at home here. Like many places in the US, we've seen a lot of change in my neighborhood as times change. One thing unlike anywhere else in the US, though, is that I have no voice in Congress.

When I first moved here, the neighborhood had just successfully lobbied Congress to get a vacant lot turned into a park. Imagine any small town in the US that had to get all of Congress to approve a small green space. Ridiculous. As are the arguments against allowing the residents of DC full participation in our democracy.

The founding fathers left women out, left black people out, and allowed only property owners to vote. Does anyone defend these actions today? Our country has fixed many wrongs and we are smart enough to fix this one. The New Columbia Admissions Act does just that.

Barbara Helmick
[redacted]
Washington DC 20009

Testimony on S. 132, New Columbia Admission Act Hearing Sept. 15, 2014

From: Anne Heutte
Washington, DC 20018

My husband, Fred, and I moved into this house in Washington, DC, in 1956. Fred Heutte was involved in the Freeway Fight, and met Julius Hobson while doing that work. The campaign for statehood began in Sam Smith's office, the office of *The DC Gazette*, when Lou Aronica, Julius Hobson, Fred Heutte, a couple of Hobson's supporters and Sam Smith met. Sam presented the idea of statehood for DC. (This is all available in the archives of the *Statehood Papers*, by Sam Smith.) I have never wavered in my conviction that statehood is proper and right for the District of Columbia. The passage of S. 132 right now is urgently needed and I fully support the Act. ***Carpe Diem!***

Sincerely,

Anne Heutte

# Testimony on the Implications of the New Columbia Admission Act

Presented to the Senate Committee on Homeland Security and Governmental Affairs

By Ann Hume Loikow, D.C. Statehood - Yes We Can!

September 15th, 2014

I would like to thank the Committee for the opportunity to submit testimony on behalf of D.C. Statehood - Yes We Can! at today's hearing on "Equality for the District of Columbia: Discussing the Implications of S. 132, the New Columbia Admission Act of 2013."

For over two centuries, the people of the District of Columbia ("District" or "D.C.") have had no representation in their national legislature. However, voting representation in Congress and its corollary "taxation without representation" are merely symptoms of a larger problem, the lack of statehood. From state status flows full Federal representation, including full voting rights in Congress, as well as full self-government at the state level.

The New Columbia Admission Act of 2013 would shrink the District of Columbia to the federal monumental core and make the residential and commercial parts of the District the State of New Columbia. Most constitutional scholars, of whatever political persuasion, agree that statehood is the simplest and most constitutional way to give people of the District the same rights as all other Americans.

Article I, section 2, of the Constitution explicitly says that "(t)he House of Representatives shall be composed of Members chosen ... 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." Article I, section 3, says that "(t)he Senate of the United States shall be composed of two Senators from each *State* ...." (Italics added)

Although there have been several "voting rights" bills introduced in the last decade to give District's nonvoting delegate a vote (a position every U.S. colony has, including Puerto Rico, Guam, American Samoa, the Virgin Islands and the Northern Mariana Islands), there are numerous legal opinions challenging the constitutionality of this, including one from the Justice Department. See http://www.justice.gov/olc/2007/devotingrights-act-2007.pdf, May 23, 2007 testimony of John P. Elwood, Deputy Assistant Attorney General, before the Subcommittee on the Constitution, Civil Rights, and Property Rights of the Senate Committee of the Judiciary on S. 1257, the District of Columbia House Voting Rights Act of 2007. Deputy Assistant Attorney General Elwood concluded his testimony saying:

> "The clear and carefully phrased provisions for State-based congressional representation constitute the very bedrock of our Constitution. These provisions have stood the test of time in providing a strong and stable basis for the preservation of constitutional democracy and the rule of law. If enacted, S. 1257 would undermine the integrity of those critical provisions and open the door to further deviations from the successful framework that is our constitutional heritage. If the District is to be accorded congressional

> representation without Statehood, it must be accomplished through a process that is consistent with our constitutional scheme, such as amendment as provided by Article V of the Constitution."

The District has already tried the constitutional amendment route to gaining full participation in the *Federal* government. In 1978, two-thirds of the House and Senate passed the Voting Rights Amendment introduced by D.C.'s nonvoting delegate, Walter Fauntroy. This constitutional amendment would have given the District full voting rights in both houses of Congress and a unrestricted vote for President (the 23rd amendment limits the District, regardless of its population, to the same number of electoral votes as the *least* populous state, and there were then and are now states with fewer people). Unfortunately, three-fourths of the states did not ratify it before the amendment expired in September 1985.

In extensive testimony on H.R. 325, the the New Columbia Admission Act, a statehood bill introduced by D.C. Delegate Walter E. Fauntroy, on June 11, 1986, Rep. Peter W. Rodino, Jr., Chairman of the Committee on the Judiciary of the U.S. House of Representatives, discussed the the proposed 1978 Constitutional amendment (see http://dcstatehoodyeswecan.org):

> "The proposed amendment was, nonetheless, a modest measure in that *it would not have resulted in full self-determination for District residents*. Under the proposal, the District would at last, have had its full complement of voting representation in both Houses, although *Congress would have continued exclusive control over the city*, subject to the limited "Home Rule" it currently enjoys." (Emphasis added)

The bottom line is that a campaign for "voting rights" is likely to end in a lawsuit and no vote in Congress.

The real problem is the District's lack of statehood, not "voting rights" in Congress. Anything other than statehood leaves the people of the District with fewer rights than other Americans, i.e., they still are colonists or "subjects" of other Americans as President William Henry Harrison said in his inaugural address in 1841:

> "Amongst the other duties of a delicate character which the President is called upon to perform is the supervision of the government of the Territories of the United States. ... It is in this District only where American citizens are to be found who under a settled policy are deprived of many important political privileges without any inspiring hope as to the future. ... We are told by the greatest of British orators and statesmen 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? Such dreams can never be realized by any agency of mine. The people of the District of Columbia are not the subjects of the people of the States, but free American citizens. Being in the latter condition when the Constitution was formed, no words used in that instrument could have been intended to deprive them of that character. ...." http://www.bartleby.com/124/pres26.html

Sam Smith, a founder of the D.C. Statehood Party and one of D.C.'s most noted alternative

journalists, often mentioned there have been empires in history that let their colonists be represented in their national legislature. For example, as a French colony, Algeria had a voting representative in the French national assembly, but it was still a colony. It took a war of independence for Algerians to truly have the right to self-government. Getting a vote in Congress, without statehood, would be like getting a vote in the British Parliament in 1775. The District would still be a colony and not have the right to self-government.

Without statehood, as Rep. Rodino pointed out, Congress would continue to "exercise exclusive Legislation in all Cases whatsoever," over the District. In effect, Congress is the District's state legislature. Any right or power Congress gives the people of D.C., Congress can revoke at any time and it has, over and over, for 214 years. For almost a century, the people of D.C. had *no* right to vote on anything or for anyone. In the October 1986 briefing booklet on D.C. statehood, *If You Favor Freedom*, Rep. Rodino wrote that:

> "Over the years, Congress has organized a variety of governments for the District of Columbia, including the current 'Home Rule' Government. In fact, in 1871, Congress established a 'Territorial government' in the District, with a governor and bicameral legislature. That government, like many before and after it, was subsequently abolished by Congress."

Under Home Rule, to the extent authorized by Congress, the Mayor and D.C. Council exercise both state and local functions. States are the fundamental unit of government in the United States. It was the people of the original 13 colonies, which included the people living in what is now the District of Columbia, who created the original 13 states. As the Declaration of Independence describes it:

> "WE hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness - That to secure these Rights, Governments are instituted among Men, *deriving their just Powers from the Consent of the Governed ....*" (Emphasis added)

The people of the District have not given their consent to the Government that governs them. They have not elected *any* of the 535 people who rule their lives and who treat them as their subjects. Congress routinely disrespects the District's nonvoting delegate and Mayor by not allowing them to testify on bills affecting *only* the District.

In contrast to statehood, which is a permanent status that can't be revoked, the District's current "Home Rule" government is a temporary limited delegation of authority from Congress that Congress can amend or revoke at any time for any or no reason at all. The total control Congress exercises means that no law the District Council passes goes into effect until Congress either affirmatively approves it, like the budget, or decides not to object to it. However, Congress *always* reserves the power to amend or repeal any law applying to the District at any time, including the charter that created our "Home Rule" government in 1973.

All states enter the union on equal footing and subject to the same laws. If the District were to

become a state, Congress could not pass special legislation for the State of New Columbia only. Now, though, Congress has both the powers of *both* a federal *and* a state legislature with regard to the District. Not being a state, the 10th amendment does not apply to D.C. so Article I's limitations on the authority of Congress don't apply in the District.

In their daily lives, District residents suffer most from the lack of statehood and control over state level functions, not from a lack of Congressional representation. Many District residents have become infected and died from HIV-AIDS because for a decade Congress prohibited the District government from implementing the public health practices, such as needle exchange, that other U.S. jurisdictions used to stem the HIV-AIDS epidemic. As a result, the District has the highest level of HIV-AIDS infection in the nation. It has been at epidemic levels as defined by the CDC and comparable to rates in southern Africa.

Only in the District has Congress ever prohibited a state or locality from counting the ballots in an election. The District government had to go to Federal District Court in 1998 to get the right to count the ballots on a 1998 medical marijuana initiative. Even after finding out that it passed overwhelmingly, only fifteen years later is it actually being implemented. For a number of years, Congress also prohibited the District government from using local tax funds for petition drives or civil actions for greater political rights. Thus, unlike many other territories that became states, we were unable to compensate or fund our shadow senators and representatives and their offices. Congress has also prohibited the use of both Federal and District funds for abortions for poor District women, rejected the Council's revisions to the District's sexual assault law and local land use law and, in the 1990's, the implementation or enforcement of a domestic partners act. In addition, it wasn't until 1940 that Congress finally passed a law allowing District residents to have access to the Federal courts under diversity jurisdiction!

A recent effort to pass a law giving D.C. budget autonomy (i.e., not requiring Congress to affirmatively approve the budgeting and expenditure of locally raised tax funds) died because of Congressional riders to codify the District-funded abortion ban, revise the District's firearms regulations (which a Federal court had previously upheld), and prohibit the District government from requiring government contractors to be union members. Similarly, an amendment removing the District Government's authority to regulate firearms at all killed attempts to pass a "voting rights" act a few years ago.

Congress must approve the District's annual budget. It treats the District budget as a federal agency budget and folds it into general government budget bills. This means that although the Mayor and Council promptly approve a balanced budget and transmit it in a timely manner to Congress, the District government faces a shutdown when Congress has not approved the Federal budget on time. Since Congress has routinely not approved all the Federal budget bills before the beginning of the fiscal year, this is an annual threat to the funding and operations of the District government and the local services it provides to its residents. What is particularly outrageous is that the national issues that prevent Congress from enacting a budget have nothing to do with the District of Columbia, but the people of the District pay the price in contingency planning expenses, shutdown costs, and higher interest rates on District bonds as bond rating agencies rightly see the District's budget process as overly long and uncertain because of the impossibility of predicting what Congress will do.

Even if we had a full voting Congressional delegation, the impact of the lack of statehood would not change much since we would only have two votes out of 102 in the Senate and one out of 536 in the House and Congress would *still* be our *state* legislature.

Retrocession is a legitimate way to achieve statehood, but is also another likely dead end. Statehood only requires Congress to pass a *single* law admitting the State of New Columbia to the union. Retrocession requires *three* laws, as both the State of Maryland and the District Council must request it and Congress must agree. The District of Columbia and Maryland have been separated for over *two centuries*, longer than most nations of the world have existed in their current form. Both have developed separate identities and histories. In addition, adding a large urban area to Maryland would dramatically change the state's political balance. Although retrocession proposals have been considered by Congress since the early 1800's, the people of the District opposed them and the bills died. Similarly, retrocession has never been supported by Maryland's elected officials.

Finally, pushing for voting rights and budget autonomy and other partial measures misdiagnoses the problem and its solution. It also ignores the fact that statehood is *only* path to self-government that District voters have ever approved.

People can only be completely free and independent, not a little. It is an all or nothing proposition. It is like pregnancy, you are either pregnant or you're not. Similarly, one can't be part free. In our case, all the partial measures just mean we are still colonists and not full American citizens. We are either free people with the right to self-government in all its aspects or we are not. It is just that simple. That is why admission of the State of New Columbia to the union is so important for those of us who believe that all Americans have the right to liberty and self-government. In fact, residents of what is now the District, as well as my great, great, great, great grandfather Francis Hume, fought a Revolution to gain it! Please report favorably on S.132 and vote to admit the State of New Columbia to the union.

My name is Jesse Lovell. I am a nearly 18 year resident of the District of Columbia, aka Washington, DC. I came here from Vermont with an interest in public policy – domestic and foreign – and an interest in democracy and voting, having spent years working on grassroots campaigns in my home state, a place where regular people can get involved and get to know their elected representatives without much effort.

Washington, DC is a very different place, but not in the way you might imagine. While Washington, DC is the home of our federal government, it is also the home to 650,000 residents who live their lives in the same way as Americans elsewhere. We talk about issues like taxes, the cost of housing, jobs, economic development, crime, transportation, etc. We are no more "all federal government employees" than are the residents of Virginia and Maryland.

But Washington, DC has a democracy problem, and it is a problem not of our own making. It is America's problem. But it is absolutely fixable. We've fixed problems our Framers missed (or let stand) many times before. If America will just sit down and listen for a few minutes, I think it will become clear what needs to be done today.

Given that debates over the rights of the residents of DC so often turn to debates over Original Intent, let's start there, if only to acknowledge that the Framers held a variety of views about the District of Columbia, and that there is a good deal of evidence suggesting that they recognized the need for more reforms in the future.

The creation of the District of Columbia – via the disenfranchisement of a group of Maryland and Virginia voters – was not without controversy, and there have been clear inconsistencies in its administration as well. During New York's ratifying convention in 1788, Alexander Hamilton introduced an amendment proposing that the future District of Columbia be provided representation in Congress upon reaching a certain population threshold. During the debate over the cession of Virginia territory for the District (1789), the state legislature proposed an amendment "that the exclusive power of legislation given to Congress over the Federal Town and its adjacent District... shall extend only to such regulations as respect the police and good government thereof." In his defense of the District Clause as written in Federalist 43, in fact, James Madison noted quite unambiguously that "a municipal legislature for local purposes, derived from their own suffrages, will of course be allowed them...." Yet Congress later saw fit to deny DC residents any local elected government for over a century during the nineteenth and twentieth centuries, and repeatedly rebuffed proposals from presidents stretching from Arthur through Truman to establish an elected local government. Madison seems to have at least suggested representation for District residents in Federalist 43 as well. Alongside the "inducements... to become willing parties to the cession," Madison notes that "the State [ceding its territory] will no doubt provide in the compact for the rights and the consent of the citizens inhabiting it...." While there may be legitimate debate about what Madison intended with this statement, it seems reasonable to conclude that he was at least proposing that there be some negotiations between the states and the federal government to define and protect the rights of these new DC residents following the cession. During a debate on a bill to restore full citizenship rights to DC residents in 1803, Rep. John Randolph of Virginia said, "This species in government is an experiment in how far freemen can be reconciled to live without rights, an experiment dangerous to the liberties of these States." During a debate on a retrocession bill the following year

(1804), Rep. Ebenezer Elmer of New Jersey called exclusive jurisdiction "a kind of government very foreign from the leading features of that would forms the basis of our social compact." President James Monroe, a president who ranks among the Framers himself, remarked in 1818 in his annual address to Congress, "[I]t might merit consideration whether an arrangement better adapted to the principles of our government and to the particular interests of the people may not be devised [for the District of Columbia]." Also particularly noteworthy among the presidents who have spoken about the lack of democracy in DC, I think, is William Henry Harrison, a former appointed governor of Ohio Territory, who devoted a good deal of time in his inaugural address in 1841 to this problem, calling on Congress to treat DC residents not as "subjects" but as "citizens", as he believed the Constitution truly intended.

But probably the most obvious reason we must look past the Framers' original intent/s regarding the District is the fact that we already have two laws on the books which significantly redefined the rights of DC residents decades ago: First, the 23rd Amendment to the Constitution, passed in 1961 to allow DC residents to vote for President; and The (Partial) Home Rule Act of 1973, which allowed DC residents to elect a local government after more than 100 years of appointed rule.

In short, we long ago recognized a need to modify the Framers' original plan for the District in order to establish a few bare minimums of democracy. Why should we so easily conclude that those two reforms are enough? There have been multiple attempts at reform over the last 40 years. A supermajority, including House Republican leader Howard Baker, passed the Voting Rights Amendment in 1978. It failed, like many other proposed amendments to the Constitution, when the deadline for ratification in 3/4 of the states passed a few years later. Since that time we've seen a long list of small reform bills blocked in virtually each and every instance by non-germane amendments. Many of us, myself included, supported these bills, following the advice of those who argued that incremental reform was the more sensible approach at the time.

I am perfectly willing to discuss another issue that advocates of statehood have frequently dealt with during (generally brief) encounters with statehood skeptics: Why not just join Maryland? While I do not think replacing 200 years of DC laws with another state's laws is an insignificant issue (neither the issue of what would become of our jurisdiction following its addition to Maryland), I would agree that if Marylanders wanted to take us, it would probably be difficult to refuse. But I've seen no evidence of support for this approach among any of Maryland's public officials. The only statements I've heard at all have been expressions of deep opposition to the idea.

There have been numerous proposals over the years to grant DC residents their rights by means of incremental steps. But where are we after 40 years? 20 years of advocacy for statehood and a voting rights constitutional amendment has been followed by 20 years of advocacy for small reforms. And nothing has been done. The time has come for this Congress to take a serious look at what it will really take to get DC residents our rights. I believe the evidence shows that it is statehood.

Fix our democracy. Show that this Congressional generation is no less capable than previous generations of seeing gaps and filling them in with common sense solutions. Set aside the partisan interests and the demands of bullying lobbyists and fix this one small problem that has been a big problem for so many generations in our city.

Respectfully submitted,

Mr. Jesse Lovell
Washington, DC

Testimony on S.132, New Columbia Admission Act
Hearing September 15, 2014

Martha T. Mednick
Washington, DC

The frustration of not having a vote is getting to be unbearable. I am 85 years old and always voted and even went to the polls with a parent when I was a child. This is why I need the vote in DC, and think that this is a change that must happen. Disenfranchisement is immoral and must change.

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At first I thought it was a typo, the license plates reading, "Taxation without Representation," but then I found it was true. I lived in DC for roughly 5 years, and the fact that it is home to almost 650,000 people, who have no power, is a shame and disgrace to our nation. While I understand the first line of the Constitution establishes the current boundaries of DC, the reality is that times have changed. Before we go and try to bring democracy to other countries, let's bring a voice to those here at home.

-Tim Murakami

The injustices of American citizens residing in the nation's capital that continue to be denied democratic rights that every other American enjoys must come to an end. The District of Columbia seeks to become the 51st state not out of some desire to be recognized as a distinct entity within the United States, but to gain their full rights as citizens. Currently, they are governed by people they did not elect. This is a violation of every basic principle of American democracy. The District of Columbia is a diverse, thriving American community comprised of more than 120 distinct neighborhoods. Citizens of the District live the same lives as other Americans. They raise families, send children to school each day, attend faith services, operate small business, and work in a wide variety of occupations. They pay federal taxes and send our sons and daughters to serve proudly in the armed forces. Senator Carper's holding this hearing is a step in the right direction, and I look forward to action by his committee to advance this issue in the Senate. Thanks.

Matutinally Yours,

james m nordlund

[redacted]
Moorhead, MN 56560

"Equality for the District of Columbia: Discussing the Implication of S. 132, the New Columbia Admissions Act of 2013"

September 15, 2014

Evanna Powell
Citizen of the United States of America and
Citizen, Resident, Voter and Taxpayer of the District of Columbia

Good afternoon Senator Carper and members of The Committee on Homeland Security and Government Affairs, I thank you for this opportunity to state reasons the District of Columbia should be a state.

I am Evanna Powell a citizen of the United States. I am also a longtime citizen, resident, voter and taxpayer of the District of Columbia.

The District of Columbia should be a state in order to confer on its citizens all rights guaranteed in the Constitution of the United States because:

1. DC residents are US citizens who have served in, and died in, all US wars, including and up to the wars in Iraq and Afghanistan;
2. DC residents are US citizens who are the only residents of a national capital, out of 119 democracies around the world, that do not have full democracy;
3. DC residents are US citizens who do not have 2 Senators in the US Senate; and
4. DC residents are US citizens who do not have a voting Representative in the US House of Representative.

The District of Columbia should be a state in order to do for its US citizens what states do for their
US citizens:

1. Spend local and federal funds without approval of Congress;
2. Have control over its budget;
3. Tax the income of the 70% workforce that works in DC but lives outside DC;
4. Control its court systems;
5. Appoint or elect its judges who are appointed by the Federal government; and
6. Control its felons who are controlled by the Federal Bureau of Prisons.

Nowhere in the Constitution of the United States did I read or does it state that one (1) citizen of the United States can be denied a Constitutional right afforded another US citizen. Because I and 630,000 US citizens who are DC citizens are denied all rights guaranteed in the Constitution, I respectfully ask that this Committee, the full Senate and House do whatever is needed to make the District of Columbia a state so that I and 630,000 US citizens can be afforded all Constitutional rights.

Thank you.

I believe that it is written that the District Of Columbia - Washington DC cannot become a state, and I agree with that. I am not totally sure as to where it is written, but it could an amendment to the Constitution. To change that Congress needs to hold a Constitutional Convention and only by a two thirds vote may that rule be changed. I would vote NO.

Captain Jim Shaw
[redacted]
Barrington, NH 03825

TESTIMONY OF

DOUGLASS SLOAN

BEFORE

SENATE HOMELAND SECURITY AND GOVERNMENTAL

AFFAIRS COMMITTEE

HEARING

S. 132 - DC STATEHOOD

September 15, 2014

Mr. Chairman, my name is Douglass Sloan and I am a native of Washington, DC, an Advisory Neighborhood Commissioner and the First Vice President of the DC Branch of NAACP. I am testifying here in behalf of DC residents who are and have been denied representation in Congress since the founding of our republic 225 years ago.

Residents of the District pay Federal taxes, fight and die in our nation's wars, serve on juries and have all of the obligations of all other Americans, except we lack the right to vote in Congress. This is a blemish on our system of government. Senate bill, S-132, is designed to change this by granting Statehood to the District by leaving the Federal enclave intact. The bill designates the area outside of the Federal enclave as New Columbia, which would become the 51st state. The Constitution provides that the District cannot exceed more the 10 miles square, but it does not state how small the District can be. In 1846 the District was reduced to its present size when Congress permitted Virginia to take its land back that it had ceded to the District. This method of reducing the size of the District and petitioning Congress for statehood for New Columbia is consistent with our Constitution.

Thomas Paine who authored the American Crisis, December 23, 1776, wrote,

Britain, with an army to enforce her tyranny, has declared that she has a right (not only to tax) but "to bind us in all cases whatsoever," and if being bound in that manner is not slavery, then there is no such thing as slavery upon earth. Even the expression is impious; for so unlimited a power can only belong to God.

Our founding fathers did not accept King George's explanation of virtual representation to justify "taxation without representation." They went to war

against the most powerful nation in the world at that time to win our right to self-government and the right to determine our own destiny. One of the core principles that we adopted was the "consent of the governed." Only direct representation guarantees the "consent of the governed" that our founding fathers and fellow Americans fought and died for.

That being said, it is particularly galling and ironic that the citizens of the District of Columbia are denied voting representation in Congress but pay Federal taxes. This is the reason we fought the American Revolution. In fact, the District is the only place where the American flag flies where its citizens pay taxes but have no vote in Congress. And we are the only capital city in the world that denies its citizens who live in the capital the right to vote in the national legislature.

Not many years after the American Revolution, the founding fathers met in Philadelphia to found a new nation. Some historians have characterized what happened there as a "bloodless coup" because Madison and the others exceeded their authority to revise and amend the Articles of Confederation. That notwithstanding, what happened there was historic and presented a new, radical form of governance where the people are the true rulers of the government. Our republic is the oldest continuing one in the world and has served as a model for other nations to emulate. In fact of the 170 countries in the world, 160 have modeled themselves after the American system of government.

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

*Our Constitution leaves no room for classification of people in a way that unnecessarily abridges that right.*

Justice Black, Wesberry v. Sanders

Americans place a great deal of importance on the matter of voting, given the history of the American Revolution which was fought over taxation without representation. However, our experience suggests that this is more honored in the breach than it is in the observance as evidenced by the denial of voting representation in Congress to citizens of the District of Columbia. Our objective here is not to overthrow the government, which denies us the vote, but only to receive full citizenship rights to which we are entitled as American citizens. That is a rather unique situation. However, a case can be made that our voting rights are denied because we have not engaged in demonstrations and other forms of direct action in order to get the attention of Congress. Jefferson himself said that the tree of liberty must be watered from time to time with the blood of patriots.

The residents of the District of Columbia, however, have never accepted the denial of voter representation. We have fought for the right to vote throughout our history. As early as 1805, residents rallied around the right to vote in Congress. In modern times, in 1978 we pursued a constitutional amendment which would have given us two senators and a representative. However, only 16 states ratified the amendment within the 7 year window, and it failed. In 1980 District citizens held a constitutional convention in which we decided to petition Congress for Statehood. We adopted the name of New Columbia for the new state and drafted a constitution. For the first time in history hearings were held in the House in 1993 on Statehood for the District of Columbia. We failed to get the

requisite votes needed to move the bill out of committee. And, this is the first time in history that the Senate held a hearing on Statehood for DC.

It is my understanding that in the testimony presented to the Committee that there was only one in opposition to DC statehood. Dr. Pilon of the Cato Institute asserted that Maryland would have to give its consent before DC could become a state because the land presently occupied by the District was ceded to it by Maryland. This position is not supported by Maryland's cession documents which forever relinquished the land to Congress without conditions under which the land had to be returned. Dr. Pilon's second point was that Congress did not intend for the District to become a state. That may be true, but the means to enfranchise the District's residents is authorized by the text of the District Clause, Art. I, Sec. 8, Cl. 17, which provides:

"The Congress shall have power ... to exercise exclusive legislation in all cases what so ever over such District (not exceeding 10 miles square) as may become the seat of Government of the U. S." The District Clause grants Congress "extraordinary and plenary" power over the District of Columbia. This clause is majestic in its scope and gives Congress the power to grant representation to the citizens of the District.

It strains credulity to suggest that Congress intended to disenfranchise the residents of the District, to deny the District the right to tax the income of nonresidents who work in DC, to deny budget authority to the district when its budget includes no federal payment, to deny the District judicial autonomy by having our judges appointed by the President and to deny the District legislative

autonomy by requiring all legislation enacted by our City Council to be approved by Congress before it becomes law.

Mr. Chairman, I suggest that our Constitution is a "freedom charter" which is designed to provide rights to its citizens, not to take away core rights which we hold dear. It is long since time to eliminate this egregious stain from our system of government by admitting New Columbia as the 51st state in our Union.

Mr. Chairman, in 1630 on the deck of the Arabella before coming to shore, John Winthrop in his sermon, referred to this nation as a "city on a hill" that the whole world would be watching. We did become that "shining city on a hill" of which Winthrop spoke. Nations all over the world look to us for leadership and are inspired by our example of representative governance. Denying District residents the right to vote in Congress is inconsistent with who we are as a people and as a nation. Rather than that shining city on a hill we have become a Potemkin village, a facade at best that fails to live up to our ideals as expressed by our founding fathers when they choose war over taxation without representation.

Mr. Chairman that concludes my statement. Thank you for the opportunity to present the views of the residents of the District of Columbia before this Senate Committee.

Douglass Sloan

**Statement of Edward "Smitty" Smith**
**Senate Homeland Security and Governmental Affairs Committee**
**"Equality for the District of Columbia:**
**Discussing the Implications of S. 132, the New Columbia Admission Act"**

When my family came to the District of Columbia in the early 1940s, the world was a very different place. As blacks in a segregated America, the denial of their fundamental, human right to legislative representation (and, at the time, the right to vote for President) in our democracy was just one entry on a long list of injustices they suffered at the hands of our government. Decades of brave and unyielding civil rights activism has bent the arc of our nation's moral development toward justice and unworked centuries-old policies and practices of institutional discrimination. However, the denial of Washingtonians' right to the most basic element of participation in our Republic—full legislative representation—persists intact.

We must end the lingering and shameful injustice of denying the full rights of democratic citizenship to the residents of our capital city. Correcting this injustice is not only a human rights imperative—as the United Nations has noted—but also a Constitutional imperative.

Since 1954, when a group of parents from my home neighborhood of Anacostia won the landmark Supreme Court case of *Bolling v. Sharpe* to force desegregation of DC schools, the "due process" clause of the Fifth Amendment has been held to provide the same guarantee of "equal protection under the law" to federal legislation as the Fourteenth Amendment requires of state law. Understood in the context of this now universally accepted principle, Congress' action to strip the District of voting rights over two centuries ago through the Organic Act of 1801 may have unconstitutionally deprived District residents of their rights to the franchise pursuant to the Fifth Amendment.

As Chief Justice Earl Warren stated in the Supreme Court's *Reynolds v. Sims* decision:

> The basic principle of representative government remains, and must remain, unchanged—the weight of a citizen's vote cannot be made to depend on where he lives. ... This is the clear and strong command of our Constitution's Equal Protection Clause.

The disenfranchisement of over six hundred thousand American citizens in our nation's capital city is not only an abrogation of our most sacred American values and a violation of our fundamental human right to voting representation, but a failure to adhere to our own Constitutional principles.

The S. 132, The New Columbia Admission Act, provides a Constitutionally permissible remedy: the creation of a new state out of much of the land that is now part of the District, shrinking the District proper to a Constitutionally consistent smaller area that still provides a federally controlled seat of government as envisioned by the Framers. I urge the Committee to continue the difficult but morally and Constitutionally imperative work of bending the arc of our nation's history towards justice. I urge that you advance this bill to the Senate floor, and I urge its swift passage.

Sincerely,

Edward "Smitty" Smith

[redacted]
Washington, D.C. 20001

**BEFORE THE UNITED STATES SENATE**
**COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS**

**TESTIMONY OF DANIEL SOLOMON OF WASHINGTON, DC**
**IN SUPPORT OF S. 132**
**SUBMITTED FOR THE RECORD**

I am a lifelong resident of the District of Columbia. My wife and I are raising our sons in the District. I am tired of being taxed without representation in Congress. I am tired of wanting to call my Senators to tell them my views on war, or climate change, or the minimum wage or the future of Social Security – and having no Senators to call. I am tired of watching my Delegate to the House articulate positions on the issues of the day as my representative, but be unable to vote on them. I want to see the unfair treatment of residents of the District of Columbia ended before my sons are old enough to vote. And that day is not far away.

Fifteen years ago I put my frustrations into action and co-founded DC Vote, an education and advocacy organization whose mission is to secure full voting representation in Congress and full democracy for the residents of the District of Columbia. DC Vote has led the fight for justice for the residents of the District since that time. With the active involvement of statehood organizers, DC Vote helped to fill the hearing room and the overflow room and the halls outside of both when this Committee held a hearing on DC Statehood on September 15, 2014.

Like most of the witnesses who testified at that hearing, I have considered and worked hard to enact alternatives to statehood that I thought might bring a measure of democracy to the residents of DC. I have come to the conclusion that the right fight now is the fight for statehood.

First, I have found that it is unreasonably difficult to get Congress to enact partial measures to help the District. The House Voting Rights Act, considered in 2007 and 2009, would have given the District a single voting member of the House of Representatives, to be offset at first by an additional Representative for the State of Utah. That balanced effort was thwarted when it was linked to a ban on gun laws for the District. A ten-year effort to provide equal representation through legislation never made it out of this Committee. A bill in the House to provide simple budget autonomy has been the target of numerous riders that would undercut the very democracy it purports to enact.

Second, if any of these measures had been passed, it could have been reversed by the next Congress. Only statehood is forever.

Finally, any partial measure enacted would still leave residents of the District of Columbia with second-class citizenship. We deserve the same rights as all other American citizens who pay federal taxes, respond to the nation's calls to war and fulfill all the other responsibilities of citizenship.

The struggle for justice for residents of the nation's capital has gone on since 1801. It is time to end taxation without representation. It is time for DC statehood.

Thank you.

Daniel Solomon
Washington, DC

**Testimony 0n Senate Bill 132**
**September 15, 2014**

I strongly support the Senate's proposal to pass Bill S132. I have lived here and raised a family since 1957. But I clearly have no lawmaking influence, or any way to express my concerns.

The population of the District is bereft of anyone who can represent its interests in Congress. We are a large and diverse group of individuals with very informed and concerned back grounds and interests. And still we have no voice.

I get angry everytime some group or interest begs me to call or write my Congressman. There is no way to express my point of view. We have an active Council and City Government but their hands are often tied. There are severe limits in the way in which we can spend our locally collected budget. In the meantime the citizens feel that no one cares or is listening so they do not get involved as they might otherwise. It is grating to hear ourselves constantly referred to as a democracy when we know there are severe limits to its meaning.

The Senate could go a long way to restoring its responsibility and leadership by passing this legislation.

Louise G. White (PhD)
[redacted]
WDC 20015

BEND THE ARC
jewish action

September 15, 2014

The Honorable Thomas Carper
Chairman
U.S. Senate Committee on Homeland
Security & Governmental Affairs
Washington, D.C. 20510

The Honorable Tom Coburn
Ranking Member
U.S. Senate Committee on Homeland
Security & Governmental Affairs
Washington, D.C. 20510

**Re: Equality for the District of Columbia: Discussing the Implications of S. 132, the New Columbia Admission Act of 2013**

Dear Chairman Carper and Ranking Member Coburn:

As the Director of Bend the Arc Jewish Action, I write to you today to express our strong support for the New Columbia Admission Act of 2013 (S. 132) and appreciation for today's hearing on this important topic. The largest national Jewish social justice organization focused exclusively on domestic policy, Bend the Arc cares deeply about ensuring the voting and equal rights of all our nation's citizens. This crucial legislation will afford the more than 600,000 residents of the District the voting representation, autonomy and rights already bestowed upon the rest of our nation's citizens.

For the Jewish community, the struggle for voting rights and equality are deeply personal. As our ancestors fled pogroms and persecution, those who came here found a country where, even if they were not always welcome or fully protected, they nonetheless had an equal right to exist and be part of our political system at its most basic level. We are inspired not only by our ancestors but by our sages of old who taught, "a ruler is not to be appointed unless the community is first consulted," (Babylonian Talmud, B'rachot 55a). In our nation, that means the full diversity of our citizenry must have the unhindered right to vote for the leaders who represent them and shape our nation's future.

Residents of the District of Columbia already fulfill the same obligations of citizenship as their fellow Americans who live in the 50 states—they pay taxes, serve on juries, fight and die in wars. Yet, D.C. residents are denied voting representation in Congress and their government, budget and laws are subject to congressional approval. In fact, Congress often overrules laws passed by the locally-elected government and overturns ballot initiatives passed by D.C. citizens simply because Congressional leaders disagree with these laws. This systemic denial of true local self-government is outdated, unjust and must be changed.

Though opponents of equality for residents of the District often point to the small population, the state of Wyoming, for example, has fewer residents and yet has three voting representatives in Congress. Indeed, our entire system of representation is based on striking a balance of power between larger and smaller states, so that a state's small

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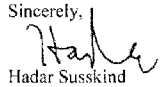
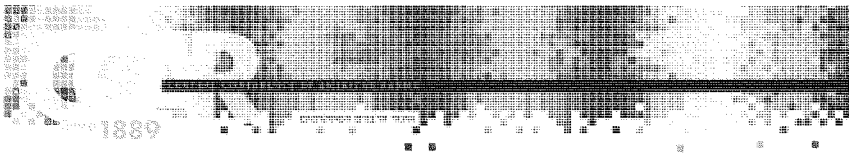
population cannot be a reason to wholly deny its citizens the representation they are due. Further, though some opponents also argue that the land of nation's capital belongs to the people, there are several states—including Nevada, Utah, Arkansas and California—in which at least 50 percent of the land is owned by the federal government and thus belongs to the people. Yet, the citizens of those states still maintain the right to vote and be represented in Congress. In fact, the United States is the only democratic nation in the world in which the citizens of its capital cannot vote in its national legislature.

Thank you again for holding this important hearing. We urge Congress to grant the District of Columbia and its citizens the same rights afforded to every other American through the passage of the New Columbia Admission Act of 2013 (S. 132).

Sincerely,



Hadar Susskind
Director
Bend the Arc Jewish Action




ENRICHING THE JEWISH COMMUNITY ■ FOSTERING EXCELLENCE IN RABBINIC LEADERSHIP

Statement of the Central Conference of American Rabbis

Submitted to the Senate Committee on Homeland Security & Governmental Affairs

Monday, September 15, 2014

On behalf of the Central Conference of American Rabbis, which includes more than 2000 Reform rabbis, we submit this statement in strong support of the New Columbia Admission Act of 2013.

We have long expressed our concern about the lack of full Congressional representation for District of Columbia residents. As we said in our 1993 resolution supporting DC statehood, "the current status of the government of the District of Columbia leaves its residents second-class citizens with limited rights but all the obligations imposed on citizens of the 50 States." While Americans living in the District pay federal taxes and serve on juries as well as in the Armed Services, they remain without full voting representation in Congress.

The New Columbia Admission Act of 2013 would create the state of "New Columbia," including the District of Columbia's eight wards but excluding federal monuments, the White House, the Capitol, the Supreme Court, and other federal landmarks. The bill would give the District's nearly 650,000 citizens voting representation in both chambers of Congress.

For centuries through to modern times, Jews throughout the world have experienced second-class citizenship and its destructive consequences. Our tradition teaches us that all are created equal, and our experience teaches us that all must be treated equally. As a Movement we consistently support achievement of equality for all. We are inspired by the lesson found in the Book of Numbers, where God instructs Moses to gather 70 elders of Israel to serve as representatives of the people (11:16–25). Today, as in biblical times, government officials must be accountable to the citizens they represent. Ensuring DC residents have fully empowered members of Congress is key to allowing their voices to be heard in the formation of our nation's laws.

As we approach midterm elections, we encourage Congress to act to ensure that the voices of DC voters will be fully heard in the next midterm election and year-round in the halls of Congress. We encourage you to support the New Columbia Admission Act of 2013.

CENTRAL CONFERENCE OF AMERICAN RABBIS
355 Lexington Avenue | New York, New York 10017 | tel 212.972.3636 | fax 212.692.0819 | www.ccarnet.org

# Testimony of Gregory Allan Cendana

Executive Director of the Asian Pacific American Labor Alliance, AFL-CIO and Co-Chair of the DC Asian American and Pacific Islander Democratic Caucus

## Equality and Justice for the District of Columbia
## S. 132, the New Columbia Admission Act

As a current resident of the District of Columbia, I fully support the New Columbia Admission Act because it is no longer an option, but a necessity. The act will allow residents, such as myself, to have a full voting voice on national legislature, and for the District to become fully autonomous as a self-governing state.

There are roughly over 650,000 residents living in the District of Columbia, who pay federal and local taxes, yet the decision to create budgets and laws lie not with the local government, but with Congress. By federal mandate, budgeting process and every legislation passed and signed by the District's mayor must be sent to Congress for review and approval. This can take up to 4 months after the fiscal year started to be finalized and implemented due to the irregularity of the congressional calendar. Needless to say, the mandated procedure create tremendous delays in our local operations and affect the District's elected leadership, government workers and agencies, residents, and local businesses in unnecessary ways. This is without counting the fact that Congress can, at a moment's notice, overturn any local enacted law, and historically have not approved a budget on time for the District in more than 16 years. What makes all of this even worse is the fact that residents of the District are the only citizens in the nation who are governed by those whom we did not elect. We serve in the military, serve on juries, yet we are taxed without representation in either house of Congress. We are citizens without full citizenship rights. We have been treated as collateral damage of national politics, constantly placed to the side as secondary priority.

By granting the District its statehood, the local government can carry out its daily operations in spite of federal shutdown and without constantly wasting

money on emergency shutdown preparations. Whether the federal government shuts down or not should not have direct implications on whether the trash will be picked up, or if children should go to school the next day. Such are local issues which Congress need not and should not spend time debating. The livelihood of the District's residents should not be placed as second consideration by Congress, but as the first priority within the jurisdiction of the local government. The best way to achieve the latter is by designating the District of Columbia as the 51st state of America. It is the most logical and efficient path forward.

Ironically, the District already have a developed apparatus and a body of laws that are granted state-level status by courts as well as the federal government for many purposes. Yet, the threat of federal shutdown is always present and deeply felt by residents of the District. Federal shuts down can potentially paralyze the core functions of the local government, including but not limited to the required investment to emergency federal shuts down planning preparations. The District's status as a federal agency rather than a municipality or a state government means threats of shutdown can lead to millions of dollars wasted in unnecessary planning costs. In 2011 alone, over $1 million dollars were spent on emergency planning for federal shutdowns. Gaining statehood will allow the District to function in full autonomy and operate in a more efficient manner.

Some would argue that the New Columbia Admission Act cannot grant the District of Columbia statehood because Congress does not have the authority to perform such action – well, they are wrong. Under Article IV, Section 3, Clause I of the Constitution, Congress has *full* authority to determine statehood to a designated territory. This means passing the Act will require no constitutional amendment. The Act will preserve a core federal district with all the principal monuments and important federal buildings to act as the seat of national government, maintaining the constitutional requirement for a federal enclave within our capital city. The Act will also give the District's residents our long over-due full voting representation in both the House and Senate and allow local law to take affect without waiting on congressional approval. We, as residents and citizens of the District of Columbia who pay taxes to our government, should have a voice in our government decision making and be given the same full benefits as the rest of the American citizens.

**Post-Hearing Questions for the Record**
**Submitted to Hon. Eleanor Holmes Norton**
**From Senator Tom A. Coburn, M.D.**

**"Equality for the District of Columbia: Discussing the Implications of S. 132, The New Columbia Admission Act of 2013"**

**September 15, 2014**

1. During the hearing, I stated that the District gets approximately $674 million a year in special funding. Prior to the National Capital Revitalization and Self-Government Improvement Act of 1997 (the "Revitalization Act"), the District received a yearly payment from the federal government of approximately $660 million per year.[1] In 1997, in the throes of the District's approaching insolvency, Congress stepped in and negotiated a new form of financial management to ensure the District paid its bills. Rather than a one-time payment to the District, Congress assumed responsibility for certain state-like services like the District's court system, its unfunded pension liability for vested teachers, police, firefighters, and judges, and other special local initiatives.[2] This was based on the understanding that since the District is not a state, it needed help providing some state-like services. One of those services is Medicaid. Accordingly, Congress agreed to increase its share of the District's Medicaid payments from 50 to 70 percent.[3] These changes were estimated to provide net financial benefits to the District of approximately $203 million a year *over* the lump-sum payment the District received prior to 1997.[4]

   As a result of those changes, the District now receives over $1 billion in special federal payments each year, simply because of its location as the Nation's Capital and exclusive of other federal grants. Approximately $674 million each year is appropriated for District services, courts, and special local programs.[5] Among these appropriations is $29 million that American taxpayers gave to the District in FY2013 to provide tuition subsidies for District residents who attend college outside the District, and $60 million for local school improvement, as well as payment for the District's local courts.[6] This is appropriated by Congress in addition to grants and other programs that other cities and states have an opportunity to obtain. The District also receives approximately $400 million more each year from Congress for its extra 20 percent share of D.C.'s Medicaid costs.[7]

   In 2009, Dr. Alice Rivlin recognized this special treatment and asked whether the District would be "forced to give up the advantages it gained in the Revitalization Act of 1997"

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[1] *District of Columbia Fiscal Structural Balance Issues*, Government Accountability Office at 3 (Sept. 2002), *available at* http://www.gao.gov/assets/240/235510.pdf.
[2] *Id.* at 3.
[3] *Id.*
[4] *Id.* at 3-4.
[5] Ex. 1, Eugene Boyd, *FY2014 Appropriations: District of Columbia*, Congressional Research Service, at 7 (Oct. 15, 2013).
[6] *Id.* at 7; *see also* S. 1371; H.R. 2786.
[7] Federal and State Share of Medicaid Spending, *available at* http://kff.org/medicaid/state-indicator/federalstate-share-of-spending/.

including taking back responsibility for funding the courts and its higher Medicaid share, and questioned whether the "net effect" of giving up this funding in exchange for becoming a state would be positive.[8]

a. If the District is not asking for special treatment to become a state, shouldn't it have to give up this special funding?

b. How will the District compensate for this loss of funding?

*Response:* The Home Rule Act of 1973 imposes several limitations on the District of Columbia's revenue capacity that do not apply to states. In contrast, under the New Columbia Admission Act, the State of New Columbia would enter the union on an equal footing with all other states, and therefore would have no unique limitations on its revenue capacity. As the testimony of Alice Rivlin and other hearing witnesses demonstrated, the State of New Columbia would have a large enough population and economy to support itself.

2. Short of full budgetary and legislative autonomy, what steps can Congress take now to help the District's financial stability and day-to-day operations?

*Response:* Congress has effectively abandoned much of its legislative and budget oversight of the District of Columbia, yet D.C. and Congress still incur substantial costs complying with the bureaucratic and pro forma motions of a phantom oversight process. Since the Home Rule Act of 1973, only three resolutions of disapproval overturning a D.C. law have been enacted during the congressional review period, two of which concerned arguably federal interests, and no disapproval resolution has been enacted since 1991. Nevertheless, the D.C. Council must spend considerable time and money, including 5,000 employee-hours and 160,000 sheets of paper per Council period, complying with a process that Congress no longer observes.

Moreover, after Congress passed the District of Columbia Financial Responsibility and Management Assistance Act of 1995 (P.L. 104-8), which established the independent Chief Financial Officer, the only such official in the country, Congress abandoned most of its oversight of the District's budget. Congress no longer passes a stand-alone D.C. Appropriations bill. Instead, the D.C. Appropriations bill is part of the Financial Services and General Government Appropriations bill, and Congress approves the spending levels and activities set forth in the District's local budget, not the individual line items of the budget itself. The Appropriations committees no longer even hold hearings on the local portion of D.C.'s budget, and only rarely on the Revitalization Act funding. Even if Congress granted the District budget and legislative autonomy, Congress would retain its constitutional authority to overturn or pass any law for the District at any time.

Beyond some changes that mirror actual practices, Congress is already close to significantly improving the District's financial stability and day-to-day operations by adopting annual versions of the provision in the Senate's fiscal year 2015 D.C. Appropriations bill that

[8] Testimony of Alice M. Rivlin, "If the District of Columbia becomes a State: Fiscal Implications," at 5 (July 13, 2009), *available at* http://www.brookings.edu/~/media/research/files/testimony/2009/7/13%20dc%20statehood%20rivlin/0713_dc_statehood_rivlin.pdf.

would permanently exempt the D.C. government from federal government shutdowns. The Senate, House and Administration all agree that D.C. should not shut down during federal shutdowns, and the three leading bond rating agencies also endorse exempting D.C. from shutdowns.

Since the federal shutdown last year, the House has voted four times to exempt D.C. from shutdowns. First, during the federal shutdown, the House passed a stand-alone bill that would have exempted D.C. from a shutdown through December 15, 2013, but the Senate refused to go along with any piecemeal spending bills to reopen the government. During floor debate on the bill, Representative Ander Crenshaw, the chairman of the appropriations subcommittee with jurisdiction over D.C., said, "The District's locally raised funds should not be withheld from them during this current Federal shutdown. This disagreement that the Republicans and the Democrats are having over Federal spending shouldn't stop the District from using its own locally raised funds like any other city in America." Second, the short-term continuing resolution (CR) that reopened the federal government last year exempted D.C. from shutdowns for the rest of fiscal year 2014. Third, the enacted fiscal year 2014 D.C. Appropriations bill exempted D.C., for the first time ever, from a shutdown for an entire fiscal year (2015). Fourth, the House-passed fiscal year 2015 D.C. Appropriations bill exempts D.C. from shutdowns in fiscal year 2016.

The threat of a shutdown forces the District to invest time and money preparing contingency shutdown plans. If the District shuts down, it could default under certain financing agreements and leases. Moreover, the 650,000 D.C. residents do not suffer alone when vital city services cease during a District shutdown. Federal officials, including the President, federal buildings, foreign embassies and dignitaries, businesses and tourists rely daily on the city's services, as well.

Further, successive CRs greatly hinder the operations of the District. Not only do successive CRs make it difficult for the city to plan its activities for the year, successive CRs greatly increase the city's costs of doing business. The city's partners, from Wall Street to small vendors, can charge a risk premium due to the uncertainty created by successive CRs.

The permanent shutdown-exemption authority in the Senate's fiscal year 2015 D.C. Appropriations bill would extend the one-year shutdown-exemption authority (fiscal year 2015) enacted in the fiscal year 2014 D.C. Appropriations bill. In September, in upgrading or maintaining the District's bond ratings, the three leading rating agencies favorably cited the provision exempting D.C. from a shutdown in fiscal year 2015. In upgrading their ratings on the District's outstanding general obligation bonds, Standard & Poor's Rating Services and Fitch Ratings both cited the provision, and Moody's Investors Service cited the provision in maintaining D.C.'s rating. The causal effect on the city's bond ratings and financing expenses are clear.

The responses above are all steps that could be taken to improve the District's financial stability and day-to-day operations.

**Post-Hearing Questions for the Record**
**Submitted to Hon. Vincent C. Gray**
**From Senator Tom A. Coburn, M.D.**

**"Equality for the District of Columbia: Discussing the Implications of S. 132, The New Columbia Admission Act of 2013"**

**September 15, 2014**

1. During the hearing, I stated that the District gets approximately $674 million a year in special funding. In response, you said the following: "I think he used the number $674 million, which I would like to see the details of. Every state gets Medicaid. We do receive some special funds. But when you total up those funds, they don't come anywhere near to $674 million. We're not asking for special treatment. When you look at the federal funds that are contained there, you're not going to find that being largely a picture that is very different than any other of the 50 states."

   Prior to the National Capital Revitalization and Self-Government Improvement Act of 1997 (the "Revitalization Act"), the District received a yearly payment from the federal government of approximately $660 million per year.[1] In 1997, in the throes of the District's approaching insolvency, Congress stepped in and negotiated a new form of financial management to ensure the District paid its bills. Rather than a one-time payment to the District, Congress assumed responsibility for certain state-like services like the District's court system, its unfunded pension liability for vested teachers, police, firefighters, and judges, and other special local initiatives.[2] This was based on the understanding that since the District is not a state, it needed help providing some state-like services. One of those services is Medicaid. Accordingly, Congress agreed to increase its share of the District's Medicaid payments from 50 to 70 percent.[3] These changes were estimated to provide net financial benefits to the District of approximately $203 million a year *over* the lump-sum payment the District received prior to 1997.[4]

   As a result of those changes, the District now receives over $1 billion in special federal payments each year, simply because of its location as the Nation's Capital and exclusive of other federal grants. Approximately $674 million each year is appropriated for District services, courts, and special local programs.[5] Among these appropriations is $29 million that American taxpayers gave to the District in FY2013 to provide tuition subsidies for District residents who attend college outside the District, and $60 million for local school improvement, as well as payment for the District's local courts.[6] This is appropriated by Congress in addition to grants and other programs that other cities and states have an

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[1] *District of Columbia Fiscal Structural Balance Issues*, Government Accountability Office at 3 (Sept. 2002), *available at* http://www.gao.gov/assets/240/235510.pdf.
[2] *Id.* at 3.
[3] *Id.*
[4] *Id.* at 3-4.
[5] Ex. 1, Eugene Boyd, *FY2014 Appropriations: District of Columbia*, Congressional Research Service, at 7 (Oct. 15, 2013).
[6] *Id.* at 7; *see also* S. 1371; H.R. 2786.

opportunity to obtain. The District also receives approximately $400 million more each year from Congress for its extra 20 percent share of D.C.'s Medicaid costs.[7]

In 2009, Dr. Alice Rivlin recognized this special treatment and asked whether the District would be "forced to give up the advantages it gained in the Revitalization Act of 1997" including taking back responsibility for funding the courts and its higher Medicaid share, and questioned whether the "net effect" of giving up this funding in exchange for becoming a state would be positive.[8]

a. The special funding described above (not including federal grants) is approximately 1/12 of the District's budget. Were you not aware of this special funding at the time of the hearing?

Unfortunately, your reading of the federal payments to the District of Columbia is inaccurate. For instance, Medicaid payments are set for all states by a statutory formula that is based on the ratio of the State's per capita income to the per capita income of the entire United States. As you noted, the District has a stagnant payment rate of 70 percent that was set by statute in 1997. Currently, six other states have rates near (within 2 percentage points) the District's, including Mississippi and Arkansas.[1] Education payments for DCTAG and the SOAR program that you noted above are the result of Congressional inaction for decades which resulted in a failing school system at primary, secondary and post-secondary levels. The District has spent billions restoring and righting these wrongs and Congress has seen fit to add funding to specific parts of that effort including ensuring that District students have access to college and funding for both the public school and public charter school arenas. To say that the District should be penalized for accepting federal funding for programs, like private school vouchers, that were imposed by federal law, is ironic.

The District does receive payments from the federal government that are unlike those received by other states. It receives funding to reimburse costs incurred from helping to protect citizens and government officers (emergency planning and security); it receives funds stemming from the Scholarships for Opportunity and Results Act (SOAR) that imposed a voucher program for private schools on the District Government while offering very welcome funding for public schools and it receives funds for scholarships for students to help equalize the cost between out-of-state and in-state tuitions at public universities across the country in compensation for the lack of a public university system. For a number of years, the District has also requested and received funds to assist in battling the epidemic of HIV/AIDS in the nation's capital.

The federal government controls the court system in the District. The President appoints its judges, with the consent of the Senate, just like any other federal court. The attorney responsible for prosecution of federal and local series crimes is appointed by the President and confirmed by the Senate. If the District were to become a state, there

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[7] Federal and State Share of Medicaid Spending, *available at* http://kff.org/medicaid/state-indicator/federalstate-share-of-spending/.

[8] Testimony of Alice M. Rivlin, "If the District of Columbia becomes a State: Fiscal Implications," at 5 (July 13, 2009), *available at* http://www.brookings.edu/~/media/research/files/testimony/2009/7/13%20dc%20statehood%20rivlin/0713_dc_statehood_rivlin.pdf.

would certainly need to be discussions on how to divide those responsibilities that fit best with the federal court system versus a state. It is quite possible that the judiciary relationship between the federal government and the new state would be unlike that of any other state. I fail to see, however, why this should slow the process to statehood.

b. If the District is not asking for special treatment to become a state, shouldn't it have to give up this special funding?

The District receives no funding that I would term as special or unique to the District. Every request we make can be linked directly to the federal presence in the District or to similar requests made by other states.

c. How will the District compensate for this loss of funding?

The District has operated within its budgetary limits for almost twenty years. I have no doubt that when it becomes a state, the elected officials of the new state will continue that track record of balanced budgets that answer the needs of the residents and visitors to Washington, D.C.

2. When considering the federal special payments and other grant money the District is eligible to receive, the District received $16,523 per capita in FY 2010, more than any state in the country.[9] That was more than eight times the national average, and over $10,000 more per person than the highest state.[10]

a. How can you say the federal money the District receives is not that different than other states when the District receives more than twice the federal money per capita than any state in the country and more than eight times the national average?

The information you are using to justify this point is half a decade out of date. Nevertheless, I am glad to have the opportunity to review this information. The report defines "Federal government aid to state and local governments" as including the following: Direct cash grants to state or local government units, Payments for grants-in-kind, such as purchases of commodities distributed to state or local government institutions (e.g., school lunch and breakfast programs), Payments to nongovernment entities when such payments result in cash or in-kind services passed on to state or local governments, Payments to regional commissions and organizations that are redistributed to the state or local level, Federal government payments to state and local governments for research and development that is an integral part of the provision of public services, and Federal revenues shared with state and local governments. In each of these cases, the District received funding based on the federal law or regulation governing payments. The District did not received additional funding that it was not entitled to according to law.

According to the report you cited, the District received, in real dollars, less than 21 other states. In over twenty of the programs selected in the report, more than any other state,

[9] Federal Aid to States for Fiscal Year 2010 (Sept. 2011), *available at* http://www.census.gov/prod/2011pubs/fas-10.pdf.
[10] Federal Aid to States for Fiscal Year 2010 (Sept. 2011), *available at* http://www.census.gov/prod/2011pubs/fas-10.pdf.

the District received zero dollars. In many cases, there are good reasons for this, like funding from the Department of Interior for "Abandoned Mine Reclamation" where there was no need for that program in the District.

Finally, it appears that the funds noted for the District include funding for independent agencies like the federal court system, Washington Metropolitan Area Transit Authority and Water and Sewer Services. As the District does not have direct control over these entities, their inclusion has skewed the findings of this report.

3. Short of full budgetary and legislative autonomy, what steps can Congress take now to help the District's financial stability and day-to-day operations?

   Congress can begin the statehood process. This would show the markets that the District was on the path to financial independence, giving additional weight to its balanced budgets and reserve funds. Further, Congress can remove legislative and policy burdens to the implementation of local policy, including commissions that unfairly slow and limit economic development. The District agrees that the federal government must have input on development in and adjacent to the federal presence, but outside the L'Enfant city, that involvement can be overly burdensome.

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[1] http://aspe.hhs.gov/health/reports/2014/FMAP2015/fmap15.pdf

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**Post-Hearing Responses for the Record**
**Chairman Philip H. Mendelson**
**From Senator Tom A. Coburn, M.D.**

**"Equality for the District of Columbia: Discussing the Implications of S. 132, The New Columbia Admission Act of 2013"**

**September 15, 2014**

1. *During the hearing, I stated that the District gets approximately $674 million a year in special funding. In response, you said the following: "We raise something like $6 billion annually from local taxes and fees just like any other jurisdiction does. There is a substantial portion of our budget that is local dollars. Almost every dollar is through a federal subsidy program that all the states get, probably the biggest being Medicaid and that's substantial but every state gets it." After suggesting the District's federal help was discontinued in the late 1990's you stated, "We're not looking for special treatment."*

   *Indeed, prior to the National Capital Revitalization and Self-Government Improvement Act of 1997 (the "Revitalization Act"), the District received a yearly payment from the federal government of approximately $660 million per year.*[1] *In 1997, in the throes of the District's approaching insolvency, Congress stepped in and negotiated a new form of financial management to ensure the District paid its bills. Rather than a one-time payment to the District, Congress assumed responsibility for certain state-like services like the District's court system, its unfunded pension liability for vested teachers, police, firefighters, and judges, and other special local initiatives.*[2] *This was based on the understanding that since the District is not a state, it needed help providing some state-like services. One of those services is Medicaid. Accordingly, Congress agreed to increase its share of the District's Medicaid payments from 50 to 70 percent.*[3] *These changes were estimated to provide net financial benefits to the District of approximately $203 million a year over the lump-sum payment the District received prior to 1997.*[4]

   *As a result of those changes, the District now receives over $1 billion in special federal payments each year, simply because of its location as the Nation's Capital and exclusive of other federal grants. Approximately $674 million each year is appropriated for District services, courts, and special local programs.*[5] *Among these appropriations is*

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[1] *District of Columbia Fiscal Structural Balance Issues*, Government Accountability Office at 3 (Sept. 2002), *available at* http://www.gao.gov/assets/240/235510.pdf.
[2] *Id.* at 3.
[3] *Id.*
[4] *Id.* at 3-4.
[5] Ex. 1, Eugene Boyd, *FY2014 Appropriations: District of Columbia*, Congressional Research Service, at 7 (Oct. 15, 2013).

*$29 million that American taxpayers gave to the District in FY2013 to provide tuition subsidies for District residents who attend college outside the District, and $60 million for local school improvement, as well as payment for the District's local courts.*[6] *This is appropriated by Congress in addition to grants and other programs that other cities and states have an opportunity to obtain. The District also receives approximately $400 million more each year from Congress for its extra 20 percent share of D.C.'s Medicaid costs.*[7]

*In 2009, Dr. Alice Rivlin recognized this special treatment and asked whether the District would be "forced to give up the advantages it gained in the Revitalization Act of 1997" including taking back responsibility for funding the courts and its higher Medicaid share, and questioned whether the "net effect" of giving up this funding in exchange for becoming a state would be positive.*[8]

a. *The special funding described above (not including federal grants) is approximately 1/12 of the District's budget. Were you not aware of this special funding at the time of the hearing?*

Yes, I was aware that the District receives additional funds from the federal government that are not made available to other states. And, as I noted in my testimony, other states receive special funding that the District does not receive.

You could argue, then, that granting statehood to the District would be a savings to the federal government of over $674 million per year. Of course the argument really should be about democracy, not finances.

b. *If the District is not asking for special treatment to become a state, shouldn't it have to give up this special funding?*

I have several answers to this. First, as stated at the hearing, the District is not asking for special treatment to become a state. I expect that with statehood

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[6] *Id.* at 7; *see also* S. 1371; H.R. 2786.

[7] Federal and State Share of Medicaid Spending, *available at* http://kff.org/medicaid/state-indicator/federalstate-share-of-spending/.

[8] Testimony of Alice M. Rivlin, "If the District of Columbia becomes a State: Fiscal Implications," at 5 (July 13, 2009), *available at* http://www.brookings.edu/~/media/research/files/testimony/2009/7/13%20dc%20statehood%20rivlin/0713_dc_statehood_rivlin.pdf.

comes the cost of paying for our local courts, felony prosecutions, a prison system, etc. – costs that are currently borne by the federal government and that exceed your calculation of $674 million.

Second, it is not "special funding;" the federal government makes special payments to most, if not all of the states. As I pointed out in my written testimony, you will see that many states get funding not made available to other states for a variety of reasons, including as a result of their relationship with the federal government.

One example is in the federal mineral royalties programs. The state of Wyoming gets $900 million in royalties from the federal government because the federal government owns land in the state on which minerals are extracted. As another example, many states get formula dollars based on the acreage of national forests within the state. This is not special treatment or funding – it is a result of the federal government's sometimes unique relations with individual states. More broadly, some states are donor states and some are "donee" meaning they get more money from the federal government than they contribute. This is most often as a result of federal highway dollar disparities.

As to our unique FMAP payment, we are one jurisdiction among 38 other states that receives more than the standard cost-share of 50/50 and one of two which receives an FMAP share based on a mandated level rather than the standard formula, the other is Louisiana. The FMAP rate ranges from 50% to 78% amongst the 50 states and the District. In states that receive only the 50% federal match, localities may pay up to 30% of Medicaid expenditures for the entire state's 50% share. Seeing as we would be a single city within a state, we would not have that ability. The need for our unique FMAP rate is that the District is uniquely all urban.

Third, there is another dimension to the "special treatment" you lament: not only do we receive something like $674 million in "special funding" annually, but we lose well over $1 billion annually due to the prohibition on taxing income at its source, the so-called "commuter tax." I would think it reasonable that there would be a demand to continue this prohibition, and it would be reasonable, in return, to maintain a federal payment to offset this Congressionally mandated loss in revenue.

c. *How will the District compensate for this loss of funding?*

Obviously, the District cannot absorb the list instantly. It makes the most sense to phase it in over several years. I would expect this to be part of the discussion about the path to statehood that ought to be happening now with Congressional leaders on both sides of the aisle.

The most obvious source of funding which could be made available through statehood would be the removal of the current prohibition on the District taxing income at its source. Known as the "commuter tax" it actually deprives the District of income from its own residents. Take baseball players (because this is World Series season) as an example. Every baseball player pays income tax, on an apportioned basis, to each of the cities in which he played. Except the District because of the prohibition. But there's more: if that player is a resident of the District, not only does he pay tax to each of the cities in which he played, but he then takes a credit against the tax he would otherwise pay to the District. This restriction loses us money from our own residents.

However – and this is critical – I do understand the sensitivity of this issue for our regional partners and understand the concerns that they have. One solution would be to retain the prohibition, and the substantial loss of income, and retain a federal payment as an offset.

I must note, though, that the District is in better fiscal health than many of the states. Regardless, the rights of U.S. citizenship should not be secondary to funding concerns.

2. *When considering the federal special payments and other grant money the District is eligible to receive, the District received $16,523 per capita in FY 2010, more than any state in the country.*[9] *That was more than eight times the national average, and over $10,000 more per person than the highest state.*[10]
   a. *How can you say the District is asking for special treatment when the District receives more than twice the federal money per capita than any state in the country and more than eight times the national average?*

Again, we are not asking for special payments or special treatment. Nor do I agree with the premise of the question that the "American taxpayers gave the District" "special funding."

Figures cited in this question, are based on a report that inaccurately attributes to the District millions of dollars. We know that we get roughly $3.77 billion per year between the expenses of our justice system, our Medicaid payment, and other federal grants. However, the Federal Aid to States report which you have attributes over $9 billion to the District.

It seems that many costs included in the report are associated with the office address where nationwide programs are administered, many of which are in the District because that is the address of many federal agencies. That money does not go to the District government. Specifically, the report cites:

- That the District of Columbia is "receiving" $2.386 billion from the Federal Railroad Administration. I can assure you that we are not handing out $3,693 to

[9] Federal Aid to States for Fiscal Year 2010 (Sept. 2011), *available at* http://www.census.gov/prod/2011pubs/fas-10.pdf.
[10] Federal Aid to States for Fiscal Year 2010 (Sept. 2011), *available at* http://www.census.gov/prod/2011pubs/fas-10.pdf.

every resident to ride Amtrak every year and there is not federal rail money flowing through our Department of Transportation. It makes more sense that these costs are attributed because Amtrak and the Northeast Corridor are based in the District.

- That the District is "receiving" $702 million out of $1 billion in payments labeled HUD Housing Programs – "Other." It can be inferred that they fund national programs that are run out of HUD offices here in the District. The next two highest recipients of these "Other" funds are Georgia and Maryland at just over $110 million each, with almost nothing going to any other state. This seems purely administrative.

Using the $3.774 billion in federal payments, and not counting these other miscellaneous dollars, assuming a population of 646,000 residents, our total is actually closer to $5,800 per capita, not over $16,000.

Please do not overlook the fact that residents of the District of Columbia are American taxpayers themselves – to the tune of some $20 billion per year.

3. *Short of full budgetary and legislative autonomy, what steps can Congress take now to help the District's financial stability and day-to-day operations?*

It appears that the intent of your question is that short of passing the two bills before your Committee, what can be done to help the District right now.

While statehood is the ultimate goal and the only way to restore our full rights of American citizenship, the budgetary and legislative autonomy measures before your committee could immediately help the District's continued financial stability and further improve day-to-day operations.

Rather than passively reviewing all of our legislation and our budgets, if in fact Congress ever felt the need to override a law or budget, it could do so currently under its plenary authority over the District. Understanding that, historically, Congress has had very little interest in dealing with review of our individuals, there seems to be little reason not to afford the additional flexibility contained in those two bills.

Short of budget and legislative autonomy, of course Congress could go back to giving us a federal payment to offset the effect of federal control over our affairs, which is not something that we are asking for. Please understand, though, that the current requirement for Congress to appropriate our budget is specifically cited by Wall Street rating agencies as a factor holding down our bond ratings. This, in turn, increases the cost of our bonds.

Congress acted 40 years ago to delegate a significant – but not total – amount of Home Rule to the District Government. Unfortunately, while Congress held back some authority (e.g., appropriating) it also lost interest. Repeatedly, District officials must come to Congress for help: don't shut us down, please pass our appropriation on time, let us align our fiscal year to that of other jurisdictions, let us raise the salary of our CFO, etc. But it is very difficult to get an answer. Give us budget autonomy, legislative autonomy, and D.C. Statehood.

Phil Mendelson, Chairman
Council of the District of Columbia

Bancroft PLLC

November 3, 2014

The Honorable Thomas R. Carper
Chair
Committee on Homeland Security
and Governmental Affairs
United States Senate
Washington, DC 20510-6250

Via Electronic Mail: laura_kilbride@hsgac.senate.gov

**RE: Responses to Post-Hearing Questions for the Record**

Dear Chairman Carper:

Enclosed are my responses to the questions for the record from the Honorable Tom Coburn, Ranking Member, in reference to my testimony before the Committee at the hearing titled "Equality for the District of Columbia: Discussing the Implications of S. 132, the New Columbia Admission Act of 2013" on September 15, 2014.

Please contact me at (202) 234-0090 with any further questions.

Sincerely,

Viet D. Dinh

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**Post-Hearing Questions for the Record**
**Submitted to Senator Tom A. Coburn, M.D.**
**From Viet D. Dinh**

**"Equality for the District of Columbia: Discussing the Implications of S. 132, The New Columbia Admission Act of 2013"**

**September 15, 2014**

1. *Some legal scholars have argued that the 23rd Amendment would be voided by S. 132 if New Columbia becomes a state and residents of the new federal enclave are permitted to vote in the state of their last residence.*
    a. *In the event the state of New Columbia was admitted to the Union, do you believe the 23rd Amendment, if not repealed, would be read to give three electoral votes to the few residents within the new federal enclave?*

The 23rd Amendment, by its own terms, provides three electoral votes to the federal enclave, however many residents there may be. As I stated in my testimony, I think it would be unwise as a matter of policy not to repeal the 23rd Amendment with the admission of New Columbia, but that amendment is not abrogated just because the federal district is smaller. There is no provision in the 23rd Amendment related to the District's population, so it is not violated when Congress alters the size of the District. It would indeed be sound policy to repeal the 23rd Amendment concurrent with admission of New Columbia, but it is not a constitutional prerequisite.

    b. *Do you believe Congress has the authority to force residents of the new federal enclave to vote in another state?*

"Congress possesses full and unlimited jurisdiction" over the District. *Neild v. District of Columbia*, 110 F.2d 246, 250 (D.C. Cir. 1940). The District Clause's delegation of exclusive power "in all Cases whatsoever" over the District "is sweeping and inclusive in character, ... In fact, when it legislates for the District, Congress 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." *Id.* at 249, 251.

In exercising its "extraordinary and plenary power" over the District, *United States v. Cohen,* 733 F.2d 128, 140 (D.C. Cir. 1984), Congress has in the past permitted residents of the District to vote in other states. Indeed, from 1790, when Congress accepted land that Maryland and Virginia ceded to the federal government to create the national capital, until 1800, when the seat of government was moved there, residents of those ceded lands voted in Maryland and Virginia respectively, including in the presidential election of 1800. *See* William Tindall, Origin and Government of the District of Columbia 17 (1908). Congress' original act accepting the cession of land from Maryland and Virginia provided that "the operation of the laws of the state within such district shall not be affected by this acceptance, until the time fixed for the removal of the government thereto, and until congress shall otherwise by law provide." Act of July 16, 1790,

ch. 28, 1 Stat. 130 at § 1. Congress ceased to permit residents from voting for purposes of federal elections in other states when it assumed authority for the District with the Act of Feb. 27, 1801, ch. 15, § 1, 2 Stat. 103. It is from Congressional action, then, that this activity was permitted in the first place. Congress could then revise or repeal provisions of the 1801 Act to permit residents of the federal enclave to vote in other states for purposes of federal elections. Although it permitted this activity from 1790 to 1800, there is no evidence that Congress compelled or coerced residents into voting in Maryland or Virginia, respectively.

Congress may not, however, act in a manner in contravention of the 23rd Amendment. So long as the 23rd Amendment remains, it grants the residents of the federal enclave three electoral votes in the Electoral College.

2. *As Peter Raven-Hansen put it, there is little debate regarding the intended function of the District to act as "[a]n autonomous federal enclave ... to assure Congress of authority of its immediate surroundings, to forever secure the independence of the federal government, avoiding the overweeing influence of any one state, as well as to avoid interstate and sectional rivalries." Assume for purposes of this question that S. 132 reduced the size of the federal enclave to just the White House.*
    a. *Would you still believe Congress has the authority to do so through legislation?*
    b. *Is there not a point at which the fundamental purpose of the federal enclave is so severely impaired by its miniscule size that it violates the District Clause, Art. 1, Sec. 8, Cl. 17?*

This subtle and difficult question highlights the tension between the text of the District Clause and its proclaimed purpose. The text of the District Clause is clear; it grants Congress plenary and exclusive authority over the federal district that "may" be created as the federal seat of government. It restricts the maximum size of the District to "ten Miles square," but places no further limits on the District's size or Congress' ability to alter the size. U.S. Const. art. I, § 8, cl. 17. On the other hand, as your question notes, some of the Framers also favored a federal district that supported an independent federal government. *See* The Federalist No. 43 (James Madison). The need for independence from state control or dependence undoubtedly influenced the Constitution's provision for a federal district, and it should inform Congress' policy judgment on the admission of New Columbia.

The Supreme Court has explained that in relation to the District, Congress retains "all the powers of legislation which may be exercised by a state in dealing with its affairs." *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 108 (1953). Indeed, the First Congress in 1791 altered the southern boundaries of the District. *See* Peter Raven-Hansen, *The Constitutionality of D.C. Statehood*, 60 Geo. Wash. L. Rev. 160, 169-70 (1991). Thirteen of the Constitution's Framers voted in favor of this amendment, which "'is contemporaneous and weighty evidence'" that the District Clause does not prevent Congress from altering the District's boundaries. *Marsh v. Chambers*, 463 U.S. 783, 790 (1983).

In exercising this constitutional authority to alter the boundaries of the federal district (not more than ten miles square), Congress must be mindful of the Framers' stated purpose in securing an independent seat of the federal government. The New Columbia Admission Act, in my opinion,

does so by preserving the important machinery of the federal government within the federal enclave. The hypothetical posed by your question would be more problematic constitutionally because it would protect only the White House and not the rest of the operations of the federal government. Whether or not those operations (the portion of the federal enclave protected by the New Columbia Admission Act but not in your hypothetical) are essential to the independence of the federal government, their exclusion is problematic for the additional, independent reason that such exclusion in no way serves to further the constitutional value of enfranchising the District's residents. It strikes me that it is harder to justify why someone living far from the federal seat—say, in Anacostia or upper Northwest—should be disenfranchised than it is to explain how having those neighborhoods under direct federal control is necessary to protect the federal government. By the same token, reducing the federal enclave to exclude the vast majority of federal buildings with no reduction in disenfranchisement (because the area hypothetically reduced has no residents) suggests that the sole reason for the reduction is to defeat the independence of the federal government. An enclave limited to the White House grounds would substantially decrease the territorial buffer some believe essential in securing the enclave's autonomy, but it would not increase enfranchisement beyond New Columbia's proposed bounds.

3. *In 2013, Congress appropriated close to $700 million for the District of Columbia, including its courts and local education initiatives, not including federal grants or its increased share of Medicaid Congress agreed to pay in 1997 when it took over some more state-like responsibilities for the District. Please discuss whether you believe these special funds should continue to be appropriated if the city becomes the state of New Columbia.*

Respectfully, I do not have a view on this issue. In my view, the mechanism of S. 132 is constitutional and it is for this Committee and Congress to decide whether or not it is wise.

**Post-Hearing Questions for the Record**
**Submitted to Hon. Alice M. Rivlin, Ph.D.**
**From Senator Tom A. Coburn, M.D.**

**"Equality for the District of Columbia: Discussing the Implications of S. 132, The New Columbia Admission Act of 2013"**

**September 15, 2014**

1. In 2013, Congress appropriated close to $700 million for the District, including its courts and local education initiatives, not including federal grants. Additionally, the District receives an additional 20 percent from Congress of its share of Medicaid costs as a result of the 1997 Revitalization Act.

    a. Please discuss whether you believe these special funds should continue to be appropriated if the city becomes the state of New Columbia.

    **It would depend on the circumstances at the time. If New Columbia were treated like any other state, it would gain the right to tax income earned in the state by non-residents. At the same time, the new state would give up special payments like the higher Medicaid match. The terms of admission of states in the past have always been hammered out in a negotiation between the state and the federal government. Often concessions were offered the new state, such as land grants for education. New Columbia's supporters in congress would try to get as good a deal as possible.**

    b. Please discuss how the District could compensate for this loss of funding, and whether you believe the addition of tax revenue and loss of special federal funding will result in a net benefit or loss.

    **The additional income tax revenue from non-resident earners would more than compensate for the loss of special funding. However, in order to gain admission New Columbia might have to agree to restrictions on its taxing power. It these were severe, the bargain might include some special funding, such as keeping the higher Medicaid match.**

2. Short of full budgetary and legislative autonomy, what steps can Congress take now to help the District's financial stability and day-to-day operations?

    **The most important would be budget autonomy: allowing the District to spend its own locally raised revenues without interference by Congress and to set its own fiscal year. It would also help to get rid of the layover period for legislation passed by the council and signed by the mayor.**

**Post-Hearing Questions for the Record**
**Submitted to Roger Pilon, Ph.D., J.D.**
**From Senator Tom A. Coburn, M.D.**

**"Equality for the District of Columbia: Discussing the Implications of S. 132, The New Columbia Admission Act of 2013"**

**September 15, 2014**

1. The framers and the Supreme Court have articulated certain requirements for statehood. Please discuss those requirements and whether or not you believe the District meets them.

   Response: As evidenced in their writings, especially in the *Federalist*, the Framers were concerned to secure liberty through politically independent federal and state institutions. In *Federalist* 51, for example, Madison addresses the two ways in which to guard against the tyranny of a majority. One is "by creating a will in the community independent of the majority," as in "governments possessing an hereditary or self-appointed authority." But that method, "at best, is but a precarious security; because a power independent of the society may as well espouse the unjust views of the major, as the rightful interests of the minor party, and may possibly be turned against both parties." The second method "will be exemplified in the federal republic of the United States," he continues. It is

   > by comprehending in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable. ... Whilst all authority in it will be derived from and dependent on the society, the society itself will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority. In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects.

   That "multiplicity of interests," which we find in each of the 50 states now comprising the United States, would hardly describe "New Columbia." Indeed, this "state" would be the nation's first and only "city-state," with no rural parts or interests and no separate and distinct, counties, towns, and cities, each with its own government, functioning under the state government. It would be just one big "capital city"—the capital *and the whole of* the state of New Columbia. And it would surround the nation's tiny "capital city," assuming Washington could still be called a "city," even if it could still be called "Washington." (Note how little S. 132's proponents have focused on what would remain of what we now think of as Washington.)

   Further to Madison's point, however, not only would this state be small, geographically, and urban, demographically, but as a practical matter, New Columbia's economy would reflect anything but a "multiplicity of interests." As with most other capital cities, the economy of Washington today—as well as surrounding jurisdictions—is almost entirely dependent on the federal government. But unlike with capital cities in the states, there would be no "rest of the state" to counterbalance the centralizing forces that invariably

characterize politics in capital cities, absent which the capital city would be like a giant vortex with all power accreting to it. The District today "escapes" that fate, insofar as it does, because the federal government, representing the interests of all of the states, has ultimate authority over it, disciplining it in the process.

2. The framers had very clear concerns about the dangers of the seat of the federal government being located in any one state.

    a. One concern was that it would be the first among equals. How would Maryland and Virginia, if not every other state, be affected if the District were to become a state?

    Response: Technically, under this proposal, the seat of the federal government would not be located "in any one state," but for all practical purposes it would be; thus, New Columbia, as the "gateway" to the nation's capital, would indeed be the "first among equals." Also as a practical matter, because Maryland and Virginia cooperate with the District today on a range of issues (e.g., transportation), with the District acting under the ultimate authority of the federal government, were the District to become an independent state—no more under the authority of the federal government than any other state—the federal government would have to sit at the table as well, thus adding a measure of inefficiency to such coordination. Moreover, as has been suggested, New Columbia could impose commuter taxes, remove current building height limits, and regulate in other ways that might affect citizens in Maryland and Virginia, not to mention everyone else coming to the nation's capital—and the state's interests might not be the nation's interests.

    b. Another concern was that the federal government would be dependent on it for all its essential services. How do you think statehood for the District would affect the federal government's operations and security?

    Response: Not only would the economy and people of New Columbia be almost entirely dependent on the federal government, as noted above, but the tiny enclave of "New Washington," in which the federal government would sit, would be entirely dependent for its basic services on an independent state, no longer under its control—dependent for everything from electrical power to water, sewers, snow removal, police and fire protection, and so much else that today is part of an integrated jurisdiction under Congress's ultimate authority. As Madison made clear in *Federalist* 43, it was precisely to avoid such interdependence that the Framers provided for an enclave large enough to ensure that the federal government would be independent of any single state, and that no single state would be either excessively dependent on the federal government or unduly influential over it.

3. During the hearing, you stated that Maryland's permission would be necessary before the District could become a state.

    a. Please explain why the land Maryland ceded could not have been used to make the state of New Columbia the day after the land was ceded.

Response: Pursuant to the Enclave Clause of Article I, Section 8, Maryland and Virginia in 1790 ceded land to the federal government *for the purpose of* becoming "the Seat of the Government of the United States"—land "purchased by the Consent of the Legislature of the State." It is highly doubtful that either state would have ceded that land for the purpose of creating another state. Regardless of that, were Congress to have changed the terms of the cession immediately after the transaction was completed, either or both states could have brought suit and likely would have won. Article IV, Section 3 makes it clear that no new state may be created from existing states "without the Consent of the Legislatures of the States concerned as well as of the Congress." The passage of time has no bearing on the legal principles at issue.

b. You mentioned recent Supreme Court precedent that was instructive on this issue. Please explain the case in more detail.

Response: On March 10, 2014, the United States Supreme Court decided *Marvin M. Brandt Revocable Trust v. United States*, 134 S. Ct. 1257 (2014), which is instructive on the issue here, even if not on all fours with it. A complex factual case, *Brandt* in essence concerned the status of land conveyed by the United States to the Brandt family in a 1976 land patent, subject to an easement obtained by a railroad in 1908 pursuant to the General Railroad Right-of-Way Act of 1875. In relevant part, the patent stated that the land was transferred *subject to the railroad's rights under the 1875 act*. When the railroad abandoned the right of way in 1996, the federal government sought a judicial declaration of abandonment and an order quieting title *in the government* to the abandoned right of way. Brandt countered that the railroad enjoyed a mere easement that was extinguished when the railroad abandoned it, so the Brandt's now enjoyed full title in the land free of any easement. By a vote of 8-1 the Court agreed, Chief Justice John Roberts writing for the Court.

Again, the analogy is not exact—far from it—but in *Brandt* the easement was granted originally *for a railway*, just as here the land was ceded *for a federal enclave*. If that purpose is abandoned, the land cannot simply be repurposed. Rather, at least in *Brandt*, it reverts to the owner—in *Brandt* to the subsequent owner by virtue of the 1976 land patent. The analogy doubtless ends there, because Maryland's cession was not an easement; and were Congress to try to repurpose most of the present District for a state, it's doubtful that the land would revert to Maryland, given the constitutional issues at play. Nevertheless, *Brandt* is instructive simply because it points to how important the *purpose* of an original transaction often is for determining any later developments. As noted above, Maryland did not cede land to the United States for the purpose of creating a new state on its border. Thus, even if Congress did have a power to so repurpose the District, which I strongly doubt, the terms of the original cession would almost certainly require the consent of Maryland, pursuant to Article IV, Section 3.

4. Some legal scholars have argued that the 23rd Amendment would be voided by S. 132 if New Columbia becomes a state and residents of the new federal enclave are permitted to vote in the state of their last residence.

a. In the event the state of New Columbia was admitted to the Union, do you believe the 23rd Amendment, if not repealed, would be read to give three electoral votes to the few residents within the new federal enclave?

Response: Yes: Congress cannot, by mere statute, extinguish *constitutional* rights, as Section 205 (a) of S. 132 appears to do by striking the 23rd Amendment's implementing legislation. As a result, the electoral votes of the few residents remaining in the new federal enclave—even if that included only the presidential family—would not only continue to be upheld but would be vastly more weighty than those in the rest of the nation.

b. Do you believe Congress has the authority to force residents of the new federal enclave to vote in another state?

Response: Probably not: Section 204 (a)(1)(A) of S. 132 provides that "Each State *shall* permit absent District of Columbia voters to use absentee registration procedures and to vote by absentee ballot … in elections for Federal office." (emphasis added) Under Article I, Section 2, Clause 1 of the Constitution, *states* set voter *qualifications*, subject to challenges based on specific constitutional guarantees (e.g., denials based on race or gender) or equal protection. Article I, Section 4 allows Congress to make time, place and manner alterations, but ordering states to permit District voters to vote absentee in their former states would seem to go more to the question of voter qualifications—e.g., residency—than to time, place and manner factors. (Moreover, in the new federal enclave there will still be residents who have no state in which they were last domiciled, yet they would still be entitled to vote under the 23rd Amendment.)

5. In 2013, Congress appropriated close to $700 million for the District of Columbia, including its courts and local education initiatives,[1] not including federal grants or its increased share of Medicaid Congress agreed to pay in 1997 when it took over some more state-like responsibilities for the District.[2] Please discuss whether you believe these special funds should continue to be appropriated if the city becomes the state of New Columbia.

Response: I have no special expertise nor any particular opinion on this matter.

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[1] Ex. 1, Eugene Boyd, *FY2014 Appropriations: District of Columbia*, Congressional Research Service, at 7 (Oct. 15, 2013).

[2] *District of Columbia Fiscal Structural Balance Issues*, Government Accountability Office at 3 (Sept. 2002), *available at* http://www.gao.gov/assets/240/235510.pdf.

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