Too Clever By Half: The Unconstitutionality of Partial Representation of the District of Columbia in Congress

Jonathan Turley*

Introduction

When the Democratic majority took control of the 110th Congress, one of the first matters on the agenda was one of its the oldest controversies: the representational status of the District of Columbia in Congress. In a bipartisan effort, sponsors proposed giving the District of Columbia a vote in the House of Representatives, but not the Senate. To satisfy political necessities, the sponsors agreed to add a presumptively Republican seat for Utah to balance the presumptively Democratic seat in the District of Columbia. Suddenly, a majority of members in the House had a stake in securing a vote for the District and the bill moved swiftly through the House in a newfound campaign for "equal representation." It was the very model of how political convenience can be the enemy of constitutional principle. Members have shown little patience with constitutional language and case law that bars them from creating this new form of voting member. Although the future remains uncertain, it is clear that only a few votes are needed to pass the bill in the Senate and override a possible presidential veto. It is the closest the District has come in decades to a true congressional vote, albeit half representation in only one house.[1] The understandable excitement over such a potentially historic change, however, has distracted many from the serious constitutional implications of the plan. Allowing Congress to create a new form of voting member would threaten not only the integrity of the House but the stability of the legislative branch in the carefully balanced tripartite system.

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* J.B. & Maurice C. Shapiro Professor of Public Interest Law at The George Washington University Law School. This Article is based on prior congressional testimony given before the 109th and 110th Congresses on various bills offered to secure a voting member for the District of Columbia in the House of Representatives while adding a new seat for the State of Utah.

1 Johanna Neuman, *Senate Says No D.C. Voice in Congress*, L.A. TIMES, Sept. 19, 2007, at A14 (noting that passage failed by only three votes and that a renewed effort is planned by sponsors).

The passions surrounding this debate have been intense and, not surprisingly, many of the arguments have been distorted or dismissed by advocates on both sides. In reality, this is not a debate between people who want District residents to have the vote and those who do not. There is universal agreement that the current nonvoting status of the District is fundamentally at odds with the principles and traditions of our constitutional system. As Justice Black stated in *Wesberry v. Sanders*:[2] "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."[3]

Thus, although significant differences remain on the means, everyone in this debate agrees on the common goal of ending the glaring denial of basic rights to the citizens of the District.[4] Yet, after decades of disenfranchisement, there is a tendency to personalize the barriers to such representation and to ignore any countervailing evidence in the constitutional debates. While attributing the failure to secure passage to those of us objecting to its constitutionality,[5] Delegate Eleanor Holmes Norton insisted that it is "slander" to claim that the Framers intended to leave District residents without their own representatives in Congress.[6] In reality, I have long argued for *full* representation for

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2 Wesberry v. Sanders, 376 U.S. 1 (1964).

3 *Id.* at 17.

4 For purposes of full disclosure, I was counsel in the successful challenge to the Elizabeth Morgan Act, Department of Transportation and Related Agencies Appropriations Act of 1997, Pub. L. No. 104-205, § 350, 110 Stat. 2951, 2979 (1996) (codified at D.C. CODE § 11-925 (2001)). Much like this proposal, a hearing was held to address whether Congress had the authority to enact the law, which allowed intervention into a single family custody dispute. I testified at that hearing as a neutral constitutional expert and strongly encouraged the members not to move forward on the legislation, which I viewed as a rare example of a "bill of attainder" under Sections 9 and 10 of Article I. *See generally The Elizabeth Morgan Act: Hearing on H.R. 1855 Before the H. Comm. on Gov't Reform & Oversight*, 104th Cong. (1995) (testimony of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School). I later agreed to represent Dr. Eric Foretich on a pro bono basis to challenge the Act, which was struck down as a bill of attainder by the Court of Appeals for the District of Columbia Circuit. *See* Foretich v. United States, 351 F.3d 1198, 1226 (D.C. Cir. 2003). The current bill is another example of Congress exceeding its authority, although now under Sections 2 and 8 (rather than Sections 9 and 10) of Article I.

5 In a Senate hearing, Delegate Norton told Senators that if they are going to vote against this bill, "do not blame the Framers blame Jonathan Turley." *Equal Representation in Congress: Providing Voting Rights to the District of Columbia: Hearing on S. 1257 Before the S. Comm. on Homeland Sec. & Gov't Operations*, 110th Cong. (2007) [hereinafter *Homeland Sec. Hearing*] (testimony of Del. Eleanor Holmes Norton, D-D.C.), *available at* http://hsgac.senate.gov/_files/051507Norton.pdf.

6 *Id.* In the same hearing, Secretary Jack Kemp noted: "I would hate to be my friend Jonathan Turley." *Id.* On that sentiment, at least, we may be in agreement.

the District and abhor the status of its residents.[7] As to slandering the Framers, truth remains an absolute defense to defamation and the record in this case refutes suggestions that the status of the District was some colossal oversight by the Framers. While some may view it as obnoxious, the Framers clearly understood the implications of creating a federal enclave represented by Congress as a whole. It is a subject worthy of academic debate and one that has received surprisingly little scholarly attention. This Article is intended to offer a foundation for such a debate by presenting one view of the weight of historical and legal sources on this question.[8]

Despite the best of motivations, the current effort to legislatively create a voting member in the House for the District is fundamentally flawed on a constitutional level.[9] Considerable expense would likely come from an inevitable and likely successful legal challenge, all for a bill that would achieve only partial representational status. District residents deserve full representation and although this bill would not offer such reform, there are alternatives, including a three-phased proposal that I have advocated in the past.[10]

As I detailed in my prior testimony on this proposal before the 109th Congress[11] and the 110th Congress,[12] I respectfully, but strongly,

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7 *See, e.g.*, *District of Columbia Fair and Equal House Voting Rights Act of 2006: Hearing on H.R. 5388 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 51–76 (2006) [hereinafter *Hearing on H.R. 5388*] (testimony of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School).

8 In this Article, I will not address the constitutionality of giving the District of Columbia and other delegates the right to vote in the Committee of the Whole. *See* Michel v. Anderson, 14 F.3d 623, 630 (D.C. Cir. 1994) (holding that "Article I, § 2 . . . . precludes the House from bestowing the characteristics of membership on someone other than those 'chosen every second year by the People of the several States'"). The most significant distinction that can be made is that the vote under this law is entirely symbolic because it cannot be used to actually pass legislation in a close vote. In 1993, Congress allowed such voting for the delegates from the District of Columbia, American Samoa, Guam, and the United States Virgin Islands as well as Puerto Rico's resident commissioner—on the condition that such votes could not be determinative passing legislation. This rule was changed in 1994 but then reinstated again in 2007. *See* Voting by Delegates and Resident Commissioner in Committee of the Whole, H.R. Res. 78, 110th Cong. (2007).

9 *See* Jonathan Turley, *Right Goal, Wrong Means*, WASH. POST, Dec. 5, 2004, at B8 (noting that current proposals would "subvert the intentions of the Founders by ignoring textual references to 'states' in the Constitution"); Jonathan Turley, *Too Clever By Half: The Unconstitutional D.C. Voting Rights Bill*, ROLL CALL, Jan. 25, 2007, at 8 (noting that the Constitution clearly limits House voting Members solely to states).

10 *See infra* Part VII.

11 *Hearing on H.R. 5388*, *supra* note 7, at 49, 53 (testimony of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School).

12 *Ending Taxation Without Representation: The Constitutionality of S. 1257: Hearing on S. 1257 Before the S. Comm. on the Judiciary*, 110th Cong. 4 (2007) [hereinafter *Ending Taxation*

disagree with the constitutional analysis offered to Congress by Professors Viet Dinh[13] and Charles Ogletree,[14] as well as Judges Kenneth Starr[15] and Patricia Wald.[16] Notably, since my first testimony on this issue, the independent Congressional Research Service joined those of us who view this legislation as facially unconstitutional.[17] Likewise, the White House recently disclosed that its attorneys have reached the same conclusion and found this legislation to be facially unconstitutional.[18] President Bush has also indicated that he will veto the legislation on constitutional grounds.

The drafters of this legislation have boldly stated that "[n]otwithstanding any other provision of law, the District of Columbia shall be considered a Congressional district for purposes of repre-

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Hearing] (prepared statement of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School), *available at* http://judiciary.senate.gov/pdf/05-23-07 Turleytestimony.pdf; *Homeland Sec. Hearing*, *supra* note 5 (testimony of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School); *District of Columbia House Voting Rights Act of 2007: Hearing on H.R. 1433 Before the H. Comm. on the Judiciary*, 110th Cong. 40 (2007) [hereinafter *Judiciary Comm. Hearing*] (same).

13 *See Judiciary Comm. Hearing*, *supra* note 12, at 8–28 (testimony of Viet Dinh, Professor of Law and Co-Director Asian Law & Policy Studies Georgetown University Law Center). This analysis was coauthored by Mr. Adam Charnes, an attorney with the law firm of Kilpatrick Stockton LLP. Viet D. Dinh & Adam H. Charnes, The Authority of Congress to Enact Legislation to Provide the District of Columbia with Voting Representation in the House of Representatives (Nov. 2004) (unpublished manuscript submitted to the H. Comm. on Gov't Reform, 108th Cong.), *available at* http://www.dcvote.org/pdfs/congress/vietdinh112004.pdf. This analysis was also supported recently by the American Bar Association in a June 16, 2006, letter to Chairman James Sensenbrenner, *available at* http://www.abanet.org/poladv/letters/109th/election/DC%20FAIR%20Act%20Ltr%20to%20House%20Jud%206-16-06%20web.pdf.

14 *See Ending Taxation Hearing*, *supra* note 12 (testimony of Charles J. Ogletree, Jesse Climenko Professor of Law, Harvard Law School), *available at* http://judiciary.senate.gov/testimony.cfm?id=2789&wit_id=6483.

15 *See Common Sense Justice for the Nation's Capital: An Examination of Proposals to Give D.C. Residents Direct Representation: Hearing Before the H. Comm. on Gov't Reform*, 108th Cong. 75–84 (2004) (testimony of Kenneth W. Starr, former Solicitor Gen. of the United States; former J., D.C. Cir.).

16 *Ending Taxation Hearing*, *supra* note 12 (testimony of Patricia M. Wald, former C.J., D.C. Cir.), *available at* http://judiciary.senate.gov/testimony.cfm?id=2789&wit_id=6482.

17 Kenneth R. Thomas, Cong. Research Serv., The Constitutionality of Awarding the Delegate for the District of Columbia a Vote in the House of Representatives or the Committee of the Whole, CRS-20 (2007), *available at* http://assets.opencrs.com/rpts/RL33824_20070124.pdf (concluding "that case law that does exist would seem to indicate that not only is the District of Columbia not a 'state' for purposes of representation, but that congressional power over the District of Columbia does not represent a sufficient power to grant congressional representation").

18 *See* Christina Bellantoni, *Democrats Adjust Rules for D.C. Vote Bill*, Wash. Times, Apr. 19, 2007, at A5; Suzanne Struglinski, *House OKs a 4th Seat for Utah*, Deseret Morning News (Salt Lake City), Apr. 20, 2007, at A8.

sentation in the House of Representatives."[19] What this language really means is: "notwithstanding any provision of the Constitution."[20] Of course, Congress cannot set aside provisions of the Constitution absent a ratified constitutional amendment. The language of this legislation is strikingly similar to a 1978 constitutional amendment that failed after being ratified by only sixteen states.[21] Indeed, in both prior successful and unsuccessful amendments[22] (as well as in arguments made in court[23]), Congress has conceded that the District is not a state for the purposes of voting in Congress. Now, unable to pass a constitutional amendment, sponsors hope to circumvent the process laid out in Article V[24] by claiming the inherent authority to add a nonstate voting member to the House of Representatives.

The controversy over the District vote was joined by an equally controversial effort to add an at-large district to the State of Utah.[25]

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19 District of Columbia House Voting Rights Act, S. 1257, 110th Cong. § 2 (2007).

20 Indeed, even the title of one of the hearings revealed a fundamental rejection of the design and intent of the Framers, "Ending Taxation Without Representation." *See Ending Taxation Hearing*, *supra* note 12 (testimony of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School). The Framers did not leave the District "without representation" and would not view its current status as an example of the colonial scourge of "taxation without representation." Rather, they repeatedly stated that the District would be represented by the entire Congress and that members (as residents of or commuters to that District) would bear a special interest in its operations. Whatever the merits of that view, the District was and is represented in the fashion envisioned by the Framers.

21 *See* H.R.J. Res. 554, 95th Cong. (1978). Likewise, in 1993, a bill to create the State of New Columbia failed by a wide margin. *See* New Columbia Admission Act, H.R. 51, 103d Cong. (1993) (failing by a 153–277 vote).

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

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

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

25 In my first testimony to the House on this matter, I expressed considerable skepticism over the legality of the creation of an at-large seat in Utah, particularly because of the "one-man, one-vote" doctrine established in *Wesberry v. Sanders*, 376 U.S. 1, 7–8, 18 (1964). *See Hearing on H.R. 5388*, *supra* note 7, at 53, 69 (testimony of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School). Although the Supreme Court has not clearly addressed the interstate implications of the "one person, one vote" doctrine, the earlier proposal would likely force it to do so. The Court has stressed that the debates over the

The Senate wisely changed the at-large provision for the Utah district to require the creation of new individual districts. This change left the constitutional question squarely on the District's member and the ability of Congress to manipulate its own rolls by adding a new form of voting member. This Article lays out the textual, historical, and policy arguments for why Congress lacks such authority.

I. The Original Purpose of a Federal Enclave and Its Continued Necessity in the Twenty-First Century

The nonvoting status of District residents remains something of a historical anomaly that should have been addressed more clearly at the drafting of the Constitution. Moreover, with the passage of time, there remains little necessity for a separate enclave beyond the symbolic value of "belonging" to no individual state. To understand the perceived necessity underlying Article I, Section 8, one has to consider the events that led to the first call for a separate federal district.

On January 1, 1783, Congress was meeting in Philadelphia when they were surprised by a mob of Revolutionary War veterans demanding their long-overdue back pay. It was a period of great discontentment with Congress, and the citizens of Pennsylvania were more likely to help the mob than to help suppress it. Indeed, when Congress called on the state officials to call out the militia, they refused.[26] To appreciate the desire to create a unique nonstate enclave, it is impor-

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Constitution reveal that "[o]ne principle was uppermost in the minds of many delegates: that, no matter where he lived, each voter should have a voice equal to that of every other in electing members of Congress." *Wesberry*, 376 U.S. at 10. Moreover, the Court has strongly indicated that there is no conceptual barrier to applying the *Wesberry* principles to an interstate rather than an intrastate controversy. Dep't of Commerce v. Montana, 503 U.S. 442, 461 (1992).

Awarding two representatives to each resident of Utah creates an obvious imbalance vis-à-vis other states. House members are expected to be advocates for this insular constituency. Here, residents of one state could look to two representatives to do their bidding whereas other citizens would be limited to one. The lifting of the 435-member limit on membership of the House, established in 1911, is also a dangerous departure for this Congress. Although membership was once increased to 437 on a temporary basis for the admission of Alaska and Hawaii, past members have respected this structural limitation. *See generally Ending Taxation Hearing*, *supra* note 12 (testimony of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School). After a casual increase, it will become much easier for future majorities to add members. Use of an at-large seat magnifies this problem by abandoning the principle of individual member districts of roughly equal constituencies. By using the at-large option, politicians can simply give a state a new vote without having to redistrict existing districts.

26 25 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 973 (Gov't Printing Office 1922) (1783).

tant to consider the dangers and lasting humiliation of that scene as it was recorded in the daily account from the debates:

> [On 21 June 1783,] [t]he mutinous soldiers presented themselves, drawn up in the street before the [s]tate [h]ouse, where Congress had assembled. [Pennsylvania authorities were] called on for the proper interposition. [State officials demurred and explained] the difficulty under actual circumstances, of bringing out the militia . . . for the suppression of the mutiny . . . . [It was] thought that without some outrages on persons or property, the temper of the militia could not be relied on . . . .
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> [T]he [s]oldiers remained in their position, without offering any violence, individuals only occasionally uttering offensive words and wantonly point[ing] their Muskets to the [w]indows of the [h]all of Congress. No danger from premeditated violence was apprehended, but it was observed that spirituous drink from the tippling houses adjoining began to be liberally served out to the Soldiers, [and] might lead to hasty excesses. None were committed however, and about [three o'clock], the usual hour [Congress] adjourned; the [s]oldiers, [though] in some instances offering a mock obstruction, permitt[ed] the members to pass through their ranks. They soon afterwards retired themselves to the [b]arracks.[27]

Congress was forced to flee, first to Princeton, N.J., then to Annapolis, and ultimately to New York City.[28]

When the Framers gathered again in Philadelphia in the summer of 1787 to draft a new constitution, the flight from that city five years before was still prominent in their minds.[29] Madison and others called for the creation of a federal enclave or district as the seat of the federal government, independent of any state and protected by federal authority.[30] Only then, Madison noted, could they avoid "public authority [being] insulted and its proceedings . . . interrupted, with impunity."[31] Madison believed that physical control of the Capital would

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27 *Id.*

28 Turley, *Right Goal, Wrong Means*, *supra* note 9, at B8.

29 *See, e.g.*, 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 433 [hereinafter ELLIOT DEBATES] (James Madison) (Jonathan Elliot ed., 2d ed. 1907).

30 *Id.*

31 THE FEDERALIST NO. 43, at 289 (James Madison) (Jacob E. Cooke ed., 1961).

allow direct control of proceedings or act like a Damocles Sword dangling over the heads of members of other states:

> How could the general government be guarded from the undue influence of particular states, or from insults, without such exclusive power? If it were at the pleasure of a particular state to control the sessions and deliberations of Congress, would they be secure from insults, or the influence of such a state?[32]

James Iredell raised the same point in the North Carolina ratification convention when he asked, "Do we not all remember that, in the year 1783, a band of soldiers went and insulted Congress?"[33] By creating a special area free of state control, "[i]t is to be hoped that such a disgraceful scene will never happen again; but that, for the future, the national government will be able to protect itself."[34]

In addition to the desire to be free from the transient support of an individual state, the Framers advanced a number of other reasons for creating this special enclave.[35] There was a fear that a state (and its representatives in Congress) would have too much influence over Congress, by creating "a dependence of the members of the general Government."[36] There was also a fear that symbolically the honor given to one state would create in "the national councils an imputation of awe or influence, equally dishonorable to the Government, and dissatisfactory to the other members of the confederacy."[37] There was also a view that the host state would benefit too much from "the gradual accumulation of public improvements at the stationary residence of the Government."[38] Finally, some Framers saw the capital

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32 3 ELLIOT DEBATES, *supra* note 29, at 433.

33 4 ELLIOT DEBATES, *supra* note 29, at 219–20, *reprinted in* 3 THE FOUNDERS' CONSTITUTION 225 (Philip B. Kurland & Ralph Lerner eds., 1987) ("The sovereignty of the United States was treated with indignity. They applied for protection to the state they resided in, but could obtain none.").

34 *Id.*

35 The analysis by Dinh and Charnes places great emphasis on this security issue and then concludes that, "[d]enying the residents of the District the right to vote in elections for the House of Representatives was neither necessary nor intended by the Framers to achieve this purpose." Dinh & Charnes, *supra* note 13, at 7. This was not, however, the only purpose motivating the establishment of a federal enclave. The general intention was to create a nonstate under complete congressional authority as a federal enclave. *See generally Ending Taxation Hearing*, *supra* note 12 (testimony of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School). The Framers clearly understood and intended for the District to be represented derivatively by the entire Congress. *Id.*

36 THE FEDERALIST NO. 43, *supra* note 31, at 289.

37 *Id.*

38 *Id.*

city as promising the same difficulties that London sometimes posed for the English.[39] London then (and now) often took steps as a municipality that challenged the national government and policy.[40] This led to a continual level of tension between the national and local representatives.

The District was created, therefore, for the specific purpose of being a nonstate, a special enclave created and operated by Congress. Under the original design, the security and operations of the federal enclave would remain the collective responsibilities of the entire Congress, and so, of all the various states. The Framers, however, intentionally preserved the option to change the dimensions or even relocate the federal district.[41] Indeed, Charles Pinckney wanted the District Clause[42] to read that Congress could "fix and *permanently* establish the seat of the Government . . . ."[43] However, the Framers rejected the inclusion of the word "permanently" to allow for some flexibility.

What is most striking about this history is not just the clarity of the purpose in the creation of the District but the lack of any continuing need for such a "federal town." Since the Constitutional Conven-

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39 KENNETH R. BOWLING, THE CREATION OF WASHINGTON, D.C.: THE IDEA AND LOCATION OF THE AMERICAN CAPITAL 76 (George Mason Univ. Press 1991).

40 This included such famous confrontations as the impeachment of Sir Richard Gurney, lord mayor of London, in 1642, after he "thwarted Parliament's order to store arms and ammunition in storehouses." RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 71–73 (1973). Likewise, after John Wilkes was imprisoned by the King and tossed out of Parliament in the 1760s, he notably became Lord Mayor of London in 1774. David Johnson, *John Wilkes: The Scandalous Father of Civil Liberty*, HISTORY TODAY, Aug. 1, 2006, at 65 (book review).

The modern London mayors often assert the same independence from the Parliament and Prime Minister, with Ken Livingston as a typical example. *See* Marjorie Miller, *American Transit Expert Rides to the Rescue*, L.A. TIMES, Feb. 4, 2001, at 8 (discussing Mayor's successful campaign to stop ministry plans on mass transport); David White, *'Tube' Strike Highlights Transport Funding Troubles*, FIN. TIMES (London), Feb. 6, 2002, at 9 (same). "Red Ken" as he was called, became London's first elected mayor in 2000. Before that time, various governing units managed London, often in tension with the national government. This was the case with the Greater London Council, which Margaret Thatcher abolished in 1986 for continually harassing and mocking her government's policies. Kevin Cullen, *Veteran of Labor's Older War, Defying Blair, May Win London*, BOSTON GLOBE, Apr. 30, 2000, at 6.

41 U.S. CONST. art. I, § 2, cl. 17.

42 *Id.*

43 Peter Raven-Hansen, *The Constitutionality of D.C. Statehood*, 60 GEO. WASH. L. REV. 160, 168 (1991) (citing JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 420 (Gaillard Hund & James Brown Scott eds., 1920)).

tion, courts have recognized that federal, not state, jurisdiction governs federal lands. The Court stressed in *Hancock v. Train*:[44]

> Because of the fundamental importance of the principles shielding federal installations and activities from regulation by the States, an authorization of state regulation is found only when and to the extent there is "a clear congressional mandate," "specific congressional action" that makes this authorization of state regulation "clear and unambiguous."[45]

Although the state retains jurisdiction for some federal properties, this depends on the manner in which it was acquired or ceded.[46] Certainly, Congress has the ability through the Enclave Clause[47] to purchase such land and to establish exclusive jurisdiction.

Moreover, the federal government now has a large security force and is not dependent on the states. Finally, the position of the federal government vis-à-vis the states has flipped, with the federal government now the dominant party in this relationship. Thus, even though federal buildings or courthouses are located in the various states, they remain legally and practically separate from state jurisdiction, although enforcement of state criminal laws does occur in such buildings. Just as the United Nations has a special status in New York City and does not bend to the pressure of its host country or city, the federal government does not need a special federal enclave to exercise its independence from individual state governments.

The original motivating purposes behind the creation of the federal enclave, therefore, are no longer compelling. Madison wanted a nonstate location for the seat of government because "[i]f any state had the power of legislation over the place where Congress should fix the general government, this would impair the dignity, and hazard the safety, of Congress."[48] Today, there is no cognizable "hazard [to] safety," but there certainly remains the symbolic question of the impairment to the dignity of the several states by locating the seat of government in a specific state. As noted below,[49] I believe that the

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44 Hancock v. Train, 426 U.S. 167 (1976).

45 *Id.* at 179 (citations omitted); *see also* Paul v. United States, 371 U.S. 245, 263 (1963); Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110, 122 (1954); California *ex rel.* State Water Res. Control Bd. v. EPA, 511 F.2d 963, 968 (9th Cir. 1975), *rev'd on other grounds*, EPA v. California, 426 U.S. 200 (1976).

46 *See* Kleppe v. New Mexico, 426 U.S. 529, 543 (1976) ("Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory[.]").

47 U.S. CONST. art. I, § 8, cl. 17.

48 3 ELLIOT DEBATES, *supra* note 29, at 89 (James Madison).

49 *See infra* Part VII.

seat of the federal government should remain completely federal territory as an important symbol of the equality of all states in the governance of the nation. The actual seat of government, however, is a tiny fraction of the current federal district.

Putting aside the questionable need for a "federal town," the creation of this federal enclave was a matter of contemporary debate at the time, and from the first suggestion of a federal district to the retrocession of the Virginia territory, the only options for representation for District residents were viewed as limited to either a constitutional amendment or retrocession of the District itself.[50] Those remain the only two clear options today, though retrocession itself can take many different forms in its actual execution, as discussed below.[51]

II. The Several States: A Textual and Contextual Analysis of Article I

The current debate not only raises the meaning of various textual and historical sources, but more fundamentally, the weight to be given textual, historical, and policy considerations in the interpretation of the Constitution. Certainly, before turning to the text of Article I, it is important to acknowledge that plain meaning arguments have their inherent limitations. Some scholars and jurists have criticized the more simplistic uses of plain meaning when, as Judge Frank Easterbrook has noted, "[t]o invoke a plain meaning rule is to beg the central question of meaning, to sweep under the rug, to hide, the means by which meaning is established."[52] Indeed, it is impossible to state that a word has a plain meaning without considering its context and purpose within a constitution or statute.[53] Yet, though strict textualist interpretative schools have long been a subject of controversy, it is generally accepted that any interpretation must begin with the text and, when clear, the text should control in conflicts.

As shown below, the composition of Congress was one of the structural provisions to be fixed within our system, to be protected

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50 Efforts to secure voting rights in the courts have failed. *See* Adams v. Clinton, 90 F. Supp. 2d 35, 50, 55–56 (D.D.C. 2000).

51 *See infra* Part III.

52 Frank H. Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL'Y 87, 91 (1984).

53 *See* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 67 (1994) ("'Plain meaning' as a way to understand language is silly. In interesting cases, meaning is not 'plain'; it must be imputed; and the choice among meanings must have a footing more solid that [sic] a dictionary . . . .").

from opportunistic manipulation or creative realignment.[54] There are fundamental terms that serve as building blocks or structural elements to the Constitution. The word "states" is one such term. Both textually and contextually, the Framers used this term with a literal meaning and purpose.

The debate over the meaning of Article I recalls the admonishment of the Supreme Court that in constitutional interpretation "every word must have its due force, and appropriate meaning; . . . no word was unnecessarily used, or needlessly added."[55] More importantly, there is a tendency to ignore the plain meaning of text when it presents inconvenient barriers to contemporary goals. In his famous commentaries on the Constitution, Justice Story warned against the use of interpretation to avoid unpopular limitations in our constitutional system:

> [T]he Constitution of the United States is to receive a reasonable interpretation of its language and its powers, keeping in view the objects and purposes for which those powers were conferred. By a reasonable interpretation we mean, that, in case the words are susceptible of two different senses, the one strict, the other more enlarged, that should be adopted which is most consonant with the apparent objects and intent of the Constitution . . . .
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> . . . .
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> . . . On the other hand, a rule of equal importance is not to enlarge the construction of a given power beyond the fair scope of its terms merely because the restriction is inconvenient, impolitic, or even mischievous. If it be mischievous,

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54 Stephen Carter made an analogous point in discussing structural provisions in the checks and balances of the Constitution:

> The specificity of these clauses is completely sensible if the authors were attempting to implement a particular conception of the way the government should work. Thus while we assume with respect to the entire Constitution that the Framers meant what they said, we may also assume that with respect to the Constitution's structural provisions they took care to say what they meant. The entire Constitution means something; the more determinate clauses mean something specific. After all, these structural provisions were meant to constitute a government comprising institutions that would interact, and it is difficult to design institutional interaction without a concrete image of what the institutions are. Because the structural provisions are relatively clear, moreover, important substantive biases held by the interpreters—the judges—cannot easily creep in and corrupt the process of adjudication.

Stephen L. Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 YALE L.J. 821, 854 (1985).

55 Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 570–71 (1840).

> the power of redressing the evil lies with the people by an exercise of the power of amendment.[56]

Justice Story's concern about the distortive effect of contemporary politics on constitutional interpretation is vividly evident in the debate over a District vote.

A. The Text of the Composition and District Clauses

1. The Composition Clause

Any constitutional analysis necessarily begins with the text of two primary provisions, though others (as will be shown)[57] are illustrative of their meaning. Article I, Section 2 is the most obvious and controlling provision on this question, not the District Clause. The Framers defined the voting membership of the House in that provision as composed of representatives of the "several States."[58] Conversely, the District Clause was designed to define the power of Congress *within* the federal enclave.

On its face, the language of Article I, Section 2 would appear a model of clarity:

> The House of Representatives shall be composed of Members chosen every second Year by the *People of the several States*, and the Electors in *each State* shall have the Qualifications requisite for Electors of the most numerous Branch of the *State Legislature*.[59]

As with the Seventeenth Amendment determination of the composition of the Senate,[60] the text clearly limits the membership of the House to representatives of the several states.

The reference to "states" is repeated in the section when the Framers specified that each representative must "when elected, be an Inhabitant of that State in which he shall be chosen."[61] Notably, the reference to "the most numerous Branch of the State Legislature" clearly distinguishes the state entity from the District.[62] The District

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56 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 419, at 310, § 426, at 314 (4th ed. 1873).

57 *See* Part II.B.

58 U.S. CONST. art. I, § 2, cl. 1.

59 *Id.* (emphasis added).

60 Though not directly relevant to S. 1257, the Seventeenth Amendment contains similar language mandating that the Senate shall be composed of two Senators of each state "elected by the people thereof." *Id.* amend. XVII.

61 *Id.* art. I, § 2, cl. 2.

62 *Id.*

had no independent government at the time and currently has only a city council.

In Article I, the drafters refer repeatedly to states or several states, as well as state legislatures, in defining the membership of the House of Representatives. As the Supreme Court has noted, "[a] state, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed."[63] Notably, no one has seriously argued that the Framers had any other meaning in mind when they used the term "several States" beyond the conventional meaning of a state under Article I, Section 2, Clause 1.[64]

Beyond the textual reference to states, the reference to members in the Composition Clause has been cited as a clear distinction in the minds of the Framers between voting and nonvoting representatives. Professors John O. McGinnis and Michael B. Rappaport address this very point and note that the word "members" was meant to protect the essential structural role by guaranteeing that representatives of the states, and only the states, would vote in Congress:

> If the House could deprive Representatives from certain states of the right to vote on bills or *could assign that right to non-members of its choosing*, a majority of the House could circumvent the carefully crafted structure established by the Framers to govern national legislation. This structure maintained important compromises that were essential to the Constitution's creation, such as the equilibrium between large and small states. The structure also protected minorities by making it more difficult for unjust legislation to pass. It is inconceivable that the Framers would have permitted a majority of the House to subvert this arrangement.[65]

2. The District Clause

The second provision at issue is the District Clause found in Article I, Section 8, which gives Congress the power:

> To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may,

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63 Texas v. White, 74 U.S. (7 Wall.) 700, 721 (1868).

64 *See* Dinh & Charnes, *supra* note 13, at 9. *But see* Peter Raven-Hansen, *supra* note 43, at 168.

65 John O. McGinnis & Michael B. Rappaport, *The Rights of Legislators and the Wrongs of Interpretation: A Further Defense of the Constitutionality of Legislative Supermajority Rules,* 47 DUKE L.J. 327, 333 (1997) (emphasis added).

> by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings . . . .[66]

Notably, the use of "in all Cases whatsoever" emphasizes the administrative and operational character of the power given to Congress. As the Supreme Court noted, Congress exercises this power "in all cases where legislation is possible."[67] This Clause confers on Congress a power to dictate the internal conditions and operations of the federal enclave. On its face, this language is not a rival authority to the Composition Clause or the structural provisions for Congress articulated in the Constitution. Indeed, it is a power that remains "controlled by the provisions of the Constitution."[68] This includes those provisions that structure the legislative branch.

Missing from the references to the federal enclave is any language suggesting any representation other than the representation afforded by Congress as a whole. Indeed, the federal enclave is referred to as "the Seat of Government" and grouped with other forms of federal enclaves and territories, allowing Congress "to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings . . . ."[69] The text conveys a single obvious meaning: the Framers created various types of enclaves that would not be part of a state or subject to the provisions referencing states under the new constitutional system. These are nonstate entities set apart from the structural provisions concerning state entities such as the Composition and Qualification Clauses.

B. The Context of the Composition and District Clauses

In some cases, the language of a constitutional provision can change when considered in a broad context, particularly with similar language in other provisions. The Supreme Court has emphasized in matters of statutory construction (and presumably in constitutional in-

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66 U.S. CONST. art. I, § 8, cl. 17.

67 O'Donoghue v. United States, 289 U.S. 516, 539 (1933) (citation omitted).

68 Binns v. United States, 194 U.S. 486, 491 (1904).

69 U.S. CONST. art. I, § 8, cl. 17.

terpretation) that courts should "assume[ ] that identical words used in different parts of the same act are intended to have the same meaning."[70] This does not mean that there cannot be exceptions,[71] but such exceptions must be based on circumstances where the consistent interpretation would lead to conflicting or clearly unintentional results.[72]

An interpretation of the Composition Clause turns on the meaning of "states." A review of the Constitution shows that this term is ubiquitous. Within Article I, the word "states" is central to defining the Article's articulation of various powers and responsibilities. Indeed, if "several States" under the Composition Clause was intended to have a more fluid meaning to extend to nonstates like the District, various provisions become unintelligible.[73] For both the composition of the House and Senate, the defining unit was that of a state with a distinct government, including a legislative branch. For example, before the Seventeenth Amendment in 1913, Article I read: "The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof . . . ."[74] For much of its history, the District did not have an independent government, let alone a true state legislative branch.

There is also the Qualification Clause, under which members must have "the Qualifications requisite for Electors of the most numerous Branch of the State Legislature," as well as other criteria of residence, age, and other characteristics.[75] Obviously, the District has no state legislature and was never intended to have such a state-like structure. Moreover, as noted below, if Congress can manipulate the meaning of the qualifications, it can change not just the voting members of Congress, but also their basic qualifications to serve in that capacity.

The drafters also referred to the "Executive Authority" of states in issuing writs for special elections to fill vacancies in Article I, Section 2. Like the absence of a legislative branch, the District did not

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70 Sorenson v. Sec'y of the Treasury, 475 U.S. 851, 860 (1986) (internal quotations and citation omitted).

71 *See, e.g.*, District of Columbia v. Carter, 409 U.S. 418, 419–20 (1973) ("Whether the District of Columbia constitutes a 'State or Territory' within the meaning of any particular statutory or constitutional provision depends upon the character and aim of the specific provision involved.").

72 *See, e.g.*, Milton S. Kronheim & Co. v. District of Columbia, 91 F.3d 193, 198–99 (D.C. Cir. 1996) (holding that the Commerce Clause and the Twenty-First Amendment apply to the District even though "D.C. is not a state").

73 *See supra* notes 71–72 and accompanying text; *infra* notes 74–81 and accompanying text.

74 U.S. CONST. art. I, § 3, cl. 1 (amended 1913).

75 *Id.* § 2, cl. 1.

have a true executive authority and would not have been able to fulfill such a structural condition.[76]

Article I also requires that "[n]o Person shall be a Representative who shall not . . . be an Inhabitant of that State in which he shall be chosen."[77] The drafters could have allowed for inhabitants of federal territories or the proposed federal district. Instead, they chose to confine the qualification for service in the House to being a resident of an actual state.

In the conduct of elections under Article I, Section 4, the drafters again mandated that "each State" would establish "[t]he Times, Places, and Manner."[78] This provision specifically juxtaposes the authority of such states with the authority of Congress. The provision makes little sense if a state is defined as including entities created and controlled by Congress.

Article I also ties the term "several States" to the actual states making up the United States. The drafters, for example, mandated that "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . . ."[79] The District was neither subject to taxes at the beginning of its existence nor represented as a member of the union of states.

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76 Indeed, the recent changes to the structure of the D.C. government would have likely been viewed as creating a de facto state-like system in conflict with the original model. The D.C. government now has a mayor and considerable independence from Congress. It has gradually grafted on the elements of a state government, including such important symbolic changes as the renaming of the former office of "corporate counsel" to be the "Office of Attorney General for the District of Columbia," a name that tracts the title for states rather than cities. This change was expressly linked to the claim of state status with the new Attorney General explaining:

> This name change comes at an important time in the District's history. In an era when the District struggles for voting rights and is compelled to bring a lawsuit for the right to tax nonresidents, a simple name change for the Office of the Corporation Counsel sends a strong message to our citizens that we are, indeed, a state in practice, if not in fact.

Press Release, District of Columbia Office of the Attorney General, Mayor Renames OCC to Office of the Attorney General for DC (May 26, 2004), *available at* http://occ.dc.gov/occ/cwp/view,a,11,q,614505,occNav_GID,1521.asp. Likewise, despite failing to pass the District voting legislation, Delegate Norton did succeed in getting the 110th Congress to pass another symbol of statehood: allowing the District to have its own quarter minted like the fifty states. Andrea Seabrook, *D.C. Scores Own Quarter* (NPR radio broadcast Dec. 23, 2007), *available at* http://www.npr.org/templates/story/story.php?storyId=17563859. Congress further agreed to the creation of a state-like stamp. *Id.* (interviewing Del. Eleanor Holmes Norton, D-D.C., who predicted that 2008 will see the vote follow the approval of a state-like stamp and quarter).

77 U.S. CONST. art. I, § 2, cl. 2.

78 *Id.* § 4, cl. 1.

79 *Id.* § 2, cl. 3 (amended 1968).

Article I, Section 2, Clause 3 specifies that "each State shall have at Least one Representative."[80] Article I, Section 3 allots two Senators to "each State." If the Framers believed that the District was a quasi-state under some fluid definition, there would have been some provision or even discussion of a District representative and two Senators from the start. At a minimum, the Composition Clause would have referenced the potential for nonstate members, particularly given the large territories, such as Ohio, which were yet to achieve state status. Yet there is no reference to the District in any of these provisions. It is relegated to the District Clause, which puts it under the authority of Congress.

The reference to "states" obviously extends beyond Article I. Article II specified that "[t]he Electors [of the President] shall meet in their respective States" and later be "transmit[ted] . . . to the Seat of the Government of the United States," that is, the District of Columbia.[81] When Congress wanted to give the District a vote in the process, it passed the Twenty-Third Amendment. That Amendment expressly distinguishes the District from the meaning of a state by specifying that District electors "shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State . . . ."[82]

Notably, just as Article I refers to apportionment of representatives "among the several States,"[83] the later Fourteenth Amendment adopted the same language in specifying that "Representatives shall be apportioned among the several States according to their respective numbers . . . ."[84] Thus, it is not true that the reference to states may have been due to some unawareness of the District's existence. The Fourteenth Amendment continued the same language in 1868 after the District was a major American city. Again, the drafters used "state" as the operative term, as with Article I, to determine the apportionment of representatives in Congress. The District was never subject to such apportionment and, even under this bill, would not be subject to the traditional apportionment determinations for other districts.

Likewise, when the Framers specified how to select a President when the Electoral College is inconclusive, they used the word

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80 *Id.*

81 *Id.* art. II, § 1, cl. 3 (amended 1804).

82 *Id.* amend. XXIII, § 1, cl. 2.

83 *Id.* art. I, § 2, cl. 3 (amended 1968).

84 *Id.* amend. XIV, § 2.

"states" to designate actual state entities. Pursuant to Article II, Section 1, "the Votes shall be taken by States, the Representation from each State having one Vote . . . ."[85]

Conversely, when the drafters wanted to refer to citizens without reference to their states, they used the fairly consistent language of "citizens of the United States" or "the people." This was demonstrated most vividly in provisions such as the Tenth Amendment, which declares that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[86] Not only did the drafters refer to the two common constitutional categories for rights and powers (in addition to the federal government), but it cannot be plausibly argued that a federal enclave could be read into the meaning of states in such provisions.

The District Clause itself magnifies the distinction of the District from actual states. It is referred to as the "Seat of Government" and subject to the same authority that Congress would exercise "over all Places purchased by the Consent of the Legislature of the State . . . ."[87] Under this language, the District as a whole was delegated to the United States. As the D.C. Circuit stressed recently in *Parker*, "the authors of the Bill of Rights were perfectly capable of distinguishing between 'the people,' on the one hand, and 'the states,' on the other."[88] Likewise, when the drafters of the Constitution wanted to refer to the District, they did so clearly in the text. This was evident not only with the original Constitution and the Bill of Rights, but also with the much later amendments. For example, the Twenty-Third Amendment, which gives the District the right to have presidential electors, expressly distinguishes the District from the states and establishes, for that purpose, that the District should be treated like a state, mandating "[a] number of electors of President and Vice President equal to the whole number of Senators and Representatives in Con-

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85 *Id*. art. II, § 1, cl. 3 (amended 1804).

86 *Id.* amend. X. *See generally* Lee v. Flintkote Co., 593 F.2d 1275, 1278 n.14 (D.C. Cir. 1979) ("[T]he District, unlike the states, has no reserved power to be guaranteed by the Tenth Amendment."). The same can be said of the Eleventh Amendment. *See* LaShawn v. Barry, 87 F.3d 1389, 1393–94 n.4 (D.C. Cir. 1996) ("The District of Columbia is not a state. . . . Thus, [the Eleventh Amendment] has no application here.").

87 U.S. CONST. art. I, § 8.

88 Parker v. District of Columbia, 478 F.3d 370, 382 (D.C. Cir. 2007). The Supreme Court has accepted the *Parker* case for review in 2008, a decision that could potentially reexamine the status of the District as well as clarify the meaning of the Second Amendment itself. *See generally* Jonathan Turley, *A Liberal's Lament: The NRA Might Be Right After All*, USA TODAY, Oct. 4, 2007, at 11A.

gress to which the District would be entitled *if it were a State* . . . ."[89] This Amendment makes little sense if Congress could simply bestow the voting rights of states on the District. Rather, it reaffirmed that, if the District wishes to vote constitutionally as a state, an amendment formally extending such parity is required.[90]

These references illustrate that the drafters knew the difference between the nouns "state," "territory," and "the District" and used them consistently. If one simply takes the plain meaning of these terms, the various provisions produce a consistent and logical meaning. It is only if one inserts ambiguity into these core terms that the provisions produce conflict and incoherence.

When one looks to the District Clause, the context belies any suggested reservation of authority to convert the District into a voting member of either house. Instead of being placed in the structural Section with the Composition Clause, the District Clause was relegated to the same Section as other areas purchased or acquired by the federal government. Under this Clause, Congress is expressly allowed "to exercise like Authority [as over the District] over all Places purchased . . . for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings . . . ."[91] If this Clause gives Congress the ability to make the federal district into a voting member, then presumably Congress could exercise "like Authority" and give the Department of Defense ten votes in Congress.

The context of the District Clause strongly suggests that it is a provision crafted for administrative purposes, as opposed to the structural provisions of Section 2. Indeed, the argument of unlimited powers under the District Clause parallels a similar argument under the Election Clause.[92] Some argue that the Framers gave states[93] or Con-

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89 U.S. CONST. amend. XXIII, § 1 (amended 1961) (emphasis added).

90 Even collateral provisions such as the prohibition on federal offices and emoluments in Article I, Section 6, make little sense if the drafters believed that the District could ever be treated like a state. For much of its history, the District was treated either like a territory or a federal agency. Lyndon Johnson appointed Mayor Walter Washington to his post by executive power over federal agencies. Officials held their offices and received their salaries by either legislative or executive action. Because the District was a creation and extension of the federal government, its officials held federal or quasi-federal offices. In the 1970s, Home Rule, *see infra* note 232, created more recognizable offices of a city government, though still ultimately under the control of Congress.

91 U.S. CONST. art. I, § 8.

92 U.S. CONST. art. I, § 4, cl. 1.

93 U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 832–33 (1995) ("The Framers intended the Elections Clause to grant States authority to create procedural regulations, not to provide States with license to exclude classes of candidates from federal office.").

gress the authority to manipulate the qualifications for members. In the latter case, the Clause provides that "Congress may at any time by Law make or alter such Regulations" that related to the "Times, Places and Manner of holding [federal] Elections."[94] Section 4 of Article I, however, was viewed by the Court as a purely procedural provision despite the absence of limiting language. As the Ninth Circuit noted in *Schaefer v. Townsend*,[95] the Supreme Court has rejected "a broad reading of the Elections Clause and held the balancing test inapplicable where the challenged provision supplemented the Qualifications Clause."[96] It is the Composition Clause and, as noted below, the Qualifications Clauses, that determine the prerequisites for congressional office.

The effort to focus on the District Clause rather than the Composition Clause is unlikely to succeed in court. The context of this language reinforces the plain meaning of the text itself. The District Clause concerns the authority of Congress over the internal affairs of the seat of government. To elevate that Clause to the same level as the Composition Clause would do great violence to the traditions of constitutional interpretation.

III. The Original Understanding of the Composition, Qualifications and District Clauses

The meaning of the Composition and District Clauses is not only consistent on both a textual and contextual basis, it is greatly reinforced by a review of the early understanding of these Clauses. History from the late eighteenth and early nineteenth centuries clearly refutes the repeated suggestion by supporters of the current legislation that the Framers did not and could not have intended to leave the District in an unrepresented status. No one has suggested that the District Clause was a focus of the debates leading to ratification or in the early Congresses. The record of these debates is incomplete, particularly in the state ratification conventions. Moreover, references to the District are sprinkled throughout the debates, tantalizing suggestions of discussion outside of the recorded sessions, but not the subject of extended debate. The assertion, however, that the meaning of the District Clause was either not clearly understood or considered at the time is clearly and irrefutably untrue. There are various references to

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94 U.S. CONST. art. I, § 4, cl. 1.

95 Schaefer v. Townsend, 215 F.3d 1031 (9th Cir. 2000).

96 *Id.* at 1038.

the Clause, and these references discussed below[97] demonstrate that the obvious meaning of the Clause was appreciated at the time. Indeed, the disenfranchisement of residents was not only obvious but equally controversial with some leaders at the time.[98]

It is also important to emphasize that the relevant historical discussions are not confined to the District Clause. While many advocates have insisted that the plain meaning of terms can change in a broader context, they notably avoid consideration of the text and history behind two clearly relevant Clauses: the Composition and Qualifications Clauses. These Clauses form a well-documented record of the intentions of the Framers as to the make-up of Congress and its inherent authority to change the composition of its own membership.

A. The Original Understanding of the Composition Clause

The intent behind the Composition Clause was clear throughout the debates. It was considered a vital structural provision. The Framers were obsessed with the power of the states and the structure of Congress. Few matters concerned the Framers more than who could vote in Congress and how they were elected. Indeed, some delegates wanted the House to be elected by the state legislatures, as was the Senate.[99] This proposal was not adopted, but the clear import of the debate was that representatives would be elected from the actual states. The very requirement of qualifications being set by "state legislature[s]" was meant to reaffirm that the composition of Congress would be controlled by states.

The Framers reinforced this view at the time. A fundamental guarantee offered to dissenters was that the composition of both houses would be controlled by the states. The Composition Clause was vital to securing the votes of reluctant members, particularly Anti-Federalists. Madison emphasized this point in *Federalist No. 45* when he pointed out that "each of the principal branches of the federal Government will owe its existence more or less to the favor of the State Governments, and must consequently feel a dependence . . . ."[100]

In his first comments after the Constitutional Convention, James Wilson emphasized the Composition Clause and the requirement that

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97 *See infra* Part III.A–C.

98 *See infra* Part III.C.

99 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 359 (Max Farrand ed., rev. ed. 1966).

100 THE FEDERALIST NO. 45, at 311 (James Madison) (Jacob E. Cooke ed., 1961).

members be elected by actual states.[101] In an October 6, 1787 speech, Wilson responded to Anti-Federalists who feared the power of the new Congress—a speech described at the time as "the first authoritative explanation of the principles of the NEW FEDERAL CONSTITUTION."[102] Wilson stressed that Congress would be tethered closely to the states and that only states could elect members:

> [U]pon what pretence can it be alleged that it was designed to annihilate the state governments? For, I will undertake to prove that upon their existence, depends the existence of the fœderal plan. For this purpose, permit me to call your attention to the manner in which the president, senate, and house of representatives, are proposed to be appointed. . . . The senate is to be composed of two senators from each state, chosen by the legislature; and therefore if there is no legislature, there can be no senate. The house of representatives, is to be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature,—*unless therefore, there is a state legislature, that qualification cannot be ascertained*, and the popular branch of the fœderal constitution must likewise be extinct. From this view, then it is evidently absurd to suppose, that the annihilation of the separate governments will result from their union; or, that having that intention, the authors of the new system would have bound their connection with such indissoluble ties.[103]

Wilson's comments, in what was billed at the time as the first public defense of the draft Constitution by a Framer, illustrate how important the Composition Clause of Article I, Section 2, was to the structure of government.[104] It was the very cornerstone for the new federal system. It is safe to say that the suggestion that the District could achieve a status equal to states in Congress would have been viewed as absurd, particularly because there could be no state legislature for the federal city. Wilson and others made clear that voting rights in Congress would be reserved for the representatives of the actual states.

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101 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 337, 342 (John P. Kaminski & Gaspare J. Saladino eds., 1981).

102 *Id.*

103 *Id.* (emphasis added).

104 *Id.*

This view was reaffirmed in the Third Congress in 1794, only a few years after ratification. The issue of the meaning of Article I, Section 2, was raised when a representative of the territory of Ohio sought admission as a nonvoting member to the House. Connecticut Representative Zephaniah Swift objected to the admission of anyone who is not a representative of a state: "The Constitution has made no provision for such a member as this person is intended to be. If we can admit a Delegate to Congress or a member of the House of Representatives, we may with equal propriety admit a stranger from any quarter of the world."[105]

Although nonvoting members would be allowed, the legislators on both sides agreed that the Constitution restricted voting members to representatives of actual states. This debate, occurring only a few years after the ratification, and with both drafters and ratifiers serving in Congress, reinforces the clear understanding of the meaning and purpose of the language.

While academic advocates of the District legislation struggle to claim an absence of a clear answer under the District Clause, they avoid the obvious thrust of the debates over the Composition Clause. The Constitutional Convention and various structural provisions of the Constitution establish not only how important the Composition Clause was to the drafters, but "makes clear just how deeply Congressional representation is tied to the structure of statehood."[106] It would be ridiculous to suggest that the delegates to the Constitutional Convention or ratification conventions would have worked out such specific and exacting rules for the composition of Congress, only to give the majority of Congress the right to create a new form of voting members from federal enclaves like the District. It would have constituted the realization of the worst fears for many delegates, particularly Anti-Federalists, to have an open-ended ability of the majority to manipulate the rolls of Congress and to use areas under the exclusive control of the federal government as the source for new voting members.

B. The Original Understanding of the Qualifications Clauses

Equally probative is the intent behind the Qualifications Clauses of Article I, Section 2. If Congress changes the meaning of the Composition Clause, it could also change the meaning of the Qualifications

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105 4 ANNALS OF CONG. 884 (1794). This debate is detailed in David P. Currie, *The Constitution in Congress: The Third Congress, 1793–1795*, 63 U. CHI. L. REV. 1, 42 (1996).

106 Adams v. Clinton, 90 F. Supp. 2d 35, 46–47 (D.D.C. 2000).

Clauses, which refers to the fixed criteria for eligibility for the House of Representatives, including the condition of being a resident of a state.

It is not simply the reference to a state that makes the Qualifications Clauses material to this debate. The Framers wrote this provision in the aftermath of the controversy over John Wilkes in the 1760s.[107] Wilkes had publicly attacked the peace treaty with France in 1763 and, in doing so, earned the ire of the Crown and Parliament. After he was convicted and jailed for sedition several years later, the Parliament moved to declare him ineligible for service in the legislature. He served anyway, and eventually the Parliament rescinded the legislative effort to disqualify him. Parliament accepted that such manipulation of qualifications for entry or service violated core democratic principles.

The Wilkes controversy was referenced in the Constitutional Convention, as members called for a rigid and fixed meaning as to the qualifications for Congress. Unless Congress was prevented from manipulating its membership, history would repeat itself. James Madison noted "[t]he abuse [the British Parliament] had made of it was a lesson worthy of our attention."[108] Madison warned that if Congress could engage in such manipulation it would "subvert the Constitution."[109]

This debate was largely triggered by proposals to allow congressional authority to add qualifications or to expressly require property prerequisites to membership. These efforts failed, however, due to a more general opposition to allowing Congress to change its membership. In a quote later cited by the Supreme Court, Alexander Hamilton noted that "[t]he qualifications of the persons who may choose or be chosen, as has been remarked upon another occasion, are *defined and fixed* in the constitution; and are *unalterable* by the legislature."[110]

The Supreme Court has emphasized this history in repeatedly holding that it was the intent of the Framers to prevent legislators from altering their own qualifications to manipulate the membership of Congress. Noting the Wilkes affair, the Court observed that the Clause was written in the aftermath of "English precedent [which] stood for the proposition that 'the law of the land had regulated the

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107 *See* Powell v. McCormack, 395 U.S. 486, 533–35 (1969).

108 *Id.* at 535 (quotation omitted).

109 *Id.* at 534.

110 THE FEDERALIST NO. 60, at 409 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (emphasis added).

qualifications of members to serve in parliament' and those qualifications were 'not occasional but fixed.' "[111]

This debate has striking similarity to the current controversy. Today, sponsors are claiming that they can use their inherent authority to create new forms of members in federal enclaves. In the debate over term limits, the Court faced a claim of reserved and undefined authority under the Tenth Amendment.[112] States claimed that the Tenth Amendment leaves them with all reserved powers and thus, unless prohibited, states are entitled to exercise the authority.[113] This is analogous to the District Clause argument that, unless expressly prohibited, Congress has absolute authority under the Clause, even to create new members. The Court, however, rejected the argument and noted that this power was never part of the original powers of the states and that "the Framers intended the Constitution to be the exclusive source of qualifications for Members of Congress."[114] The same can be said of the District Clause. The power to unilaterally manipulate the rolls of membership in Congress was never an inherent power of Congress, and the composition of the voting members of Congress was exclusively defined under Section 2 of Article I.[115] Indeed, as the Court noted in *U.S. Term Limits v. Thorton*,[116] the Framers feared that if the membership of Congress could be manipulated, Congress could become "a self-perpetuating body to the detriment of the new Republic."[117]

The Qualification Clauses, and debate, magnify the significance of this section to the design of our constitutional system. Although this debate concerned the ability of states rather than Congress to manipulate the rolls of members, the principle remains the same. Indeed, the Framers were so concerned about efforts in Congress to use majority voting to manipulate membership that they required a supermajority to expel a member.[118] Just as there is no inherent right

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111 *Powell*, 395 U.S. at 528 (quoting 16 PARL. HIST. ENG. 589, 590 (1769)).

112 U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 798 (1995).

113 *Id.*

114 *Id.* at 800–01.

115 *Id.* at 801.

116 U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995).

117 *Id.* at 793 n.10.

118 U.S. CONST. art. I, § 5, cl. 2. Madison viewed expulsion as a potential abuse tool of factional interests, the scourge of democratic systems. *See* RECORDS, *supra* 99, at 254 (referencing how "the right of expulsion . . . in emergencies of faction might be dangerously abused"); *see also* Powell v. McCormack, 395 U.S. 486, 536 (1969) (noting "the Convention's decision to increase the vote required to expel, because that power was too important to be exercised by a bare majority") (citations omitted).

to exclude members or tweak qualifications, there is no right to create new forms of members. The Framers clearly viewed such efforts at manipulation of the composition of Congress as destabilizing for the entire system. Indeed, the very stability of the legislative branch depends upon preventing Congress from unilaterally shrinking or expanding its membership by tweaking the Qualifications Clauses.

C. The Original Understanding of the District Clause

As opposed to either the Composition or Qualifications Clauses, the District Clause was not part of the debate or the provisions relating the structure of the government itself. It was contained with a list of enumerated powers of Congress in Article I, Section 8 that cover everything from creating post offices to inferior courts.[119] It was notably placed in the same Clause as the power of the Congress over "the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings."[120] Nevertheless, the creation of a seat of government was an issue of interest and concern before ratification.

As noted above, the status of the federal district was also clearly understood as a nonstate entity.[121] The Supreme Court has observed that "[t]he object of the grant of exclusive legislation over the district was . . . national in the highest sense, and the city organized under the grant became the city, not of a state, not of a district, but of a nation."[122] Although Madison conceded that some form of "municipal Legislature for local purposes" might be allowed, the district was to be the creation of Congress and maintained at its discretion.[123] Indeed, Madison dismissed the notion that this federal enclave could ever pose a threat to states given its unique status:

> The exclusive jurisdiction over the ten miles square is itself an anomaly in our representative system. And its object being manifest, and attested by the views taken of it at its date, there seems a *peculiar impropriety in making it the fulcrum for a lever stretching into the most distant parts of the Union*, and overruling the municipal policy of the States. The remark is still more striking when applied to the smaller places

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119 U.S. CONST. art. 1, § 8.

120 *Id.* § 8, cl. 17.

121 *See supra* notes 31–35 and accompanying text.

122 O'Donoghue v. United States, 289 U.S. 516, 539–40 (1933).

123 THE FEDERALIST NO. 43, *supra* note 31, at 289 (James Madison).

> over which an exclusive jurisdiction was suggested by a regard to the defence and the property of the nation.[124]

While not a matter of daily debate, the political status of the District residents was a controversy then as it is now. The Federal Farmer captured this concern in his January 1788 letter, where he criticized the fact that there was not "a single stipulation in the constitution, that the inhabitants of this city, and these places, shall be governed by laws founded on principles of freedom."[125] The various references to the District's status and function offer a consistent understanding of the plain meaning of the District Clause. The absence of a vote in Congress was clearly understood as a prominent characteristic of a federal district. Moreover, being a resident of the new capital city was viewed as compensation for this limitation. The fact that members would work, and generally reside, in the District gave the city sufficient attention in Congress.[126] Maryland Representative John Dennis noted that "though they might not be represented in the national body, their voice would be heard."[127] Indeed, it was the source of considerable competition and jealousy among the states.[128] In the Virginia Ratification Convention, Patrick Henry observed with unease how they have been "told that numerous advantages will result, from the concentration of the wealth and grandeur of the United States in one happy spot, to those who will reside in or near it. Prospects of profits and emoluments have a powerful influence on the human mind."[129]

Because residence would be voluntary within the federal district, most viewed the representative status as a quid pro quo for the obvious economic and symbolic benefit. Indeed, despite the fact that the citizens of the capital city would be disenfranchised, many cities from

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124 Letter from James Madison to Judge Spencer Roane (May 6, 1821), *in* 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 217, 220 (1867) (emphasis added).

125 Letter from the Federal Farmer to the Republican, XVIII (Jan. 25, 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 339, 346 (Herbert J. Storing ed., 1981); *see also* THE FOUNDERS' CONSTITUTION, *supra* note 33, at 220.

126 This point has been made by modern courts in rejecting the claim that residents lack influence over Congress in seeking benefits or protections. United States v. Cohen, 733 F.2d 128, 135 (D.C. Cir. 1984) ("It is, in any event, fanciful to consider as 'politically powerless' a city whose residents include a high proportion of the officers of all three branches of the federal government, and their staffs.").

127 10 ANNALS OF CONG. 998 (1801) (remarks of Rep. John Dennis).

128 Notably, during the Virginia Ratification Convention, when Grayson describes the District as "detrimental and injurious to the community, and . . . repugnant to the equal rights of mankind," he is not referring to the lack of voting rights but the anticipated power that District residents would wield over the rest of the nation due to "such exclusive emoluments." 3 ELLIOT DEBATES, *supra* note 29, at 291 (William Grayson).

129 *Id.* at 158.

Baltimore to Philadelphia to Elizabethtown vied for the opportunity to be selected for the honor.[130] It is simply not true that the District's status was overlooked because few people thought that the capital city "would evolve into the vibrant demographic and political entity it is today."[131] Various statements before ratification directly contradict this argument. First, the continued reference to the population of the Maryland/Virginia enclave is misleading.[132] At the time of the debate, many like Samuel Osgood believed the enclave was more likely to be found in Philadelphia or other populated areas.[133] The competition among the states for this designation was due in great part to the expectation that it would grow to be the greatest American city. Indeed, some cities vying for the status were already among the largest cities, like Baltimore, Annapolis, and Philadelphia. The new capital city was expected to be grand. Ultimately, Pierre Charles L'Enfant designed a city plan to accommodate 800,000 people, a huge city at that time.[134] The new enclave could easily have over 30,000 residents, the original constitutional standard for a representative in the House.[135] Second, far from disregarding the size of the future District, many delegates feared the creation of a huge city like an American London or Rome. Thus, many assumed that federal power and monies would draw both wealth and citizens to the new "Federal Town."[136]

It is true that there was little consideration of how residents would fare in terms of taxation, civil rights, conscription, and the like.[137] There is a very good reason for this omission: the drafters un-

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130 *See* BOWLING, *supra* note 39, at 78–79, 182–88.

131 RICHARD P. BRESS & LORI ALVINO MCGILL, CONGRESSIONAL AUTHORITY TO EXTEND VOTING REPRESENTATION TO CITIZENS OF THE DISTRICT OF COLUMBIA: THE CONSTITUTIONALITY OF H.R. 1905, at 3 (2007), *available at* http://www.acslaw.org/files/Bress%20and%20McGill%20on%20Constitutionality%20of%20HR%201905.pdf.

132 The population of the area now established as the District was 8000 in 1787. 1 U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, at 26 (3d ed. 1975).

133 Letter from Samuel Osgood to Samuel Adams (Jan. 5, 1788), *reprinted in* 5 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 621 (Merrill Jensen, John P. Kaminski & Gaspare J. Saladino eds., 1976) [hereinafter DOCUMENTARY HISTORY].

134 Adams v. Clinton, 90 F. Supp. 2d 35, 49 n.24 (D.D.C. 2000).

135 2 ELLIOT DEBATES, *supra* note 29, at 177.

136 *See infra* notes 161–66.

137 Various references were made to potential forms of local governance that might be allowed by Congress. Madison noted that:

> [A]s the [ceding] State will no doubt provide in the compact for the rights, and the consent of the citizens inhabiting [the federal district]; as the inhabitants will find sufficient inducements of interest to become willing parties to the cession; as they will have had their voice in the election of the Government which is to exercise authority over them; as a municipal Legislature for local purposes, derived from

derstood that these conditions would depend entirely on Congress. Because these matters would be left to the discretion of Congress, the details were not relevant to the constitutional debates. The *status* of the residents, however, was clearly debated and understood: residents would be represented by Congress as a whole and would not have individual representation in Congress. It is not true that "[t]he issue was not on their radar screen."[138] The District Clause received a proportionate level of attention and, more importantly, when it was discussed before ratification, delegates showed that they understood the issue well.

During ratification, various leaders objected to the disenfranchisement of the citizens in the district. In New York, Thomas Tredwell objected that the nonvoting status of District residents "departs from every principle of freedom . . . subjecting the inhabitants of that district to the exclusive legislation of Congress, in whose appointment they have no share or vote . . . ."[139]

The whole of Thomas Tredwell's comments merit reproduction:

> The plan of the *federal city*, sir, departs from every principle of freedom, as far as the distance of the two polar stars from each other; for, subjecting the inhabitants of that district to the exclusive legislation of Congress, *in whose appointment they have no share or vote*, is laying a foundation on which may be erected as complete a tyranny as can be found in the Eastern world. Nor do I see how this evil can possibly be prevented, without razing the foundation of this happy place, where men are to live, without labor, upon the fruit of the labors of others; this political hive, where all the drones in the society are to be collected to feed on the honey of the land. How dangerous this city may be, and what its operation on the general liberties of this country, time alone must discover; but I pray God, it may not prove to this western world

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> their own suffrages, will of course be allowed them; and as the authority of the Legislature of the State, and of the inhabitants of the ceded part of it, to concur in the cession, will be derived from the whole people of the State, in their adoption of the Constitution, every imaginable objection seems to be obviated.

THE FEDERALIST NO. 43, *supra* note 31, at 289 (James Madison). The drafters correctly believed that the "inducements" for ceding the land would be enough for residents to voluntarily agree to this unique status. Moreover, Madison correctly envisioned that forms of local government would be allowed, albeit in varying forms over the years.

138 Mary Beth Sheridan, *Picking the Brains of the Founding Fathers*, WASH. POST, May 28, 2007, at B6 (quoting The George Washington University historian Kenneth Bowling).

139 2 ELLIOT DEBATES, *supra* note 29, at 402 (Rep. Thomas Tredwell, N.Y.).

> what the city of Rome, enjoying a similar constitution, did to the eastern.[140]

In the effort to maintain that the voting status of District residents was simply not considered before ratification, advocates entirely avoid discussion of such passages that indicate that the issue was recognized and discussed at the time.

Some delegates even suggested amendments that would have addressed the problem. One such amendment was offered by Alexander Hamilton, who wanted the District residents to be able to secure representation in Congress once they grew to a reasonable size.[141] On July 22, 1788, Hamilton asked that the District Clause be amended to mandate that "the Inhabitants of the said District shall be entitled to the like essential Rights as the other Inhabitants of the United States in general."[142] Hamilton wanted the District to be given the same proportional representation in Congress and knew that this would have to be done in the body of the Constitution, in light of the District Clause. His proposal would have mandated:

> That When the Number of Persons in the District of Territory to be laid out for the Seat of the Government of the United States, shall according to the Rule for the Apportionment of Representatives and direct Taxes Amount to [blank] such District shall cease to be parcel of the State granting the Same, and Provision shall be made by Congress for their having a District Representation in that Body.[143]

Advocates like Richard Bress have insisted that this amendment neither shows a contemporary understanding of the implications of the District Clause as to the voting status of its residents, nor indicates an effort to guarantee such a vote. "That proposal," he claims, "presumed the District's residents could continue voting with the state from which the District was carved, and would have given them the *automatic* right to cast votes as *District residents* once the District's population reached the size necessary for voting representative under the apportionment rules."[144] This argument requires a considerable effort to ignore the obvious: Hamilton believed that under the current

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140 *Id.* (second emphasis added).

141 5 THE PAPERS OF ALEXANDER HAMILTON 189 (Harold C. Syrett & Jacob E. Cooke eds., 1962).

142 *Id.* at 190.

143 *Id.* at 189.

144 *Ending Taxation Hearing*, *supra* note 12 (statement of Richard P. Bress, Partner, Latham & Watkins, LLP), *available at* http://www.dcappleseed.org/projects/publications/Bress-05-23.pdf (citing PAPERS OF ALEXANDER HAMILTON, *supra* note 141, at 189).

language D.C. citizens would not be guaranteed "the like essential Rights as the other inhabitants of the United States" and most importantly believed that an amendment was necessary to grant "District Representation in that Body." Moreover, Hamilton's amendment starts with a description of how the District "shall according to the Rule for the Apportionment of Representatives and direct Taxes . . . cease to be parcel of the [original] State . . . ."[145] This does not suggest a belief that the District would continue to vote with the original state. To the contrary, it reflects the obvious meaning of the District Clause that it will cease to be part of any state and then proposes an amendment to guarantee a representative in Congress.

Hamilton was not the only one raising the issue of the rights of the residents of the future district at the New York Convention. On July 7, 1788, Melancton Smith also sought to make the rights and obligations of the residents commensurate with other citizens.[146] Smith's long amendment specifically raised concerns about the ability of Congress to afford district residents special status in terms of taxation, duties, and other obligations.[147] The amendment would expressly impose the same obligations while also addressing the ability of Congress to deny residents' constitutional rights. Thus, Smith wanted an express statement that "it is understood that the stipulations in this Constitution, respecting all essential rights, shall extend as well to this district as to the United States in general."[148] This amendment apparently was followed by a similar, but not identically-worded amendment referenced by Hamilton in his own proposal.[149]

Presumably, there would be little debate that voting was one of those essential rights, but Smith did not go as far as Hamilton in expressly referencing representation in Congress. Indeed, Hamilton appears to have viewed the two amendments as addressing similar points. On July 22, 1788, he moved to substitute a second version of the Smith amendment with language that expressly stated congressional representation as a right to be extended to District residents.[150]

Notably, in at least one state convention, the very proposal to give the District a vote in the House, but not the Senate, was proposed. In Massachusetts, Samuel Osgood sought to amend the provi-

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145 PAPERS OF ALEXANDER HAMILTON, *supra* note 141, at 189.

146 2 ELLIOT DEBATES, *supra* note 29, at 410 (Melancton Smith, N.Y. Del. to Continental Congress).

147 *Id.*

148 *Id.*

149 *See* PAPERS OF ALEXANDER HAMILTON, *supra* note 141, at 189–90 n.2.

150 *Id.*

sion to allow the residents to be "represented in the lower House."[151] No such amendment was enacted. Instead, some state delegates, like William Grayson in Virginia, distinguished the District from a state entity. Repeatedly, he stressed that the District would not have basic authorities and thus "is not to be a fourteenth state."[152] Osgood's letter to Samuel Adams, another member of the ratification convention, reveals that Adams had solicited his advice on these matters. The January 5, 1788, letter came at a critical time, shortly before the final votes on ratification the following month. Osgood himself referred to the timing as "a critical Moment" in the ratification convention.[153] It is a rare glimpse into the substantive exchanges of two delegates during the ratification debates.

Osgood refers to "many a Sleepless Night" in dealing with the proposed Constitution and returns repeatedly to the District as a source of this concern:

> I have finally fixed upon the exclusive Legislation in the Ten Miles Square.—This space is capable of holding two Millions of People—Here will the Wealth and Riches of every State center—And shall there be in the Bowels of the united States such a Number of People, brot up under the Hand of Despotism, without one Priviledge of Humanity . . . . Shall the supreme Legislature of the most enlightened People on the Face of the Earth; . . . be secluded from the World of Freemen; & seated down among Slaves & Tenants at Will?[154]

Osgood describes the efforts of Philadelphia to supply the ten miles enclave as a foolish move because it would find that the enclave would draw away both its citizens and their rights.[155] Notably, Osgood wanted to guarantee representation "when numerous enough [to] be represented in the lower House."[156] Like Hamilton, he understood that there was no current provision for such representation. Osgood also believed that Philadelphians and others were ignoring these flaws and that the delegates would have to protect them from themselves because "Mankind are too much disposed to barter away their Freedom for the Sake of Interest."[157] In addition to showing a clear, contemporary understanding of the implications of the District Clause

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151 Letter from Samuel Osgood to Samuel Adams, *supra* note 133.

152 THE FOUNDERS' CONSTITUTION, *supra* note 33, at 223.

153 5 DOCUMENTARY HISTORY, *supra* note 133, at 618.

154 *Id*. at 621.

155 *Id.*

156 *Id.*

157 *Id.*

and absence of representational status, Osgood's letter further belies arguments by advocates like Bress that so few people lived in the District that these questions were simply not considered by the Framers.

The ratification debates have other references to the District Clause and proposed amendments. In North Carolina, objections were made to the inherent power that Congress would yield within the ten-mile enclave.[158] James Iredell defended the District Clause with reference to the failure of the state government to come to the aid of the delegates during the Philadelphia riot.[159] In response, delegates proposed limiting the authority of Congress in the enclave:

> That the exclusive power of legislation given to Congress over the federal town and its adjacent district, and other places purchased or to be purchased by Congress of any of the states, shall extend only to such regulations as respect the police and good government thereof.[160]

Although this amendment did not expressly address the preexisting rights of the residents, it showed that the District Clause was a concern as to its implications both for other states and the District's own residents. Virtually the same language was put forward in Virginia[161] and in the Pennsylvania General Assembly.[162] As these efforts limiting Congress's authority in the federal enclave indicate, the greatest concern was that the District could create an undue concentration of federal authority and usurp states' rights. Even with the express guarantees of state powers under the Composition Clause, there were many who were still deeply suspicious of the ability of the federal government to "annihilate" state authority.[163] Anti-Federalists, like George Mason, viewed the existence of a district under the exclusive control of Congress to be threatening.[164] He was not alone. Many

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158 4 ELLIOT DEBATES, *supra* note 29, at 245.

159 *Id.* at 220.

160 *Id.*

161 3 ELLIOT DEBATES, *supra* note 29, at 660.

162 This was an effort to qualify the earlier ratification of the Constitution. 2 DOCUMENTARY HISTORY, *supra* note 133.

163 *Id.*

164 In the Virginia Ratification Convention, notes record how George Mason stressed his view that:

> [F]ew clauses in the Constitution [are] so dangerous as that which gave Congress exclusive power of legislation within ten miles square. Implication, he observed, was capable of any extension, and would probably be extended to augment the congressional powers. But here there was no need of implication. This clause gave them an unlimited authority, in every possible case, within that district. This ten miles square, says Mr. Mason, may set at defiance the laws of the surrounding

viewed the future city to be a likely threat, not just to other cities, but the nation due to its power and size. Samuel Osgood noted that he had "finally fixed upon the exclusive legislation in the Ten Miles Square. . . . What an inexhaustible fountain of corruption are we opening?"[165] A member of the New York Ratification Convention compared the new capital city to Rome and complained that it could prove so large and powerful to control the nation as did that ancient city.[166] There would have been a riot if, in addition to creating a federal district, Congress could give it voting status equal to a state. The possibility of a federal district or territory being made a voting member of Congress would have certainly endangered, if not doomed, the precarious majority supporting the Constitution.

In order to quell fears of the power of the District, supporters of the Constitution emphasized that the exclusive authority of Congress over the District would have no impact on states, but was only a power related to the *internal* operations of the seat of government. This point was emphasized by Edmund Pendleton on June 16, 1788, as the President of the Virginia Ratification Convention. He assured his colleagues that Congress could not use the District Clause to affect states because the powers given to Congress only affected District residents and not states or state residents:

> Why oppose this power? Suppose it was contrary to the sense of their constituents to grant exclusive privileges to citizens residing within that place; the effect would be directly in opposition to what he says. It could have *no operation without the limits* of that district. Were Congress to make a law granting them an exclusive privilege of trading to the East Indies, it could have no effect the moment it would go without that place; for their exclusive power is confined to that district. . . . This exclusive power is limited to that place solely for their own preservation, which all gentlemen allow to be necessary . . . .[167]

Pendleton's view of the purpose and limitation of the District Clause is reflected in a long line of Supreme Court cases. As the Court noted in *Cohens v. Virginia*,[168] this Clause gives Congress clear

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> states, and may, like the custom of the superstitious days of our ancestors, become the sanctuary of the blackest crimes.

THE FOUNDERS' CONSTITUTION, *supra* note 32, at 222.

165 BOWLING, *supra* note 39, at 81.

166 *Id.*

167 THE FOUNDERS' CONSTITUTION, *supra* note 33, at 180.

168 Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821).

authority over internal matters related to the District and not significant matters affecting states outside of the District.[169] The Court has also stated: "We could not of course countenance any exercise of this plenary power either within or without the District if it were such as to draw into congressional control subjects over which there has been no delegation of power to the Federal Government."[170]

Pendleton's comments capture the essence of the problem then and now. Congress has considerable plenary authority over the District, but that authority is lost when it is used to change the District's status vis-à-vis the states. Such external use of District authority is precisely what delegates were assured could not happen under this Clause.

This history offers ample support for the plain meaning of the text of the Constitution. It demonstrates that the implications of the language were understood at the time of ratification. Indeed, the language prompted efforts to amend the Constitution. These efforts to give District residents conventional representation failed, despite the advocacy of no less a person than Alexander Hamilton.[171] Although the issue of the status of the residents was not a major topic of debate, it requires an exercise of willful blindness to argue that the District's voting status was simply some oversight or casual omission. The contemporary record supporting the constitutional language is further strengthened when one examines the history immediately following ratification.

IV. The Post-Ratification Treatment of the District as a Federal Enclave by Congress and the Courts

The status of the District, as represented by Congress as a whole, has been a matter of continual controversy from ratification to the present day. Thus, this is no new debate, but one that has been addressed by both the Congress and the courts on a regular basis. The early congressional debates in this area are particularly revealing.

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169 *Id.* at 265.

170 Nat'l Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 602 (1949).

171 This is not to say that the precise conditions of the cessation were clear. Indeed, some states passed amendments that qualified their votes; amendments that appear to have been simply ignored. Thus, Virginia ratified the Constitution, but specifically indicated that some state authority would continue to apply to citizens of the original state from which the "Federal Town and its adjacent District" was ceded. Moreover, Congress enacted a law that provided that the laws of Maryland and Virginia "shall be and continue in force" in the District, suggesting that, unless repealed or amended, Maryland continues to have jurisdictional claims in the District. *See* Act of Feb. 27, 1801, ch. 15, § 1, 2 Stat. 103.

Members clearly understood, as did the drafters and ratifiers, that only representatives of the actual states could be voting members and that Congress's authority over the District was a purely internal power.

In the late eighteenth and early nineteenth centuries, the political status of the District was viewed as fixed and immutable absent a constitutional amendment or retrocession. Indeed, a constitutional amendment was repeatedly referenced during debates over the lack of a vote in Congress. Maryland Representative John Dennis noted that such a change could occur as the city grew in size: "[I]f it should be necessary [that residents have a representative], the Constitution might be so altered as to give them a delegate to the General Legislature when their numbers should become sufficient."[172] Indeed, one of the most prominent advocates for the District at its creation sought such an amendment. A well-known jurist and lawyer, Augustus Woodward was a close associate of L'Enfant and played a significant role in the early evolution of the District. He published a series of essays under the pen name of Epaminondas entitled *Considerations on the Government of the Territory of Columbia*.[173] He was opposed to the lack of a vote for residents in Congress, but stressed that "[i]t will require an amendment to the Constitution of the United States" to secure individual representation for District residents.[174]

Various efforts were made to legislatively create delegates for the District, but these were largely nonvoting members and failed. For example, as early as 1819, a proposal was made to give the District the same status as a territory with a nonvoting member.[175] It was defeated. Notably, this was roughly thirty years after the ratification and roughly the same period before retrocession of the Virginia portion of the District. Contrary to those who argue that this issue was overlooked, it continued to be raised, and even nonvoting representation continued to be denied. A similar proposal in the Senate recognizing the "equal necessity of allowing to the District of Columbia a delegate, upon a footing with the Territorial governments" was not adopted in the House in 1820.[176] A similar motion in 1824 was tabled[177] in the House and again in 1830.[178] Proposals recorded in

172 10 ANNALS OF CONG. 998–99 (1801) (remarks of Rep. John Dennis).

173 AUGUSTUS WOODWARD, CONSIDERATIONS ON THE GOVERNMENT OF COLUMBIA 5–6 (1801).

174 *Id.*

175 *See* U.S. HOUSE JOURNAL, 16th Cong., 1st Sess. 90 (1819).

176 36 ANNALS OF CONG. 552 (1820).

177 41 ANNALS OF CONG. 1504, 1506 (1824).

1836,[179] 1838,[180] and 1845[181] also failed. These were all proposals for nonvoting status where the constitutional issue was avoided.[182] Yet, they all failed for lack of support. The only two methods for attaining a vote in Congress was statehood for a territory and (for the District) retrocession.[183]

A. The Retrocession Debates

The knowledge of the nonvoting status of the capital city was reaffirmed not long after the cessation when a retrocession movement began. Within a few years of ratification, leaders continued to discuss the disenfranchisement of citizens from votes in Congress. Republican Representative John Smilie from Pennsylvania objected that "the people of the District would be reduced to the state of subjects, and deprived of their political rights . . . ."[184] The passionate opposition to the nonvoting status of the District was as strong as it is today:

> We have most happily combined the democratic representative with the federal principle in the Union of the States. But the inhabitants of this territory, under the exclusive legislation of Congress, partake of neither the one nor the other. They have not, and they cannot possess a State sovereignty; nor are they in their present situation entitled to elective franchise. They are as much the vassals of Congress as the

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178 U.S. HOUSE JOURNAL, 21st Cong., 2d Sess. 568 (1830).

179 U.S. SENATE JOURNAL, 24th Cong., 1st Sess. 208 (1836).

180 CONG. GLOBE, 25th Cong., 2d Sess. 271 (1838).

181 U.S. HOUSE JOURNAL, 28th Cong., 2d Sess. 297 (1845).

182 Bress cites these examples with a notation that the constitutional issue was never raised in most of the debates, suggesting that somehow members did not view the Clause as creating a constitutional barrier. *Ending Taxation Hearing*, *supra* note 12 (supplemental statement of Richard P. Bress, Partner, Latham & Watkins, LLP), *available at* http://www.dcappleseed.org/projects/publications/Bress-05-23.pdf, at *6. Because these proposed amendments dealt with nonvoting members, however, there is no reason why the constitutional issue would be raised. There is little debate that Congress can create nonvoting members. Yet, even on this symbolic level, there was little interest in creating a member for the District, which was represented by Congress as a whole and had a Committee assigned to its governing affairs.

183 Indeed, territories were expected to eventually evolve into states as was the case with the Northwest Territory, which existed at the time of the time of the ratification and, under the Ordinance of July 13, 1787 ("Northwest Ordinance"), could become states after meeting certain criteria . Eventually, the Northwest Territory became the states of Ohio, Indiana, Illinois, Michigan, and Wisconsin. Only then did the citizens in those areas receive voting representatives in Congress. *See generally* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801–1829, at 90 (2001). The District has already attempted statehood and was partially retroceded. The current legislation is attempting to create an easier third option never envisioned by the Framers or the early Congresses.

184 6 ANNALS OF CONG. 992 (1801); *see also* THOMAS, CONG. RESEARCH SERV., *supra* note 17, at 6.

> troops that garrison your forts, and guard your arsenals. They are subjects, not merely because they are not represented in Congress, but also because they have no rights as freemen secured to them by the Constitution.[185]

Members questioned the need to "keep the people in this degraded situation" and objected to subjecting American citizens to "laws not made with their own consent."[186] The federal district was characterized as being subject to despotic rule "by men . . . not acquainted with the minute and local interests of the place, coming, as they did, from distances of 500 to 1000 miles."[187] Much of this debate followed the same lines of argument that we hear today. While acknowledging that "citizens may not possess full political rights," leaders like John Bacon of Massachusetts noted that they had special status and influence as residents of the capital city.[188] Yet, retrocession bills were introduced within a few years of the actual cessation, again prominently citing the lack of any congressional representation as a motivating factor.[189]

Indeed, the retrocession of Virginia highlights the original understanding of the status of the District. Virginians contrasted their situation with residents of Washington. For them, cessation was "an evil hour, [when] they were separated" from their state and stripped of their political voice.[190] Washingtonians, however, were viewed as compensated for their loss of political representation. As a committee noted in 1835,

> [o]ur situation is essentially different, and far worse, than that of our neighbors on the northern side of the Potomac. They are citizens of the Metropolis, of a great, and noble Republic, and wherever they go, there clusters about them all those glorious associations, connected with the progress and fame of their country. They are in *some* measure compensated in the loss of their political rights.[191]

Thus, during the drive for retrocession that began shortly after ratification, District residents appear to have opposed retrocession

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185 Mark D. Richards, Presentation Before the Arlington Historical Society: Fragmented Before a Great Storm (May 9, 2002), *available at* http://www.dcwatch.com/richards/020509.htm (citing CONG. REC. 910 (1805)) (quoting Rep. Ebenezer Elmer, R-N.J.).

186 *Id.* (quoting Rep. John Smilie, R-Pa.).

187 *Id.* (quoting Rep. John Smilie, R-Pa.).

188 *Id.* (quoting Rep. John Bacon, R-Mass.).

189 *Id.*

190 *Id.*

191 *Id.*

and accepted the condition as nonvoting citizens in Congress as their special status. Indeed, the only serious retrocession effort focused on Georgetown and not the capital city itself. Some in Maryland vehemently objected to the nonvoting status, complaining to Congress that "the people are almost afraid to present their grievances, least a body in which they are not represented, and which feels little sympathy in their local relations, should in their attempt to make laws for them, do more harm than good."[192] Yet, even in a vote taken within Georgetown, the Board of Common Council voted overwhelmingly (410 to 139) to accept these limitations in favor of staying with the federal district.[193]

During the Virginia retrocession debate, various sources reported the strong opposition of residents in the city to returning to Maryland, even though such retrocession would return their right to full representation. The reason was financial. District residents received considerable economic advantages from living within the federal city. These benefits were not as great in the Virginia areas, a point made in a congressional report:

> The people of the county and town of Alexandria have been subjected not only to their full share of those evils which affect the District generally, but they have enjoyed none of those benefits which serve to mitigate their disadvantages in the county of Washington. The advantages which flow from the location of the seat of Government are almost entirely confined to the latter county, *whose people, as far as your committee are advised, are entirely content to remain under the exclusive legislation of Congress*. But the people of the county and town of Alexandria, who enjoy few of those advantages, are (as your committee believe) justly impatient of a state of things which subjects them not only to all the evils of inefficient legislation, but also to political disfranchisement.[194]

The result of this debate was the retrocession of Northern Virginia, changing the shape of the District from the original diamond shape created by George Washington.[195] The Virginia land was retro-

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192 Mark D. Richards, *The Debates Over the Retrocession of the District of Columbia, 1801–2004*, WASH. HIST. 55, 62 (Spring/Summer 2004), *available at* http://www.dcvote.org/pdfs/mdrretro062004.pdf (quoting memorial submitted by Sen. William D. Merrick of Maryland).

193 *Id.*

194 *Retrocession of Alexandria to Virginia*, DAILY NAT'L INTELLIGENCER, Mar. 20, 1846, at 1 (emphasis added) (reprinting committee report).

195 Under the Residence Act of July 16, 1790, Washington was given the task of drawing

ceded to Virginia in 1846. The District residents chose to remain as part of the federal seat of government, independent from participation or representation in any state. Just as with the first cession, it was clear that residents had knowingly "relinquished the right of representation, and . . . adopted the whole body of Congress for its legitimate government . . . ."[196]

Finally, much is made of the ten-year period during which District residents voted with their original states, before the federal government formally took control of the District. As established in *Adams*, this argument has been raised and rejected by courts as without legal significance.[197] This was simply a transition period before the District became the federal enclave. Under the Residence Act of 1790, which was entitled "An Act for Establishing the Temporary and Permanent Seat of the Government of the United States,"[198] Congress selected Philadelphia as the temporary capital while authorizing the establishment of the federal district.[199] This law allowed the District to continue under the prior state systems pending the implementation of federal jurisdiction. The law expressly states that, while the District was being surveyed and established, "the operation of the laws of the state within such district shall not be affected by this acceptance, until the time fixed for the removal of the government thereto, and until Congress shall otherwise by law provide."[200]

Clearly, Congress could use its authority regarding the internal affairs of the District to continue such state functions pending its final takeover and to avoid a dangerous gap in basic governmental functions. It was clearly neither the intention of the drafters nor indicative of the post-federalization status of residents. Rather, as indicated by the Supreme Court,[201] the exclusion of residents from voting:

District lines, *see* ch. 28, 1 Stat. 130 (1790), not surprising given his adoration around the country and his experience as a surveyor. Washington adopted a diamond-shaped area that included his hometown of Alexandria, Virginia. This area included parts that now belong to Alexandria and Arlington. At the time, the area contained two developed municipalities (Georgetown and Alexandria) and two undeveloped municipalities (Hamburg, later known as Funkstown, and Carrollsburg).

196 Loughborough v. Blake, 18 U.S. (5 Wheat.) 317, 324 (1820).

197 *See* Adams v. Clinton, 90 F. Supp. 2d 35, 56 (D.D.C. 2000); *see also* Albaugh v. Tawes, 233 F. Supp. 576, 578 (D. Md. 1964) (per curiam).

198 Act for Establishing the Temporary and Permanent Seat of the Government of the United States, ch. 28, 1 Stat. 130 (1790).

199 *Id.*

200 *Id.*

201 *See* Reily v. Lamar, 6 U.S. (2 Cranch) 344, 356–57 (1805).

> was the consequence of the completion of the cessation transaction—which transformed the territory from being part of a state, whose residents were entitled to vote under Article I, to being part of the seat of government, whose residents were not. Although Congress' exercise of jurisdiction over the District through passage of the Organic Act was the last step in that process, it was a step expressly contemplated by the Constitution.[202]

B. The Post-Retrocession Controversies over the District Status and Congressional Members

As noted above, as early as 1794, Congress was dealing with claims by territories that their representatives should be allowed to be members of the House.[203] Congress, which had some of the original Framers and ratifiers among its members, insisted that the most that a nonstate could receive in representation would be a nonvoting member.[204]

Early controversies also focused on the use of Congress's plenary authority under the District Clause to create national policies or affect states. The consistent view was that the plenary authority over the District was confined to its internal operations and, as noted by Pendleton, would not extend beyond its borders to affect the states.[205] For example, in 1814, the use of this authority was successfully challenged when used to create a second national bank. Senator John Calhoun and Representative Robert Wright joined together to use the District Clause as a way of avoiding constitutional questions.[206] It was defeated in part by arguments that the District Clause could not be used to circumvent national legislation or impose policies on the rest of the nation.[207] In 1813, the proposed National Vaccine Institution was defeated after sponsors sought to use the District Clause to establish it under Congress's plenary authority.[208] Again, it was viewed as an effort to use the District Clause to impose policies outside of its borders. Likewise, in 1823, an effort to create a fraternal association for the relief of families of dead naval officers was rejected.[209] Opponents

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202 *Adams*, 90 F. Supp. 2d at 62.

203 *See supra* Part III.A.

204 *See supra* note 105 and accompanying text.

205 *Id.*

206 28 ANNALS OF CONG. 496 (1814).

207 *Id.*

208 CURRIE, *supra* note 183, at 300.

209 40 ANNALS OF CONG. 437, 541–42 (1823).

objected to the use of the District Clause to create an institution with national purposes.[210]

When one looks at the historical structure and status of the District as a governing unit, it is obvious that neither the drafters nor later legislators would have viewed the District as interchangeable with a state under Article I. When the District was first created, it was barely a city, let alone a substitute for a state: "The capital city that came into being in 1800 was, in reality, a few federal buildings surrounded by thinly populated swampland, on which a few marginal farms were maintained."[211]

For much of its history, the District was not even properly classified as an independent city. In 1802, the first mayor was a presidential appointee.[212] Congress continued to possess authority over its budget and operations. Although elections were allowed until 1871, the city was placed under a territorial government and effectively run by a Board and Commissioner of Public Works, again appointed by the President.[213] After 1874, the city was run through Congress and the Board of Commissioners.[214]

In 1967, the House Judiciary Committee directly addressed how to give the District an actual voting member in Congress and concluded:

> If the citizens of the District are to have voting representation in the Congress, a constitutional amendment is essential; statutory action alone will not suffice. This is the case because provisions for elections of Senators and Representatives in the Constitution are stated in terms of the States, and the District of Columbia is not a State.[215]

Despite the failure of this constitutional amendment effort, members did not abandon their principled view that only such a change could bring representational status to the District. Indeed, in 1976, members again recognized that "[i]f the citizens of the District are to

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210 *Id.* at 494–97, 501–19.

211 Philip G. Schrag, *By the People: The Political Dynamics of a Constitutional Convention*, 72 GEO. L.J. 819, 826 (1984). Schrag also noted that "[t]he towns of Georgetown and Alexandria were included in the District, but even Georgetown was, to Abigail Adams, 'the very dirtyest Hole I ever saw for a place of any trade or respectability of inhabitants.'" *Id.* (quotations omitted).

212 *Id.* at 826–28.

213 *Id.* at 827.

214 *Id.*

215 EMANUEL CELLER, COMM. ON THE JUDICIARY, PROVIDING REPRESENTATION OF THE DISTRICT OF COLUMBIA IN CONGRESS, H.R. REP. NO. 90-819, at 4 (1967).

have voting representation in the Congress, a constitutional amendment is essential; statutory action alone will not suffice."[216]

President Lyndon Johnson expressly treated the District as the equivalent of a federal agency when he appointed Walter Washington to be mayor in 1967.[217] Under Johnson's legal interpretation, giving the District a vote in Congress would have been akin to making the Department of Defense a congressional member to represent all of the personnel and families on military bases. In granting this form of home rule, Congress retained final approval of all legislative and budget items. In 1973, when it passed the Self-Government Act,[218] Congress noted that it was simply a measure to "relieve Congress of the burden of legislating upon essentially local District matters."[219] Congress again retained final approval.

Thus, for most of its history, the District was maintained as either a territory, a federal agency, or a delegated governing unit of Congress. All of these constructions are totally at odds with the qualification and descriptions of voting members of Congress. The drafters went to great lengths to guarantee independence of members from federal offices or benefits in Article I, Section 6. Likewise, members are not subject to the potential manipulation of their home powers by either the federal government or the other states (through Congress).[220]

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216 DON EDWARDS, COMM. ON THE JUDICIARY, PROVIDING REPRESENTATION OF THE DISTRICT OF COLUMBIA IN CONGRESS, H.R. REP. NO. 94-714, at 4 (1975).

217 Schrag, *supra* note 211, at 829–30.

218 Pub. L. No. 93-198, 87 Stat. 774 (1973) (codified at D.C. CODE §§ 1-201 to 1-206 (2001)).

219 *Id.* § 1-201(a).

220 Over the history of the District, it has had a variety of different governmental systems imposed at the whim of Congress. These include:

- A presidentially appointed three-member commission (1790–1802);
- A popularly elected two chamber council with a presidentially appointed mayor (1802–1820);
- A popularly elected board of common council, board of alderman, and mayor; the elected mayor was replaced by a mayor appointed by the council and alderman and subsequently the mayor being again popularly elected (1820–1871);
- A presidentially appointed governor and council along with a popularly elected house of delegates, and for the first time a popularly elected non-voting delegate to the House of Representatives (1871–1874);
- Another presidentially appointed three member commission (1874–1878);
- Another presidentially appointed commission; this commission consisted of two civilians and one senior Army engineer officer (1878–1967);
- A presidentially appointed mayor/commissioner and nine-member council (1967–1973);
- A non-voting delegate to the House of Representatives, independent of the form of government (1970–Present);

The post-retrocession period contains a long line of cases that repeatedly deny the District the status of a state and reaffirm the intention to create a nonstate entity. This status did not impair the ability of Congress to impose other obligations of citizenship. Thus, in *Loughborough v. Blake*,[221] the Court ruled that the lack of representation did not bar the imposition of taxation.[222] The District was created as a unique area controlled by Congress that was expressly distinguished from state entities. This point was amplified by then-Judge Scalia of the D.C. Circuit in *United States v. Cohen*:[223]

> [The District Clause] enables Congress to do many things in the District of Columbia which it has no authority to do in the 50 states. There has never been any rule of law that Congress must treat people in the District of Columbia exactly the same as people are treated in the various states.[224]

Additionally, a long line of cases establish that the drafters intended legislative authority to be "constitutionally limited to 'Members chosen . . . by the People of the several States.'"[225] This interpretation has long been supported by the Justice Department.[226]

V. A Response to Messrs. Dinh, Starrs et al.

Given the unwavering consistency between the plain meaning of the text of Article I and the historical record, it is baffling to read assertions by Professor Dinh that "[t]here are no indications, textual or otherwise" to suggest that the Framers viewed the nonvoting status

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> • Home Rule, a congressional invention, providing for a popularly elected mayor and city council (1974–Present);
>
> • and finally, a congressionally established transitory Control Board, consisting of five members appointed by the President exercising sovereign authority over the popularly elected mayor and council (1995–2001).

Aaron E. Price, Sr., Comment, *A Representative Democracy: An Unfulfilled Ideal for Citizens of the District of Columbia*, 7 D.C. L. REV. 77, 83–84 (2003) (citations omitted).

221 Loughborough v. Blake, 18 U.S. (5 Wheat.) 317 (1820).

222 *Id.* at 324–25; *see also* Heald v. District of Columbia, 259 U.S. 114, 124 (1922); Neild v. District of Columbia, 110 F.2d 246 (D.C. Cir. 1940).

223 United States v. Cohen, 733 F.2d 128 (D.C. Cir. 1984).

224 *Id.* at 140–41.

225 Michel v. Anderson, 817 F. Supp. 126, 140 (D.D.C. 1993) (citing U.S. CONST. art. I, § 2, cl. 1).

226 *See, e.g.*, *District of Columbia Representation in Congress: Hearing on S.J. Res. 65 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 95th Cong. 16–29 (1978) (testimony of John M. Harmon, Assistant Att'y Gen., Office of Legal Counsel) (explaining the options for a voting member in Congress, but excluding legislative creation of a new member); Letter from Martin F. Richman, Acting Assistant Att'y Gen., Office of Legal Counsel (Aug. 11, 1967) (concluding that "a constitutional amendment is essential" for representation of the District in Congress).

of the District to be permanent or beyond the inherent powers of Congress to change.[227] Indeed, in his testimony before Congress, Professor Dinh repeated his position that this issue was not considered during the drafting and ratification. He and Mr. Charnes have written that the nonvoting status "was neither necessary nor intended by the Framers" and have further asserted that the only "purpose for establishing a federal district was to ensure that the national capital would not be subject to the influences of any state."[228] They insist that "representation for the District's residents seemed unimportant" at the time.[229] The record, however, directly contradicts these statements. As noted earlier, there were various stated purposes behind designating the federal district, and the issue of the nonvoting status of its residents was repeatedly raised before final ratification. Most importantly, the nonvoting status of residents was tied directly to the concept of a seat of government under the control and exclusive jurisdiction of Congress. This status of the District was viewed as obnoxious by some and essential by others before ratification and during the early retrocession movement.

It is true that the District is viewed as "an exceptional community" that is "[u]nlike either the States or Territories."[230] This does not mean, however, that this unique or "*sui generis*" status empowers Congress to bestow upon the District the rights and privileges that are expressly given to the states. To the contrary, Congress has plenary authority in the sense that it holds legislative authority on matters *within* the District.[231] The extent to which the District has and will continue to enjoy its own governmental systems depends entirely upon the will of Congress.[232] This authority over the District does not mean that it can increase the power of the District to compete with the states or dilute their powers under the Constitution. Indeed, as noted below, the District itself took a similar position in recent litigation when it emphasized that it should not be treated as a state under the Second Amendment, and that constitutional limitations are not

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227 Dinh & Charnes, *supra* note 13, at 6.

228 *Id.* at 6.

229 *Id.*

230 District of Columbia v. Carter, 409 U.S. 418, 432 (1973) (citations omitted), *superseded by statute*, Pub. L. No. 96-170, 93 Stat. 1284 (1979) (amending 42 U.S.C. § 1983).

231 *Id.* at 429 ("[T]he power of Congress over the District of Columbia includes all the legislative powers which a state may exercise over its affairs.") (quotation omitted).

232 *See* District of Columbia Home Rule Act of 1973, D.C. CODE § 1-201.1 (2001).

implicated by laws affecting only the federal enclave with "no possible impact on the states."[233]

The repeated reference to the District Clause in terms of taxation, conscription, and other state-like matters is entirely irrelevant. Congress can impose any of these requirements within the District.[234] As the Court stated in *Heald v. District of Columbia*,[235] the "[r]esidents of the District lack the suffrage and have politically no voice in the expenditure of the money raised by taxation."[236] Congress cannot, however, use its authority over the internal operations of the District to change the District's political status vis-à-vis the states. Ironically, just as the nonvoting status of the District was discussed before ratification, so was the distinction between exercising powers within the District and using the same powers against states. For example, during the Virginia debates, Pendleton defended the District Clause by noting that "this clause does not give Congress power to impede the operation of any part of the Constitution, or to make any regulation that may affect the interests of the citizens of the Union at large."[237] The dangers posed by a "Federal Town" were muted both by the fact that Congress would control its operations and that Congress's exclusive legislation concerned its internal operations.

It is equally hard to see the "ample constitutional authority," alluded to by Dinh and Charnes,[238] for Congress using its authority over the internal operations of the District to change the composition of voting members in a house of Congress. To the contrary, the arguments made in their paper strongly contradict suggestions of inherent authority to create de facto state members of Congress. For example, it is certainly true that the Constitution gives Congress "extraordinary and plenary power to legislate with respect to the District."[239] This legislation, however, is not simply a District matter. It affects the voting rights of the states by augmenting the voting members of Congress. It is also legislation that alters the structural make-up of Congress. More importantly, Dinh and Charnes go to great lengths to

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233 Brief for the District of Columbia at 38, Parker v. District Columbia, 478 F.3d 370 (D.C. Cir. 2007) (No. 04-7041).

234 Heald v. District of Columbia, 259 U.S. 114, 124 (1922) ("There is no constitutional provision which so limits the power of Congress that taxes can be imposed only upon those who have political representation.").

235 Heald v. District of Columbia, 259 U.S. 114 (1922).

236 *Id.* at 124.

237 3 THE FOUNDERS' CONSTITUTION, *supra* note 33.

238 Dinh & Charnes, *supra* note 13, at 4.

239 *Id.*

point out how different the District is from the states, noting that the District Clause:

> [W]orks an exception to the constitutional structure of "our Federalism," which delineates and delimits the legislative power of Congress and state legislatures. In joining the Union, the states gave up certain of their powers. Most explicitly, Article II, section 10 specifies activities which are prohibited to the States. None of these prohibitions apply to Congress when it exercises its authority under the District Clause. Conversely, Congress is limited to legislative powers enumerated in the Constitution; such limited enumeration, coupled with the reservation under the Tenth Amendment, serves to check the power of Congress vis-à-vis the states.[240]

This is precisely the point. The significant differences between the District and the states further support the view that they cannot be treated as the same entities for the purposes of voting in Congress. The District is not independent of the federal government, but subject to the will of the federal government. Nor is the District independent of the states, which can exercise enormous power over its operations. The drafters wanted members to be independent from any influence exerted through federal offices or the threat of arrest. For that reason, they expressly prohibited members from holding offices with the federal government,[241] other than their legislative offices, and protected them under the Speech or Debate Clause.[242]

The District has different provisions because it was not meant to act as a state. For much of its history, the District was treated like a territory or a federal agency without any of the core independent institutions that define most cities, let alone states. Thus, the District is allowed exceptions because it is not serving the functions of a state in our system.

Dinh and Starr have both argued that references to "states" are not controlling because other provisions with similar references have been interpreted as nevertheless encompassing District residents.[243] This argument is illusory. The relatively few cases extending the meaning of "states" to the District generally involved irreconcilable conflicts between a literal meaning of the term state and the inherent

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240 *Id.* at 6.

241 U.S. CONST. art. I, § 6, cl. 2.

242 *Id.* art. I, § 6, cl. 1.

243 *See* Dinh & Charnes, *supra* note 13, at 14, 16; *see also* Starr, *supra* note 15, at 75, 83.

rights of all American citizens under the Equal Protection Clause[244] and other provisions.[245] District citizens remain U.S. citizens, even though they are not state citizens. The creation of the federal district removed one right of citizenship, voting in Congress, in exchange for the status of being part of the Capital City. Congress never intended to turn residents into noncitizens with no constitutional rights. As the Court stated in 1901:

> [T]he District was made up of portions of two of the original states of the Union, and was not taken out of the Union by cessation. Prior thereto its inhabitants were entitled to all the rights, guaranties, and immunities of the Constitution . . . .
>
> The Constitution had attached to [the District] irrevocably. There are steps which can never be taken backward. . . . The mere cession of the District of Columbia to the Federal government relinquished the authority of the States, but it did not take it out of the United States or from under the aegis of the Constitution. Neither party had ever consented to that construction of the cession.[246]

The upshot of these opinions is that a literal interpretation of the word "states" would produce facially illogical and unintended consequences. Because residents remain U.S. citizens, they must continue to enjoy those protections accorded to citizens.[247] Otherwise, they could all be enslaved or impaled at the whim of Congress.

Likewise, the Commerce Clause[248] is intended to give Congress the authority to regulate commerce that crosses state borders. Although the Clause refers to commerce "among the several States,"[249] the Court rejected the notion that it excludes the District as a nonstate.[250] The reference to several states was to distinguish the regulated activity from intrastate commerce. As a federal enclave, the District was clearly subsumed within the Commerce Clause.[251] Such commerce questions are clearly not intrastate matters but multiple jurisdictional matters.

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244 U.S. CONST. amend. XIV, § 1, cl. 2.

245 *See* Dinh & Charnes, *supra* note 13, at 16.

246 O'Donoghue v. United States, 289 U.S. 516, 540–41 (1933) (quotation omitted).

247 *See, e.g.*, Callan v. Wilson, 127 U.S. 540, 550 (1888) (holding that District residents continue to enjoy the right to trial as American citizens).

248 U.S. CONST. art. I, § 8, cl. 3.

249 *Id.*

250 *See* Stoutenburgh v. Hennick, 129 U.S. 141, 147–48 (1889).

251 *See id.*

None of these cases means that the term "states" can now be treated as having an entirely fluid and malleable meaning. The courts merely adopted a traditional interpretation as a way to minimize the conflict between provisions and to reflect the clear intent of the various provisions.[252] The District Clause was specifically directed at the meaning of a state. It creates a nonstate status related to the seat of government and particularly Congress. The nonvoting status of the District is a special entity. In provisions dealing with such rights as equal protection, the rights extend to all citizens of the United States. A literal interpretation of states in such contexts would defeat the purpose of the provisions and produce a counterintuitive result. Thus, Congress could govern the District without direct representation, but it must do so in such a way as not to violate those rights protected in the Constitution:

> Congress may exercise within the District all legislative powers that the legislature of a State might exercise within the State; and may vest and distribute the judicial authority in and among courts and magistrates, and regulate judicial proceedings before them, as it may think fit, *so long as it does not contravene any provision of the Constitution of the United States*.[253]

Notably, Congress had to enact statutes and a constitutional amendment to treat the District as a quasi-state for some purposes. Thus, Congress could enact a law that allowed citizens of the District to maintain diversity suits despite the fact that the Diversity Clause refers to diversity between "states."[254] Diversity jurisdiction is meant to protect citizens from the prejudice of being tried in the state courts of another party. The triggering concern was the fairness afforded to two parties from different jurisdictions. District residents are from a different jurisdiction than citizens of any state, and the diversity conflict is equally real.

The decision in *National Mutual Insurance Co. v. Tidewater Transfer Co.*[255] is heavily relied upon in the Dinh and Starr analyses. The actual rulings comprising the decision, however, would appear to contradict their conclusions. Only two justices indicated that they

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252 *See also* District of Columbia v. Carter, 409 U.S. 418, 420 (1973) ("Whether the District of Columbia constitutes a 'State or Territory' within the meaning of any particular statutory or constitutional provision depends upon the character and aim of the specific provision involved.").

253 Palmore v. United States, 411 U.S. 389, 397 (1973) (emphasis added) (citation omitted).

254 *See* 28 U.S.C. § 1332 (2000).

255 Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1948).

would treat the District as a state in their interpretations of the Constitution.[256] The Court began its analysis by stating categorically that the District was not a state and could not be treated as a state under Article III.[257] This point was clearly established in 1805 in *Hepburn v. Ellzey*,[258] only a few years after the establishment of the District. The Court rejected the notion that "Columbia is a distinct political society; and is therefore 'a state' . . . . the members of the American confederacy only are the states contemplated in the constitution."[259] This view was reaffirmed by the Court in 1948:

> In referring to the "States" in the fateful instrument which amalgamated them into the "United States," the Founders obviously were not speaking of states in the abstract. They referred to those concrete organized societies which were thereby contributing to the federation by delegating some part of their sovereign powers and to those that should later be organized and admitted to the partnership in the method prescribed. They obviously did not contemplate unorganized and dependent spaces as states. The District of Columbia being nonexistent in any form, much less a state, at the time of the compact, certainly was not taken into the Union of states by it, nor has it since been admitted as a new state is required to be admitted.[260]

The Court also ruled, however, that Congress could extend diversity jurisdiction to the District because this was a modest use of Article I authority given the fact that the "jurisdiction conferred is limited to controversies of a justiciable nature, the sole feature distinguishing them from countless other controversies handled by the same courts being the fact that one party is a District citizen."[261] Thus, while residents did not have this inherent right as members of a nonstate, Congress could include a federal enclave within the jurisdictional category.

When one looks at the individual opinions of this highly fractured, plurality decision, it is hard to see what about *Tidewater* gives advocates so much hope.[262] Dinh and his co-author Charnes state that

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256 *See id.* at 625–26 (Rutledge, J., concurring, joined by Murphy, J.).

257 *Id.* at 588 (majority opinion).

258 Hepburn v. Ellzey, 6 U.S. (2 Cranch) 445 (1805).

259 *Id.* at 452.

260 *Tidewater*, 337 U.S. at 588.

261 *Id.* at 591.

262 The Congressional Research Service included an exhaustive analysis of the case in its excellent study of this bill and its constitutionality. *See* THOMAS, CONG. RESEARCH SERV., *supra* note 17, at 9–17.

"[t]he significance of *Tidewater* is that the five justices concurring in the result believed either that the District was a state under the terms of the Constitution or that the District Clause authorized Congress to enact legislation treating the District as a state."[263] Yet, to uphold this legislation, a majority of the Court would have to recognize that the District Clause gives Congress this extraordinary authority to convert the District into an effective state for voting purposes. In *Tidewater*, six of nine justices appear to reject the argument that the Clause could be used to extend diversity jurisdiction to the District,[264] a far more modest proposal than creating a voting nonstate entity. Five justices agreed only *in the result* that produced the ruling, a point emphasized by Justice Frankfurter when he noted with considerable irony in his dissent that:

> A substantial majority of the Court agrees that each of the two grounds urged in support of the attempt by Congress to extend diversity jurisdiction to cases involving citizens of the District of Columbia must be rejected—but not the same majority. And so, conflicting minorities in combination bring to pass a result—paradoxical as it may appear—which differing majorities of the Court find insupportable.[265]

When one reviews the insular opinions, it is easy to see what Justice Frankfurter meant and why this case is radically overblown in its significance to the immediate controversy. Justices Rutledge and Murphy, in concurring, based their votes on the irrelevance of the distinction between a state citizen and a District citizen for the purposes of diversity.[266] This view, however, was expressly rejected by the Jackson plurality of Justices Jackson, Black, and Burton. The Jackson plurality did not agree with Justice Rutledge that the term "state" had a more fluid meaning, an argument close to the one advanced by Dinh and Starr. Conversely, Justices Rutledge and Murphy strongly dissented from the arguments of the Jackson plurality.[267] Likewise, represented in two dissenting opinions, Chief Justice Vinson and Justices Frankfurter, Douglas, and Reed rejected arguments that Congress had such authority under either the District Clause or the Diversity

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263 Dinh & Charnes, *supra* note 13, at 13.

264 *See Tidewater*, 337 U.S. at 587–88, 626, 646.

265 *Id.* at 655.

266 *See id.* at 625 (Rutledge, J., concurring).

267 *Id.* at 604 ("But I strongly dissent from the reasons assigned to support [the Court's judgment] in the opinion of Mr. Justice Jackson.").

Clause.[268] The Jackson plurality prevailed because Justices Rutledge and Murphy were able to join in the result, not the rationale. Justices Rutledge and Murphy suggested that they had no argument with the narrow reading of the structuring provisions concerning voting members of Congress. Rather, they drew a distinction with other provisions affecting the rights of individuals as potentially more expansive:

> [The] narrow and literal reading was grounded exclusively on three constitutional provisions: the requirements that members of the House of Representatives be chosen by the people of the several states; that the Senate shall be composed of two Senators from each state; and that each state "shall appoint, for the election of the executive," the specified number of electors; all, be it noted, provisions relating to the organization and structure of the political departments of the government, not to the civil rights of citizens as such.[269]

Thus, Justice Rutledge saw that, even allowing for some variation in the interpretation of "states," there was a distinction to be drawn when such expansive reading would affect the organization or structure of Congress. This would leave at most three justices who seem to support the interpretation of the District Clause advanced in this case.

Professor Dinh's reliance on *De Geofroy v. Riggs*[270] is equally misplaced. It is true that the Court found that a treaty referring to "states of the Union" included the District of Columbia.[271] This interpretation, however, was not based on the U.S. Constitution and its meaning. Rather, the Court relied on the meaning commonly given this term under international law:

> It leaves in doubt what is meant by "States of the Union." Ordinarily these terms would be held to apply to those political communities exercising various attributes of sovereignty which compose the United States, as distinguished from the organized municipalities known as Territories and the District of Columbia. And yet separate communities, with an independent local government, are often described as states, though the extent of their political sovereignty be limited by relations to a more general government or to other countries. The term is used in general jurisprudence and by writ-

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268 *See id.* at 626–27 (Vinson, C.J., dissenting); *see also id.* at 646, 653–54 (Frankfurter, J., dissenting).

269 *Id.* at 619 (Rutledge, J., concurring).

270 De Geofroy v. Riggs, 133 U.S. 258 (1890).

271 Dinh & Charnes, *supra* note 13, at 16.

> ers on public law as denoting organized political societies with an established government.[272]

This was an interpretation of a treaty based on the most logical meaning that the signatories would have used for its terminology. It was not, as suggested, an interpretation of the meaning of that term as it is used in the U.S. Constitution. Indeed, as shown above, the Court begins by recognizing the more narrow meaning under the Constitution before adopting the more generally understood meaning for the purpose of interpreting a treaty in the context of international and public law.[273]

Finally, Professor Dinh and Mr. Charnes place great importance on the fact that citizens overseas are allowed to vote under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA).[274] Dinh and Charnes cite this fact as powerful evidence that "[i]f there is no constitutional bar prohibiting Congress from permitting overseas voters who are not citizens of a state to vote in federal elections, there is no constitutional bar to similar legislation extending the federal franchise to District residents."[275] Again, the comparison between overseas and District citizens is misplaced. Although the Supreme Court has never reviewed the UOCAVA and some legitimate questions remain about its constitutionality, several courts have found the statute to be constitutional.[276] In the overseas legislation, Congress made a logical choice in treating citizens abroad as continuing to be citizens of the last state in which they resided. The same argument, advanced by Dinh et al., was used and rejected in *Attorney General of Guam v. United States*.[277] In that case, citizens of Guam argued, as do Dinh and Charnes, that the meaning of "state" has been interpreted liberally and that the Overseas Act relieves any necessity of being a resident of a state for voting in the presidential election.[278] The court categorically rejected the argument and noted that the act was "premised constitutionally on prior residence in a state."[279] The court quoted from the House Report in support of this holding:

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272 *De Geofroy*, 133 U.S. at 268 (citation omitted).

273 *Id.*

274 Uniformed and Overseas Citizens Absentee Voting Act, Pub. L. No. 99-410, 100 Stat. 924 (1986) (codified as amended at 42 U.S.C. § 1973ff (Supp. IV 2000)).

275 Dinh & Charnes, *supra* note 13, at 18.

276 *See* Romeu v. Cohen, 265 F.3d 118, 125–26 (2d Cir. 2001); De La Rosa v. United States, 842 F. Supp. 607, 611–12 (D.P.R. 1994).

277 Att'y Gen. of Guam v. United States, 738 F.2d 1017, 1019–20 (9th Cir. 1984).

278 *See id.* at 1019.

279 *Id.* at 1020.

> The Committee believes that a U.S. citizen residing outside the United States can remain a citizen of his last State of residence and domicile for purposes of voting in Federal elections under this bill, as long as he has not become a citizen of another State and has not otherwise relinquished his citizenship in such prior State.[280]

Given this logical and limited rationale, the court held that the UOCAVA "does not evidence Congress's ability or intent to permit all voters in Guam elections to vote in presidential elections."[281]

Granting a vote in Congress is not merely a tinkering of "the mechanics of administering justice in our federation."[282] It would touch upon the constitutionally sacred rules of who can create laws that bind the nation.[283] This is not the first time that Congress has sought to give the District a voting role in the political process that is given textually to the states. When Congress sought to allow the District to participate in the Electoral College, it passed a constitutional amendment to accomplish that goal, the Twenty-Third Amendment. Likewise, when Congress changed the rules for electing members of the United States Senate, it did not extend the language to include the District. Rather, it reaffirmed that the voting membership was composed of representatives of the states. These cases and enactments reflect that voting was a defining characteristic of the District and not a matter that can be awarded, or removed, by a simple vote of Congress.

The courts have taken great care for over two hundred years to clearly maintain the original understanding of the District as represented by Congress as a whole. This point was made by Chief Justice John Roberts in one of his last decisions as a lower court judge. In *Banner v. United States*,[284] the D.C. Circuit (including now-Chief Justice Roberts) stressed that:

> [T]he Constitution denies District residents voting representation in Congress. . . . Congress *is* the District's government, and the fact that District residents do not have

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280 *Id.* (citing H.R. REP. NO. 649, at 7, *reprinted in* 1975 U.S.C.C.A.N. 2358, 2364).

281 *Id.*

282 Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 585 (1949).

283 In the past, the District and various territories were afforded the right to vote in Committee. Such committees, however, are merely preparatory to the actual vote on the floor. It is that final vote that is contemplated in the constitutional language. *See* Michel v. Anderson, 14 F.3d 623, 629–30 (D.C. Cir. 1994) (recognizing the constitutional limitation that would bar Congress from granting votes in the full House).

284 Banner v. United States, 428 F.3d 303 (D.C. Cir. 2005) (per curiam).

> congressional representation does not alter that constitutional reality.
>
> . . . .
>
> It is beyond question that the Constitution grants Congress exclusive authority to govern the District, but does not provide for District representation in Congress.[285]

The overwhelming case law precedent refutes the arguments of Messrs. Dinh and Starr. Indeed, just recently in *Parker v. District of Columbia*,[286] the United States Court of Appeals for the District of Columbia Circuit reaffirmed, in both majority and dissenting opinions, that the word "states" refers to actual state entities.[287] *Parker* struck down the District's gun control laws as violative of the Second Amendment.[288] That Amendment uses the term "a free state," and the parties argued over the proper interpretation of the term. Notably, in its briefs and oral argument, the District appeared to take a different position on the interpretation of the word "state," arguing that the court could dismiss the action because the District is not a state under the Second Amendment—a position later adopted by the dissenting judge. The District argued:

> The federalism concerns embodied in the Amendment have no relevance in a purely federal entity such as the District because there is no danger of federal interference with an effective *state* militia. This places District residents on a par with state residents. . . . The Amendment, concerned with ensuring that the national government not interfere with the "security of a free State," is not implicated by local legislation in a federal district having no possible impact on the states or their militias.[289]

In the opinion striking down the District's laws, the majority noted that the term "free state" was unique in the Second Amend-

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285 *Id*. at 309, 312 (citing U.S. CONST. art. I, § 8, cl. 17).

286 Parker v. District of Columbia, 478 F.3d 370 (D.C. Cir. 2007).

287 *Id.* at 396, 405. The D.C. Circuit is the most likely forum for a future challenge to this law.

288 *See id.* at 395, 399–401. The Second Amendment states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.

289 Brief for the District of Columbia at 38, Parker v. District Columbia, 478 F.3d 370 (D.C. Cir. 2007) (No. 04-7041). Adding to the irony, the District's insistence that it was a nonstate under the Constitution was criticized by the plaintiffs as "specious" because the Second Amendment uses the unique term of "free states" rather than "the states" or "the several states." This term, they argued, was intended to mean a "free society," not a state entity. Appellant's Reply Brief at 15 n.4, Parker v. District Columbia, 478 F.3d 370 (D.C. Cir. 2007) (No. 04-7041).

ment and that "[e]lsewhere the Constitution refers to 'the states' or 'each state' when unambiguously denoting the domestic political entities such as Virginia."[290] Although the dissent would have treated "free state" to mean the same as other state references, the uniform meaning given the term "states" was equally clear:

> The Supreme Court has long held that "State" as used in the Constitution refers to one of the States of the Union. . . . In fact, the Constitution uses "State" or "States" 119 times apart from the Second Amendment and in 116 of the 119, the term unambiguously refers to the States of the Union.[291]

The dissent specifically relies on the fact that the District is not a state for the purposes of voting in Congress.[292] Thus, in the latest decision from the D.C. Circuit, the judges continue the same view of the non-state status of the District, as described in earlier decisions of both the Supreme Court and lower courts.

VI. The Policy and Practical Implications of Using the District Clause To Create New Forms of Voting Members

The current approach to securing partial representation for the District is fraught with dangers. What is striking is how none of these dangers have been addressed by advocates with any level of detail. Instead, members are voting on a radical new interpretation with little thought or recognition of its implications for our constitutional system. The Framers created clear guidelines to avoid creating a system on a hope and a prayer. It would be a shame if our current leaders added ambiguity where clarity once resided in the Constitution on such a question. The burden should be on those advocating this legislation to fully answer each of these questions before asking for a vote from Congress.

A. Partisan Manipulation of the Voting Body of Congress

By adopting a liberal interpretation of the meaning of "states" in Article I, Congress would be undermining the very bedrock of our constitutional structure. The membership and division of Congress was carefully defined by the Framers. The legislative branch is the engine of the Madisonian democracy. It is in these two houses that

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290 *Parker*, 478 F.3d at 396.

291 *Id.* at 405 (Henderson, J., dissenting). The dissent noted that three instances of the use of the term "state" involve the use of "foreign state" under Article I, Section 9, Clause 8; Article III, Section 2, Clause 1; and the Eleventh Amendment. *Id.* at 405 n.9.

292 *Id.* at 406 (citing Adams v. Clinton, 531 U.S. 941 (2000)).

disparate factional disputes are converted into majoritarian compromises, the defining principle of the Madisonian system. Allowing majorities to manipulate the membership rolls would add dangerous instability and uncertainty to the system. The obvious and traditional meaning of "states" deters legislative measures to create new forms of voting representatives or shifting voters among states.[293] Under this approach, the House could award a vote to District residents and a later majority could take it away. The District residents would continue to vote, not as do other citizens, but at the whim and will of the Congress like some party favor that can be withdrawn with the passing fortunes of politics. Moreover, the evasion of the 435-member limitation created in 1911 would encourage additional manipulations of the House rolls in the future. Finally, if the Congress can give the District one vote, they could by the same authority give the District ten votes or, as noted below,[294] award additional seats to other federal enclaves.

B. Creation of New Districts Among Other Federal Enclaves and Territories

If successful, this legislation would allow any majority in Congress to create other novel seats in the House. This is not the only federal enclave, and there is great potential for abuse and mischief in the exercise of such authority. Under Article IV, Section 3, "[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[295] Roughly thirty percent of land in the United States (over 659 million acres) is part of a federal enclave regulated under the same power as the District.[296] The Supreme Court has re-

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293 This latter approach was raised by Judge Leval in *Romeu v. Cohen*, 265 F.3d 118, 129–30 (2d Cir. 2001), when he suggested that Congress could require each state to accept a certain proportion of voters in territories to give them a voice in Congress. This view has been rejected, including by the concurring opinion in that decision which found "no authority in the Constitution for the Congress (even with the states' consent) to enact such a provision." *Id.* at 131 (Walker, C.J., concurring); *see also* Igartua-De La Rosa v. United States, 417 F.3d 145, 154 n.9 (1st Cir. 2005). According to Chief Judge Walker, there are "only two remedies afforded by the Constitution: (1) statehood . . . , or (2) a constitutional amendment." Romeu, 265 F.3d at 136 (Walker, C.J., concurring).

294 *See infra* Part VII.B.

295 U.S. CONST. art. IV, § 3, cl. 2.

296 Deborah Zabarenko, *Climate Change Hit U.S. Federal Land, Water*, REUTERS, Sept. 6, 2007, *available at* http://www.alertnet.org/thenews/newsdesk/N06343350.htm; *see also* national atlas.gov, Federal Lands and Indian Reservations, http://nationalatlas.gov/printable/fedlands.html (last visited Jan. 2, 2008). In addition to the District of Columbia and domestic federal areas, this includes such territories in American Samoa, Baker Island, Federated States of Micronesia, Guam, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Marshall Islands,

peatedly stated that the congressional authority over other federal enclaves derives from the same basic source:[297]

> This brings us to the question whether Congress has power to exercise "exclusive legislation" over these enclaves within the meaning of Art. I, § 8, cl. 17, of the Constitution, which reads in relevant part: "The Congress shall have Power . . . [t]o exercise exclusive Legislation in all Cases whatsoever" over the District of Columbia and "to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings."
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> The power of Congress over federal enclaves that come within the scope of Art. I, § 8, cl. 17, is obviously the same as the power of Congress over the District of Columbia. The cases make clear that the grant of "exclusive" legislative power to Congress over enclaves that meet the requirements of Art. I, § 8, cl. 17, by its own weight, bars state regulation without specific congressional action.[298]

Congress could use the same claimed authority to award seats to other federal enclaves. Indeed, because these enclaves were not established with the purpose of being a special nonstate entity, as was the District, they could claim to be free of some of these countervailing arguments against the District. Indeed, the District is often treated the same as states for the purposes of federal jurisdiction, taxes, and military service. There are literally millions of people living in these areas, including Puerto Rico, with a population of four million people—roughly eight times the size of the District.[299] These territories are under the plenary authority of Congress.[300] Similar to the cases involving the District, this authority is often stated in absolute

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Midway Islands, Navassa Island, Northern Mariana Islands, Palmyra Atoll, Republic of Palau, Puerto Rico, the U.S. Virgin Islands, U.S. Minor Outlying Islands, and Wake Island. FEDERAL REAL PROPERTY COUNCIL, FY 2005 FEDERAL REAL PROPERTY REPORT: AN OVERVIEW OF THE FEDERAL GOVERNMENT'S REAL PROPERTY ASSETS 3 (June 2006), http://www.gsa.gov/gsa/cm_attachments/GSA_DOCUMENT/FRPR_5-30_updated_R2872-m_0Z5RDZ-i34K-pR.pdf.

297 In addition to Article I, Section 8, the Territorial Clause in Article IV, Section 3 states that "[t]he Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." U.S. CONST. art. IV, § 3, cl. 2.

298 Paul v. United States, 371 U.S. 245, 263 (1963).

299 U.S. Census Bureau, http://www.census.gov/schools/facts/puerto_rico.html.

300 *See, e.g.*, Davila-Perez v. Lockheed Martin Corp., 202 F.3d 464, 468 (1st Cir. 2000) ("Puerto Rico . . . is still subject to the plenary powers of Congress under the territorial clause . . . .").

terms. In *Downes v. Bidwell*,[301] the Court held that "[t]he territorial clause . . . is absolute in its terms, and suggestive of no limitations upon the power of Congress in dealing with [nonstate territories]."[302] Puerto Rico would warrant as many as six districts.[303] It is not enough to assert that the District has a more compelling political or historical case. Advocates within these federal enclaves and territories can, and have,[304] cited the same interpretation for their own representation in Congress.

It is no answer to this concern to note that territory residents do not bear full taxation burdens, military conscription, or the right to vote in presidential elections.[305] Congress determines whether these territories will bear taxation or service burdens, just as it did for the District. The District previously did not share the taxation burden, but now does as a result of congressional fiat. As for the presidential election, it took the Twenty-Third Amendment to secure that right for the District residents. If anything, voting in the presidential elections is proof that the District is not distinct from territories.

Finally, it is argued that residents in the territories only have nationality not citizenship.[306] In fact, there are millions of citizens residing in federal enclaves and territories. More to the point, the interpretation being advanced in this legislation turns on the authority of Congress, not the status of residents, to justify the creation of a new district.

C. Expanded Senate Representation

Although the issue of Senate representation is left largely untouched in the Dinh and Starr analyses,[307] there is no obvious princi-

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301 Downes v. Bidwell, 182 U.S. 244 (1901).

302 *Id.* at 285.

303 Indeed, citing this bill, some have already called for Puerto Rico to be given multiple seats in Congress. *See* José R. Coleman Tió, Comment, *Six Puerto Rican Congressmen Go to Washington*, 116 YALE L.J. 1389, 1390 n.6 (2007).

304 *Id.* at 1391–92.

305 *Cf.* Bress & McGill, *supra* note 131, at 8 (citing such factors to support the claim of unique status for the District).

306 *Id.*

307 In their footnote on this issue, Dinh and Charnes note that there may be significance that the Seventeenth Amendment refers to the election of two Senators "from each state." Dinh & Charnes, *supra* note 13, at 13 n.57. They suggest that this somehow creates a clearer barrier to District representatives in the Senate—a matter of obvious concern in that body. *See id.* The interpretation tries too hard to achieve a limiting outcome, particularly after endorsing a wildly liberal interpretation of the language of Article I. Article I, Section 2 refers to members elected "by the People of the several States" whereas the Seventeenth Amendment refers to two Senators "from each State" and "elected by the people thereof." U.S. CONST. art. I, § 2; *id.* amend.

ple that would prevent a majority from expanding its ranks with two new Senate seats for the District. Two Senators and a member of the House would be a considerable level of representation for a nonstate with a small population. Yet, this analysis would suggest that such a change could take place without a constitutional amendment. When asked about the extension of the same theory to claiming two Senate seats in the last hearing before the House Judiciary Committee, Professor Dinh once again said that he had not given it much thought.[308] Yet, since his first report in 2004, this issue has been repeatedly raised to Dinh without a response. Likewise, Richard Bress has given legal advice to the House Committee on the constitutionality of the legislation for years and was asked the same question in the last hearing, but insisted that he had not resolved the question.[309] After those hearings, Mr. Bress published a defense of the current bill, and, despite the earlier questions from members on this point, he again declined to answer and dismissed the issue as "entirely speculative."[310]

In his last testimony on this question, Dinh ventured to offer a possible limitation that would confine his interpretation to only the House. He cited Article I, Section 3, and (as he had in his 2004 report) noted that "quite unlike the treatment of the House of Representatives, the constitutional provisions relating to composition of the Senate additionally specifies that there shall be two senators 'from each State.'"[311] As I pointed out in the prior hearing, however, Section 2 has similar language related to the House, specifying that "each State shall have at Least one Representative."[312] It remains unclear why this language does not suggest that same "interests of states qua states" for the House as it does for the Senate.

Conversely, if this language can be ignored in Section 2, it is not clear why it cannot also be ignored in Section 3. One would expect at a minimum that, after three years, these advocates could answer this

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XVII. Because the object of the Seventeenth Amendment is to specify the number from each state, it is obviously more direct to write "two Senators from each State," rather than "two Senators elected by the people from each of the several States."

308 *See Judiciary Comm. Hearing*, *supra* note 12, at 112 (testimony of Viet Dinh, Professor of Law and Co-Director Asian Law & Policy Studies Georgetown University Law Center).

309 *See id*. (testimony of Richard P. Bress, Partner, Latham & Watkins, LLP).

310 Bress & McGill, *supra* note 131, at 12.

311 *See Judiciary Comm. Hearing*, *supra* note 12, at 20 n.56, 118 (testimony of Viet Dinh, Professor of Law and Co-Director Asian Law & Policy Studies Georgetown University Law Center); Dinh & Charnes, *supra* note 13, at 13 n.57.

312 *Hearing on H.R. 5388*, supra note 7 (testimony of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School) (referring to U.S. CONST. art. I, § 2).

question with the certainty that they offer on the House question. There is an element of willful blindness to the implications of the new interpretation. To his credit, at the last hearing, Bruce Spiva of DC Vote answered the question directly.[313] He stated that he wanted to see such Senate representation and believed that the same arguments could secure such an expansion.[314] Legislators should not vote on a radical new interpretation without confirming whether the same argument would allow the addition of new members in the Senate.

D. One Person, One Vote

This legislation would create a bizarre district that would not be affected by a substantial growth or reduction in population. The bill states that "the District of Columbia may not receive more than one Member under any reapportionment of Members."[315] Thus, whether the District of Columbia grew to three million or shrank to 30,000 citizens, it would remain a single congressional district, unlike other districts that must increase or decrease to guarantee such principles as one person/one vote. This could ultimately produce another one person/one vote issue. If the District shrinks to a sub-standard size in population, other citizens could object that because it is not a state under Article I, Section 3 (creating the minimum of vote representative per state), this new District would violate principles of equal representation. Likewise, if the District grew in population, citizens would be underrepresented and Congress would be expected to add another representative under the same principles, potentially giving the District more representatives than some states. The creation of a district outside of the apportionment requirements is a direct contradiction of the Framers' intent.[316]

E. Nonseverability

The inevitable challenge to this legislation could produce serious legislative complications. With a relatively close House division, the casting of a questionable vote for the District could leave the validity of the legislation itself in question. Moreover, if challenged, the status of the two new members would be in question. This latter problem is not resolved by Section 6's nonseverability provision, which states: "If

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313 *See Judiciary Comm. Hearing*, *supra* note 12, at 35 (testimony of Bruce V. Spiva, Partner, Spiva & Hartnett, LLP).

314 *Id.*

315 S. 1257, 110th Cong. § 2(b)(1) (2007).

316 *See* Wesberry v. Sanders, 376 U.S. 1, 8–11, 13–14 (1964).

any provision of this Act or any amendment made by this Act is declared or held invalid or unenforceable, the remaining provisions of this Act or any amendment made by this Act shall be treated and deemed invalid and shall have no force or effect of law."[317] However, if the D.C. vote is subject to a temporary or permanent injunction (or conversely, if the Utah seat is enjoined), it could be argued that a provision of the Act was not technically "declared or held invalid or unenforceable." Rather, it could be enjoined for years on appeal, without any declaration or holding of unenforceability. This confusion could even extend to the next presidential election. By adding a district to Utah, that new seat would add another electoral vote for Utah in the presidential election. Given the last two elections, it is possible that there could be another cliffhanger with a tie or one-vote margin between the main candidates. The Utah vote could be determinative. Yet, such a close election is likely to occur in the midst of litigation over the current legislation.[318] Thus, we could face a constitutional crisis over whether the Congress will accept the results based upon this vote when both the Utah and District seats might be nullified in a final ruling.[319]

F. Qualification Issues

Because delegates are not addressed or defined in Article I, these new members from the District or territories would not technically be covered by the qualification provisions for members of Congress. Thus, although conventional members of Congress would be constitutionally defined,[320] these new members would be legislatively defined—allowing Congress to lower or raise such requirements in contradiction to the uniform standard of Article I. Conversely, if Congress treats any district or territory as "a state" and any delegate as a "member of Congress," it would effectively gut the qualification standards in the Constitution by treating the title rather than the defi-

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317 S. 1257, 110th Cong. § 6 (2007).

318 The case challenging the Elizabeth Morgan Act (on which I was lead counsel) took years before it was struck down as an unconstitutional bill of attainder. *See* Foretich v. United States, 351 F.3d 1198, 1204, 1226 (D.C. Cir. 2003).

319 Indeed, some in Utah are already questioning the wisdom of seeking this novel deal with the District because it is likely that the state will receive a new district in the ordinary course of reapportionment in 2012, while litigation would delay any seat founded on this legislation. *See* Thomas Burr, *Should Utah Stay on Quest for House Seat?*, SALT LAKE TRIB., Sept. 23, 2007.

320 *See* U.S. CONST. art. I, § 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.").

nition of "members of Congress" as controlling. As noted above,[321] this directly contradicts the express effort of the Framers to make the qualifications of Congress a fixed structural element of the Constitution.

Another example of this contradiction can be found in the definition of the districts of members versus delegates. Members of Congress represent districts that are adjusted periodically to achieve a degree of uniformity in the number of constituents represented, including the need to add or eliminate districts for states with rising or falling constituencies. A District member would be locked into a single district that would not change with the population. The result is undermining the uniformity of qualifications and constituency provisions that the Framers painstakingly placed into Article I.

G. Faustian Bargain

This legislation is a true Faustian bargain for District residents who are about to effectively forego true representation for a limited and non-guaranteed district vote in one house. The legislation would only serve to delay true representational status for district residents. On a practical level, this bill would likely extinguish efforts at full representation in both houses. During the pendency of the litigation, it is highly unlikely that additional measures would be considered, thereby delaying reforms for many years. Ultimately, if the legislation were struck down, it would leave the campaign for full representation frozen in political amber for many years.[322]

VII. The Modified Retrocession Plan: A Three-Phase Alternative for the Full Representation of Current District Residents in Both the House and the Senate

The history of the District of Columbia shows that, even before its formal creation, there were cries of objection to the status of its

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321 *See supra* notes 107–10 and accompanying text.

322 Notably, the sponsors would not support a good-faith offer from Senator John Warner (R-Va.) to draft a constitutional amendment that would create the special seat in the House for the District. *See* Mary Beth Sheridan, *Senators Block D.C. Vote Bill, Delivering Possibly Fatal Blow*, WASH. POST, Sept. 19, 2007, at A1. The dismissal of this proposal was highly enlightening. Some sponsors do not believe that they could win a direct vote by the citizens. Thus, they are seeking a novel way of circumventing voters and hoping that plaintiffs would not have standing to challenge the law. The assumption that the public would not support the reform, however, is misplaced. The last amendment sought the creation of a 51st state, a much more difficult concept to sell to the public. The creation of a special seat for the district is materially different from the earlier proposal.

residents.[323] Since that time, there have been dozens of different proposals to change the status of the District, including one successful retrocession of part of the original district and one unsuccessful effort to ratify a constitutional amendment making the district a state.[324] A constitutional amendment remains the most straightforward approach to resolving this long controversy. Certainly, as noted above, it was the option that many thought appropriate when the District was created. Moreover, while the proposal of state status was not popular nationally, a more modest constitutional amendment securing representation in the House would likely appeal to many reluctant voters. Thus, the current legislative approach could be put into a proposed amendment and possibly win over those citizens uncomfortable with the idea of either statehood or senate representation for the District.[325]

Putting aside a constitutional amendment, however, there remains retrocession, which can come in many different forms. Like a constitutional amendment, retrocession offers a complete and lasting resumption of political rights for residents. Ironically, the complete bar to representation in Congress was viewed as necessary because any halfway measure would only lead to eventual demands for statehood. For example, James Holland of North Carolina noted that only retrocession would work because anything short of that would be a flawed territorial form of government:

> If you give them a Territorial government they will be discontented with it, and you cannot take from them the privilege you have given. You must progress. You cannot disenfranchise them. The next step will be a request to be admitted as a member of the Union, and, if you pursue the practice relative to territories, you must, so soon as their numbers will authorize it, admit them into the Union. Is it proper or politic to add to the influence of the people of the seat of Government by giving a representative in this House and a representation in the Senate equal to the greatest State in the Union? In my conception it would be unjust and impolitic . . . .[326]

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323 *See supra* note 125 and accompanying text.

324 *See supra* notes 195–96 and accompanying text.

325 This alternative has been refused by sponsors who insist on a legislative fix rather than presenting the question to the voters. *See* Mary Beth Sheridan, *D.C. Vote Nears Its Do-or-Die Moment*, WASH. POST, Sept. 16, 2007, at C1.

326 Richards, *supra* note 192 (quoting Rep. James Holland, R-N.C.).

We are, hopefully, in the final chapter of this debate. One hundred and sixty years ago, Congress retroceded land back to Virginia under its Article I authority.[327] Retrocession has always been the most direct way of securing a resumption of voting rights for District residents.[328] Most of the District can be simply returned from whence it came: the state of Maryland. The greatest barrier to retrocession has always been more symbolic than legal. Replacing Washington, DC with Washington, MD is a conceptual leap that many are simply not willing to make. However, it is the most logical resolution of this problem.[329]

For a number of years, I have advocated the reduction of the District of Columbia to the small area that runs from the Capitol to the Lincoln Memorial.[330] The only residents in this space would be the First Family. The remainder of the current District would then be retroceded to Maryland.

Such retrocession can occur without a constitutional amendment. Ironically, in 1910 when some members sought to undo the Virginia retrocession, another George Washington University Law Professor, Hannis Taylor, supplied the legal analysis that the prior retrocession was unconstitutional without an amendment.[331] I respectfully disagree with my esteemed predecessor. In my view, Congress can not only order retrocession, but can do it without the prior approval of Maryland—though I believe that this would be a bad policy decision. Although Congress did allow Virginia to vote to accept its land back, it is not clearly required to do so under the Constitution. The original land grant was ceded to Congress, which always had the right to retrocede it. Obviously, no one is suggesting such a step. As a constitu-

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327 *See supra* note 195 and accompanying text.

328 An alternative, but analogous, retrocession plan has been proposed by Representative Dana Rohrabacher. For a recent discussion of this proposal, see Dana Rohrabacher, *Full Representation for Washington—The Constitutional Way*, ROLL CALL, Jan. 25, 2007, at 8.

329 At first blush, there would seem to be a promising approach found in legislation granting Native Americans the right to vote in the state in which their respective reservation is located. *See* 8 U.S.C. § 1401(a)(2) (2000). After all, these areas fall under congressional authority in the provision of Section 8. U.S. CONST. art. I, § 8, cl. 3. The District, however, presents the dilemma of being intentionally created as a unique nonstate entity, severed from Maryland. For this approach to work, the District would still have to be returned to Maryland while retaining the status of a federal enclave. *See* Evans v. Cornman, 398 U.S. 419, 424–25 (1970) (holding that residents on the campus of the National Institutes of Health (NIH) in Maryland could vote as part of that state's elections).

330 *See, e.g.*, *Hearing on H.R. 5388*, *supra* note 7 (testimony of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School).

331 S. DOC. NO. 61-286, at 4 (1910) (Opinion of Hannis Taylor as to the Constitutionality of the Act of Retrocession of 1846).

tional matter, however, I do not see the barrier to retroceding the Maryland portion of the original federal enclave. As John Calhoun correctly noted in 1846: "The act of Congress, it was true, established this as the permanent seat of Government; but they all knew that an act of Congress possessed no perpetuity of obligation. It was a simple resolution of the body, and could be at any time repealed."[332]

I have also proposed a three-phase process for retrocession. In the first phase, a political transfer would occur immediately with the District securing a House seat as a Maryland district and residents voting in Maryland statewide elections. In the second phase, any incorporation of public services from education to prisons to law enforcement would occur. In the third phase, any incorporation of tax and revenue systems would occur.

These phases would occur over many years with only the first phase occurring immediately upon retrocession. Indeed, I have recommended the creation of a three-commissioner body, like the one that worked with George Washington in the establishment of the original federal district. These commissioners would recommend and oversee the incorporation process. Moreover, Maryland can agree to continue to treat the District as a special tax or governing zone until incorporation is completed. Indeed, Maryland may choose to allow the District to continue in a special status due to its historical position.

Any incorporation is made easier, not more difficult, by the District's historic independence. Like most cities, it would continue to have its own law enforcement and local governing authority. The District could also benefit, however, from incorporation into Maryland's respected educational system and other statewide programs related to prisons and other public needs. Maryland could benefit from the addition of one of the world's great centers of learning and politics and a city experiencing a comprehensive political and economic renewal after years of corruption and cronyism.[333] The city is now prospering, and its residents currently pay roughly $6 billion a year in federal taxes, the second highest per capita in the nation.[334]

In my view, this approach would be unassailable on a legal level and highly efficient on a practical level. I realize that there remains a fixation with the special status of the city, but much of this status

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332 CONG. GLOBE, 29th Cong., 1st Sess. 1046 (1846).

333 *See, e.g.*, David Nakamura, *Senate Approves D.C. School Takeover Plan*, WASH. POST, May 23, 2007, at B1.

334 *See Homeland Security Hearing*, *supra* note 5, at 1 (testimony of Del. Eleanor Holmes Norton, D-D.C.).

would remain. Although the city would not technically be the seat of government, it would obviously remain for all practical purposes our Capital City.

This is not to suggest that a retrocession would be without complexity. Indeed, the Twenty-Third Amendment represents an obvious anomaly.[335] Section 1 of that Amendment states:

> The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:
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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 State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.[336]

Because the only likely residents would be the first family, this presents something of a problem. There are a few obvious solutions. One solution would be to repeal the Amendment, which is the most straight-forward and preferred.[337] Another approach would be to leave the Amendment as constructively repealed. Most presidents vote in their home states. A federal law can bar residences in the new District of Columbia. A third and related approach would be to allow the Clause to remain dormant because it states that electors are to be appointed "as the Congress may direct."[338] Congress can enact a law directing that no such electors may be chosen. The only concern is that a future majority could do mischief by directing an appointment when electoral votes are close.

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335 *See* U.S. CONST. amend. XXIII.

336 *Id*. amend. XXIII, § 1.

337 I have previously stated that my preference would be to repeal the entire Electoral College as an archaic and unnecessary institution and move to direct election of our President. But that is a debate for another day.

338 *See* Peter Raven-Hansen, *The Constitutionality of D.C. Statehood*, 60 GEO. WASH. L. REV. 160, 187–88 (1991); Philip G. Schrag, *The Future of District of Columbia Home Rule*, 39 CATH. U. L. REV. 311, 317 (1990).

Conclusion

There is an old story about a man who comes upon another man in the dark on his knees looking for something under a street lamp. "What did you lose?" he asked the stranger. "My wedding ring," he answered. Sympathetic, the man joined the stranger on his knees and looked for almost an hour until he asked if the man was sure that he dropped it here. "Oh, no," the stranger admitted, "I lost it across the street but the light is better here." Like this story, there is a tendency in Congress to look for answers where the political light is better, even when it knows that the solution must be found elsewhere. That is the case with the current District legislation, which mirrors an earlier failed effort to pass a constitutional amendment. The 1978 amendment was a more difficult course, but the answer to the current problems can only be found constitutionally in some form of either an amendment or retrocession.

Currently, the advocates of a new District seat are looking where the light is better with a simple political trade-off of two seats. It is deceptively easy to make such political deals by majority vote. Not only is this approach facially unconstitutional, but the outcome of this legislation, even if sustained on appeal, would not be cause for celebration. Indeed, this legislation would replace one grotesque constitutional curiosity in the current status of the District with a new curiosity. The creation of a single vote in the House (with no representation in the Senate) would create a type of half-formed citizenry with partial representation derived from residence in a nonstate. It is an idea that is clearly put forward with the best of motivations, but one that is shaped by political convenience rather than constitutional principle.

From its very inception, the District was meant to be unique: a nonstate entity represented by the whole of Congress. It may be true that the drafters should have addressed concerns like those of Hamilton. However, there is an amendment process for the correction of outdated or ill-advised provisions. More importantly, this constitutional process would preserve the integrity and stability of the legislative branch. Allowing Congress to create new forms of members would undermine the very structure of the legislative branch under Article I.

It is certainly time to right this historical wrong, but, in our constitutional system, how we do something is often more important than what we do. The current legislative approach is simply the wrong means to a worthy end. It is not, however, the only means. Although

a constitutional amendment and retrocession are neither easy nor fast, they represent the greatest hope for a lasting resolution of the unrepresented status of the citizens of the District of Columbia.