STATEMENT FOR THE RECORD
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ENDING TAXATION WITHOUT REPRESENTATION:
THE CONSTITUTIONALITY OF S. 1257

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COMMITTEE ON THE JUDICIARY
THE UNITED STATES SENATE

I.
INTRODUCTION

Chairman Feingold, Senator Specter, members of the Committee, it is an honor to appear before you today to discuss the important question of the representational status of the District of Columbia in Congress. At the outset, I believe that it is important for people of good faith to acknowledge that this is not a debate between people who want District residents to have the vote and those who do not. I expect that everyone here today would agree that the current non-voting 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*:[1] "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."

Today, we are all seeking a way to address the glaring denial of basic rights to the citizens of our Capitol City.[2] Clearly, this is a matter that is heavily laden with passions from decades of disenfranchisement. However, there is a tendency to personalize the barriers to such representation and to ignore any countervailing evidence in the constitutional debates. In the last Senate hearing, my friend Delegate Eleanor Holmes Norton told Senators that if they are going to vote against this bill, "do not to blame the Framers

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

[2] While I am a former resident of Washington, I come to this debate with views primarily of an academic and litigator. In addition to teaching at George Washington Law School, I was counsel in the successful challenge to the Elizabeth Morgan Act. Much like this bill, a hearing was held to address whether Congress had the authority to enact the law -- the 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 Section 9-10 of Article I. 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. *Foretich v. United States*, 351 F.3d 1198 (D.C. Cir. 2003). The current bill is another example of Congress exceeding its authority, though now under sections 2 and 8 (rather than section 9 and 10) of Article I.

blame Jonathan Turley."[3] Del. Norton went further to argue that it was "slander" to claim that the Framers intended to leave District residents without their own representatives in Congress.[4] In reality, I have long argued for *full* representation for the District and abhor the status of its residents.[5] As for claims of slandering the Framers, truth remains an absolute defense to defamation and the record in this case could not be more clear as to the intentions of the Framers. While some may view it as obnoxious (and indeed some at the time held the same view), the Framers most certainly did understand the implications of creating a federal enclave represented by Congress as a whole.

Unlike many issues before Congress, there has always been a disagreement about the means rather than the ends of full representation for the District residents. Regrettably, I believe that S. 1257 is the wrong means.[6] Despite the best of motivations, the bill is fundamentally flawed on a constitutional level and would only serve to needlessly delay true reform for District residents.[7] Indeed, considerable expense would likely come from an inevitable and likely successful legal challenge -- all for a bill that

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[3] *Equal Representation in Congress: Providing Voting Rights to the District of Columbia,* before the Committee on Homeland Security and Government Operations, United States Senate, 110th Cong., May 15, 2007 (testimony of De. Norton).

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

[5] I have described the modified retrocession plan that I proposed in the last analysis section and I would be happy to discuss it at more length during this hearing.

[6] *See generally* Jonathan Turley, *Too Clever By Half: The Unconstitutional D.C. Voting Rights Bill*, Roll Call, Jan. 25, 2007, at 3; Jonathan Turley, *Right Goal, Wrong Means*, Wash. Post, Dec. 12, 2004, at 8.

[7] In this testimony, I will not address the constitutionality of giving the District of Columbia and other delegates the right to vote in the Committee of the Whole. *See Michel v. Anderson*, 14 F.3d 623 (D.C. Cir. 1994) (holding that "Article I, §2 . . . precludes the House from bestowing the characteristics of membership on someone other than those 'chosen every second year by the People of the several States."). The most significant distinction that can be made is that the vote under this law is entirely symbolic since it cannot be used to actually pass legislation in a close vote.

would ultimately achieve only partial representational status. The effort to fashion this as a civil rights measure ignores the fact that it confers only partial representation without any guarantee that it will continue in the future. It is the equivalent of allowing Rosa Parks to move halfway to the front of the bus in the name of progress. District residents deserve full representation and, while this bill would not offer such reform, there are alternatives, including a three-phased proposal that I have advocated in the past.

As I laid out in detail in my prior testimony on this proposal before the 109th Congress[8] and twice before the 110th Congress,[9] I must respectfully but strongly disagree with the constitutional analysis offered to Congress by Professor Viet Dinh,[10] and the Hon. Kenneth Starr.[11] Notably, since my first testimony on this issue, the independent Congressional Research Service joined those of us who view this legislation as facially unconstitutional.[12]

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8 *District of Columbia Fair and Equal House Voting Rights Act of 2006*, before the Subcommittee on the Constitution, United States House of Representatives, 109th Cong., 2nd Sess. 2 (testimony of Jonathan Turley).

9 *Equal Representation in Congress: Providing Voting Rights to the District of Columbia,* before the Committee on Homeland Security and Government Operations, United States Senate, 110th Cong., May 15, 2007 (testimony of Jonathan Turley); *District of Columbia Fair and Equal House Voting Rights Act of 2007*, before the Committee on the Judiciary, United States House of Representatives, 110th Cong., March 14, 2007 (testimony of Jonathan Turley).

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

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

12 Congressional Research Service, The Constitutionality of Awarding the Delegate for the District of Columbia a Vote in the House of Representatives or the Committee of the Whole, January 24, 2007, at i (Analysis by Mr. Eugene Boyd) (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

Likewise, the White House recently disclosed that its attorneys have reached the same conclusion and found this legislation to be facially unconstitutional.[13] President Bush has indicated that he will veto the legislation on constitutional grounds.

Permit me to be blunt, I consider this Act to be the most premeditated unconstitutional act by Congress in decades.[14] I have taken the liberty of submitting roughly 70 pages of testimony today in the hope of leaving no question as to the clarity of the textual language and historical record on this point. As shown below, on every level of traditional constitutional analysis (textualist, intentionalist, historical) the unconstitutionality of this legislation is plainly evident. Conversely, the interpretations of Messrs. Dinh and Starr are based on uncharacteristically liberal interpretations of the text of Article I, which ignore the plain meaning of the word "states" and the express intent of the Framers.

The bill's drafters have boldly stated that "[n]otwithstanding any other provision of law, the District of Columbia shall be considered a Congressional district for purposes of representation in the House of Representatives."[15] What this language really means is: "notwithstanding any provision of the Constitution." The problem is that this Congress cannot set aside provisions of the Constitution absent a ratified constitutional amendment. Of course, the language of S. 1257 is strikingly similar to a 1978 constitutional amendment that failed after being ratified by only 16 states.[16] Indeed, in both prior successful and unsuccessful amendments[17] (as

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representation, but that congressional power over the District of Columbia does not represent a sufficient power to grant congressional representation.").

[13] Suzanne Struglinski, *House OKs a 4th seat for Utah*, Deseret Morning News, April 20, 2007, at 1; Christina Bellantoni, *Democrats Adjust Rules for D.C. Vote Bill*, Wash. Times, April 19, 2007, at A5.

[14] To the credit of Congress, the Elizabeth Morgan Law was blocked by members on the House floor due to its unconstitutionality and was only passed when it was added in conference and made part of the Transportation Appropriations bill – a maneuver objected to publicly by both Senators and Representatives at the time. Efforts to allow a vote separately on the Act were blocked procedurally after the conference.

[15] S. 1257 §2.

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

well as in arguments made in court),[18] the 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[19] by claiming the inherent authority to add a non-state voting member to the House of Representatives.

The Senate has wisely changed the at-large provision for the Utah district to require the creation of new individual districts. However, given the House bill, I wish to stress that I also believe that the concurrent awarding of an at-large seat would raise difficult legal questions, including but not limited to the guarantee of "one person, one vote." I will address each of these arguments below. However, in the hope of a more productive course, I will also briefly explore an alternative approach that would be (in my view) both unassailable on a legal basis and more practicable on a political basis.

II.
THE ORIGINAL PURPOSE OF A FEDERAL ENCLAVE IN THE 21ST CENTURY

The non-voting status of District residents remains something of a historical anomaly that should be a great embarrassment for all citizens.

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

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

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

Indeed, 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 public of Pennsylvania was more likely to help the mob than to help suppress it. Indeed, when Congress called on the state officials to call out the militia, they refused. To understand the desire to create a unique non-state enclave, it is important to consider the dangers and lasting humiliation of that scene as it was recorded in the daily account from the debates:

> On 21 June 1783, the mutinous soldiers presented themselves, drawn up in the street before the state-house, where Congress had assembled. [Pennsylvania authorities were] called on for the proper interposition. [State officials demurred and explained] the difficulty, under actual circumstances, of bringing out the militia . . . for the suppression of the mutiny . . . . [It was] thought that, without some outrages on persons or property, the militia could not be relied on . . . . The soldiers remained in their position, without offering any violence, individuals only, occasionally, uttering offensive words, and, wantonly pointing their muskets to the windows of the hall of Congress. No danger from premeditated violence was apprehended, but it was observed that spirituous drink from the tippling-houses adjoining, began to be liberally served out to the soldiers, and might lead to hasty excesses. None were committed, however, and, about three o'clock, the usual hour, Congress adjourned; the soldiers, though in some instances offering a mock obstruction, permitting the members to pass through their ranks. They soon afterwards retired themselves to the barracks.[20]

Congress was forced to flee, first to Princeton, N.J., then to Annapolis and ultimately to New York City.[21]

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[20] 25 Journals of the Continental Congress 1774-1789, at 973 (Gov't Printing Office 1936) (1783).

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

When the Framers gathered again in Philadelphia in the summer of 1787 to draft a new constitution, the flight from that city five years before was still prominent in their minds. Madison and others called for the creation of a federal enclave or district as the seat of the federal government – independent of any state and protected by federal authority. Only then, Madison noted, could they avoid "public authority [being] insulted and its proceedings . . . interrupted, with impunity."[22] Madison believed that the physical control of the Capitol would allow direct control of proceedings or act like a Damocles' Sword dangling over the heads of members of other states: "How could the general government be guarded from the undue influence of particular states, or from insults, without such exclusive power? If it were at the pleasure of a particular state to control the sessions and deliberations of Congress, would they be secure from insults, or the influence of such a state?"[23] 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?"[24] 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."[25]

In addition to the desire to be free of the transient support of an individual state, the Framers advanced a number of other reasons for creating this special enclave.[26] There was a fear that a state (and its

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

[23] 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787 433 (Madison, J.) (Jonathan Elliot, ed., 2d ed. 1907).

[24] 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution, *supra*, reprinted in 3 The Founders' Constitution 225 (Philip B. Kurland & Ralph Lerner eds., 1987).

[25] *Id.*

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

representatives in Congress) would have too much influence over Congress, by creating "a dependence of the members of the general government."[27] There was also a fear that symbolically the honor given to one state would create in "the national councils an imputation of awe and influence, equally dishonorable to the Government and dissatisfactory to the other members of the confederacy."[28] There was also a view that the host state would benefit too much from "[t]he gradual accumulation of public improvements at the stationary residence of the Government."[29] Finally, some Framers saw the capitol city as promising the same difficulties that London sometimes posed for the English.[30] London then (and now) often took steps as a municipality that challenged the national government and policy. This led to a continual level of tension between the national and local representatives.

The District was, therefore, created for the specific purpose of being a non-State without direct representatives in Congress.

Indeed, even the title of this hearing reveals a fundamental rejection of the design and intent of the Framers. 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 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.

Under the original design, the security and operations of the federal enclave would remain the collective responsibilities of the entire Congress – of all of the various states. The Framers, however, intentionally preserved the option to change the dimensions or even relocate the federal district. Indeed, Charles Pinckney wanted that District Clause to read that Congress

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federal enclave. The Framers clearly understood and intended for the District to be represented derivatively by the entire Congress.

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

[28] *Id.*

[29] *Id.*

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

could "fix and *permanently* establish the seat of the Government . . ."[31] However, the Framers rejected the inclusion of the word "permanently" to allow for some flexibility.

While I believe that the intentions and purposes behind the creation of the federal enclave are clear, I do not believe that most of these concerns have continued relevance for legislators. Since the Constitutional Convention, courts have recognized that federal, not state, jurisdiction governs federal lands. As the Court stressed in *Hancock v. Train*,[32] "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.'"[33] 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 – though 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, no longer exist. Madison wanted a non-state location for the seat of government because "if any state had the power of legislation over the place where Congress should fix the general government, this

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[31] *See generally* 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)).

[32] 426 U.S. 167, 179 (1976).

[33] *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 Resources Control Board v. EPA*, 511 F.2d 963, 968 (9th Cir. 1975).

would impair the dignity, and hazard the safety, of Congress."[34] There is no longer a cognizable "hazard [to] safety" but there certainly remains the symbolic question of the impairment to the dignity for the several states of locating the seat of government in a specific state. It is a question that should not be dismissed as insignificant. I personally believe that the 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.

Throughout this history 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.[35] Those remain the only two clear options today, though retrocession itself can take many different forms in its actual execution, as will be discussed in Section V.

III.
THE UNCONSTITUTIONALITY OF THE CREATION OF A SEAT IN THE HOUSE FOR THE DISTRICT UNDER ARTICLE I

A. The Text and Context of Article I of the Constitution Contradict Claims that the Congress May Award Voting Rights to the District of Columbia.

As noted above, I believe that S. 1257 would violate the clear language and meaning of Article I. To evaluate the constitutionality of the legislation, one begins with the text, explores the original meaning of the language, and then considers the implications of the rivaling interpretations for the Constitution system. This analysis overwhelmingly shows that the creation of a vote in the House of Representatives for the District would do great violence to our constitutional traditions and values. To succeed, it would require the abandonment of traditional interpretative doctrines and

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[34] 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787 89 (Madison, J.) (Jonathan Elliot ed., 2d ed. 1907).

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

could invite future manipulation of one of the most essential and stabilizing components of the Madisonian democracy: the voting rules for the legislative branch. The Composition of Congress was one of the structural provisions that are fixed within our system – protected from opportunistic manipulation or creative realignment.[36]

1. *The Text of the Constitutional Provisions.*

Any constitutional analysis necessarily begins with the text of the relevant provision or provisions. To the extent that the language clearly addresses the question, there is obviously no need to proceed further into other interpretative measures that look at the context of the provision, the historical evidence of intent, etc. The instant question could arguably end with this simple threshold inquiry.

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." Conversely, the District Clause was designed to define the power of Congress *within* the federal enclave.

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[36] 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).

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

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch in the States Legislature.[37]

As with the Seventeenth Amendment election of the composition of the Senate,[38] the text clearly limits the House to the membership of representatives of the several states.

On its face, the reference to "the people of the several states" is a clear restriction of the voting membership to actual states. The reference to "states" is repeated in the section when the Framers specified that each representative must "when elected, be an inhabitant of that State in which he shall be chosen." Moreover, the reference to "the most numerous Branch in the States Legislature" clearly distinguishes the state entity from the District. The District had no independent government at the time and currently has only a city council.

In reading such constitutional language, the Supreme Court has admonished courts that "every word must have its due force, and appropriate meaning; . . . no word was unnecessarily used or needlessly added."[39] In his famous commentaries on the Constitution, Justice Story warned against the use of the interpretation to avoid unpopular limitations in our constitutional system:

> The 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 these 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

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37 U.S. Const. Art. I, Sec.2.

38 While not directly relevant to S. 1257, the Seventeenth Amendment contains similar language that mandates that the Senate shall be composed of two senators of each state "elected by the people thereof."

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

> apparent objects and intent of the constitution. . . .
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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, the power of redressing the evil lies with the people by an exercise of the power of amendment.[40]

In Article I, the drafters refer repeatedly to states or several states as well as state legislatures in defining the membership of the House of Representatives. As the Court has noted, "[a] state, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed."[41] 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.

Putting aside notions of plain meaning,[42] the structure and language of this provision clearly indicate that the drafters were referencing formal state entities. It takes an act of willful blindness to ignore the obvious meaning of these words.

Academics have also noted that the use of the term "members" in the Composition Clause was a clear distinction in the minds of the Framers between voting and non-voting representatives. Professors John O. McGinnis and Michael B. Rappaport address this very point and note that 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:

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[40] 1 Joseph Story, Commentaries on the Constitution of the United States §§ 419-26, at 298-302 (2d ed. 1851).

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

[42] It is true that plain meaning at times can be over-emphasized. *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 than a dictionary."). Yet, it should not be ignored when the context of the language makes its meaning plain, as here.

> 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.[43]

The second provision is the District Clause found in Article I, Section 8 which gives Congress the power to "exercise exclusive Legislation in all Cases whatsoever, over such District." Notably, the use of "in all cases whatsoever" emphasizes the administrative and operational character of the power given to Congress. It was a power to dictate the internal conditions and operations of the federal enclave. On its face, this language is not a rival authority to the Composition Clause or structural provisions for Congress. Adding a member to Congress is not some "case" or internal matter of the District, it is changing the structure of Congress and the status of the several states.

As will be discussed more fully below, the obvious meaning of this section is supported by a long line of cases that repeatedly deny the District the status of a state and reaffirm the intention to create a non-state entity. This status did not impair the ability of Congress to impose other obligations of citizenship. Thus, in *Loughborough v. Blake*,[44] the Court ruled that the lack of representation did not bar the imposition of taxation. Lower courts rejected challenges to the imposition of an unelected local government. The District was created as a unique area controlled by Congress that expressly distinguished it from state entities. This point was amplified by then Judge Scalia of the D.C. Circuit in *United States v. Cohen*:[45] the District Clause "enables Congress to do many things in the District of Columbia which it

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[43] 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).

[44] 18 U.S. (5 Wheat.) 317, 324 (1820).

[45] 733 F.2d 128, 140 (D.C. Cir. 1984).

has no authority to do in the 50 states. There has never been any rule of law that Congress must treat people in the District of Columbia exactly as people are treated in the various states."[46]

2. The Context of the Language.

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 interpretation) that courts should "assume[] that identical words used in different parts of the same act are intended to have the same meaning."[47] This does not mean that there cannot be exceptions[48] but such exceptions must be based on circumstances under which the consistent interpretation would lead to conflicting or clearly unintentional results.[49]

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 non-states like the District, various provisions become unintelligible. For both the composition of the House and Senate, the defining unit was that of a state with a distinct government, including a legislative branch. For example, before the 17th Amendment in 1913, Article I read: "The Senate of the United States shall be composed of two Senators from each state, chosen by the Legislature thereof . . ." For much of its history, the District did not have an independent government, let alone a true state legislative branch.

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46 *Id.*

47 *Sorenson v. Sec'y of the Treasury*, 475 U.S. 851, 860 (1986).

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

49 *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.").

There is also the Qualification Clause under which members must have "the Qualifications requisite for Electors of the most numerous Branch of the State legislature" in Article I, Section 2. Obviously, the District has no state legislature and was never intended to have such a state-like structure. Moreover, as noted below, if Congress can manipulate the meaning of the Qualifications, it can change not just the voting members of Congress but their basic qualifications to serve in that capacity.

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

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

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

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

Article I, clause 3 specified that "each state shall have at Least one Representative." If the Framers believed that the District was a quasi-state under some fluid definition, the District would have presumably had a representative and two Senators from the start. At a minimum, the Composition Clause would have referenced the potential for non-state members, particularly given the large territories such as Ohio, which were yet to achieve state status. Yet, there is no reference to the District in any of

these provisions. It is relegated to the District Clause, which puts it under the authority of Congress.

The reference to "states" obviously extends beyond Article I. Article II specified that "the Electors [of the president] shall meet in their respective States" and later be "transmit[ted] to the Seat of the Government of the United States," that is, the District of Columbia. When Congress wanted to give the District a vote in the process, it passed the 23rd Amendment. That amendment expressly distinguishes the District from the meaning of a state by specifying that District electors "shall be considered, for the purposes of the election of President and Vice President, to be electors by a state."

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

Likewise, when the Framers specified how to select a president when the Electoral College is inconclusive, they used the word "states" to designate actual state entities. Pursuant to Article II, Section 1, "the Votes shall be taken by States the Representation from each State having one Vote."

Conversely, when the drafters wanted to refer to citizens without reference to their states, they used fairly consistent language of "citizens of the United States" or "the people." This was demonstrated most vividly in provisions such as the Tenth Amendment, which states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."[50] Not

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[50] *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

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 from actual states. It is referred to as the "Seat of Government" and subject to the same authority that Congress would exercise "over all Places purchased by the Consent of the Legislature of the State . . ." Under this language, the District as a whole was delegated to the United States. As the D.C. Circuit stressed recently in *Parker*, "the authors of the Bill of Rights were perfectly capable of distinguishing between "the people," on the one hand, and "the states," on the other." Likewise, when the drafters of the Constitution wanted to refer to the District, they did so clearly in the text. This was evident not only with the original Constitution and the Bill of Rights, but much later amendments. For example, the Twenty-Third Amendment giving the District the right to have presidential electors expressly distinguishes the District from the States in the Constitution and establishes, for that purpose, the District should be treated like a State: mandating "[a] number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled *if it were a State.*"[51] This amendment makes little sense if Congress could simply bestow the voting rights of states on the District. Rather, it reaffirmed that, if the District wishes to vote constitutionally as a State, it requires an amendment formally extending such parity.[52]

Eleventh Amendment. *See LaShawn v. Barry*, 87 F.3d 1389, 1394 n.4 (D.C. Cir. 1996) ("The District of Columbia is not a state . . . Thus, [the Eleventh Amendment] has no application here.").

[51] U.S. Const. XXIII amend. Sec. 1.

[52] 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. Since the District was a creation and extension of the federal government, its officials held federal or quasi-federal offices. In the 1970s, Home Rule created more

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

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

The context of the District Clause shows that it is a provision crafted for administrative purposes as opposed to the structural provisions of Section 2. Indeed, the argument of unlimited powers under the District Clause parallels a similar argument under the Election Clause. Some argued that the Framers gave states[53] or Congress authority to manipulate the qualifications for members. In the latter case, the clause provides that "Congress may at any time by law make or alter such regulations" that related to the time, place and manner of federal elections."[54] Section 4 of Article I, however, was viewed by the Court as a purely procedural provision despite the absence of limiting language. As the Ninth Circuit noted in *Schaefer v. Townsend*, the Court has rejected "a broad reading of the Elections Clause and held the balancing test inapplicable where the

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recognizable offices of a city government – though still ultimately under the control of Congress.

[53] U.*S. Term Limits*, 514 U.S. at 832-33 ("the Framers intended the Elections Clause to grant States authority to create procedural regulations, not to provide States with license to exclude classes of candidates from federal office.").

[54] U.S. Cong. Art. I, sec. 4.

challenged provision supplemented the Qualifications Clause."[55] It is the Composition Clause (and, as noted below, the Qualifications Clause) that determine the prerequisites for congressional office.

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

B. The Original Meaning and History of Article I Strongly Rebut the Claims of Inherent Authority to Create New Forms of Members in Congress.

1. The Original Understanding of the Composition Clause.

The intent behind the Composition Clause was clear throughout the debates as a vital structural provision. The Framers were obsessed with the power of the states and the structure of Congress. Few matters concerned the Framers more than who could vote in Congress and how they were elected. Indeed, some delegates wanted the House to be elected by the state legislatures as was the Senate.[56] This proposal was not adopted, but the clear import of the debate was that representatives would be elected from the actual states. The very requirement of qualifications being set by "state legislature" was meant to reaffirm that the composition of Congress would be controlled by states.

This view was reinforced by Framers at the time. It was precisely the control of the states of the composition of both houses and the presidency that was the principle argument for the Constitution. The Composition Clause was vital to securing the votes of reluctant members, particularly Antifederalists. Madison emphasized this point in *Federalist No. 45* when he pointed out that "each of the principal branches of the federal government will owe its existence more or less to the favor of the State governments, and must consequently feel a dependence."[57]

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55 *Schaefer v. Townsend*, 215 F.3d 1031, 1038 (9th Cir. 2000).

56 1 Records of the Federal Convention of 1787, at 359 (Max Farrand ed., rev. ed. 1966)

57 The Federalist No. 45, at 220 (J. Madison).

In his first comments after the Constitutional Convention, James Wilson emphasized the Composition Clause and the requirement that members be elected by actual states. In an October 6, 1787 speech, Wilson responded to Anti-Federalists who feared the power of the new Congress – a speech described at the time as "the first authoritative explanation of the principles of the NEW FEDERAL CONSTITUTION."[58] Wilson stressed that Congress would be tethered closely to the states and that only states could elect members:

> [U]pon what pretence can it be alleged that it was designed to annihilate the state governments? For, I will undertake to prove that upon their existence, depends the existence of the foederal plan. For this purpose, permit me to call your attention to the manner in which the president, senate, and house of representatives, are proposed to be appointed. . . . The senate is to be composed of two senators from each state, chosen by the legislature; and therefore if there is no legislature, there can be no senate. The house of representatives, is to be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature,--*unless therefore, there is a state legislature, that qualification cannot be ascertained*, and the popular branch of the foederal constitution must likewise be extinct. From this view, then it is evidently absurd to suppose, that the annihilation of the separate governments will result from their union; or, that having that intention, the authors of the new system would have bound their connection with such indissoluble ties.[59]

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.[60] It was not some ambiguity but the very cornerstone for the new federal system. It is safe to say that the suggestion that the District could achieve equal status to states in Congress would have been viewed as absurd, particularly given the fact that there could be no state legislature for the federal city. Wilson and others made clear that voting members of

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[58] 13 Documentary History of the Ratification of the Constitution 337, 342 (John P. Kaminski & Gaspare J. Saladino, eds., 1981)

[59] *Id.*

[60] *Id.*

Congress would be reserved to the representatives of the actual states.

This view was again 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 non-voting member to the House. Connecticut Rep. 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.[61]

Although non-voting members would be allowed, the members 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.

2. The Original Understanding of the Qualifications Clause.

Equally probative is the intent behind the Qualifications Clause of Section 2 of Article I. If Congress changes the meaning of the Composition Clause, it could also change the meaning of the Qualifications Clause, which refers to the fixed criteria for eligibility to the House of Representatives, including the condition of being a resident of a state.

It is not simply the reference to a state that makes the Qualifications Clause material to this debate. The Framers wrote this provision in the aftermath of the controversy over John Wilkes.[62] Wilkes had publicly attacked the peace treaty with France and, in doing so, earned the ire of Crown and Parliament. After he was convicted and jailed for sedition, the Parliament moved to declare his ineligible for service in the legislature. He served anyway and eventually the Parliament rescinded the legislative effort to disqualify him. It was deemed as violative of a center precept of the Parliament that it could not manipulate the qualifications needed for entry or service.

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[61] 4 Annals of Cong 884 (Nov 17, 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).

[62] *Powell,* 395 U.S. at 535

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."[63] Madison warned if Congress could engage in such manipulation it would "subvert the Constitution."[64]

This debate was largely triggered by proposals to allow for congressional authority to add qualifications or to expressly require property prerequisites to membership. These efforts failed, however, on a more general opposition to allowing Congress to change its membership. In a quote later cited by the Supreme Court, Alexander Hamilton noted that "[t]he qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, are *defined and fixed* in the Constitution, and are *unalterable* by the legislature."[65]

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 qualifications of members to serve in parliament' and those qualifications were 'not occasional but fixed.'"[66]

This debate has striking similarity to the current controversy. Today, members 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.[67] States claimed that the Tenth Amendment establishes leaves them with all reserved powers and thus, unless prohibited, states are entitled to exercise the authority. This is analogous to the District Clause argument that, unless expressly prohibited, Congress has absolute authority under the

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63 *Id.* (quoting 2 Farrand 250).

64 *Id.*

65 The Federalist No. 60, at 371 (emphasis added).

66 *Powell*, 395 U.S. at 528 (quoting 16 Parl. Hist. Eng. 589, 590 (1769)).

67 U.S. Term Limits, Inc. v. Thorton, 514 U.S. 779 (1995).

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." [68] 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 Congress was exclusively defined under Section 2 of Article I. Indeed, as the Court noted in *U.S. Term Limits v. Thorton*, 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."[69]

The Qualifications Clause, and its debate, magnify the significance of this section to the design of our constitutional system. While 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 super-majority to expel a member.[70] Just as there is no inherent right 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 to unilaterally shrink or expand its membership by tweaking the Qualifications Clause.

3. 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 Section 8 that cover everything from creating post

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68 *Id.*

69 *Id.* at 794.

70 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,* at 254 (referencing how "in emergencies of faction might be dangerously abused"); *see also Powell v. McCormack*, 395 U.S. 486, 536 (1969) (noting that "the Convention's decision to increase the vote required to expel, because that power was 'too important to be exercised by a bare majority'").

offices to inferior courts. 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." Nevertheless, the creation of a seat of government was an issue of interest and concern before ratification.

As noted above, the status of the federal district was also clearly understood as a non-state entity. The Supreme Court has observed that "[t]he object of the grant of exclusive legislation over the district was . . . national in the highest sense, and the city organized under the grant became the city, not of a state, not of a district, but of a nation."[71] While Madison conceded that some form of "municipal legislature for local purposes" might be allowed, the district was to be the creation of Congress and maintained at its discretion.[72]

It has been repeatedly asserted by defenders of this legislation that the Framers simply did not consider the non-voting status of District residents and could not possibly have intended such a result. This argument is clearly and irrefutably untrue. The political status of the District residents was a controversy then as it is now. The Federal Farmer captured this concern in his January 1788 letter, where he criticized the fact that there was not "a single stipulation in the constitution, that the inhabitants of this city, and these places, shall be governed by laws founded on principles of Freedom."[73]

The absence of a vote in Congress was clearly understood as a prominent characteristic of a federal district. However, being a resident of the new capitol city was viewed as compensation for this limitation. Indeed, it was the source of considerable competition and jealousy among the states.[74] In the Virginia Ratification Convention, Patrick Henry observed with unease how they have been

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71 *O'Donoghue*, 289 U.S. at 539-40.

72 The Federalist No. 43, at 280 (J. Madison).

73 Letters from the Federal Farmer to the Republican, XVI (January 20, 1788) reprinted in 2 The Complete Anti-Federalist 327 (Herbert J. Storing, ed., Univ. of Chicago Press 1981); *see also* The Founders' Constitution, *supra*, at 220.

74 Notably, during the Virginia Ratification Convention, when Grayson describes the District as "detrimental and injurious to the community, and how repugnant to the equal rights of mankind," he is not referring to the

> 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.[75]

Since residence would be voluntary within the federal district, most viewed the representative status as a *quid pro quo* for the obvious economic and symbolic benefit. Indeed, despite the fact that the citizens of the capitol city would be disenfranchised, many cities from Baltimore to Philadelphia to Elizabethtown vied for the opportunity to be selected for the honor.[76] Moreover, it is not true that few people thought that the capitol city "would evolve into the vibrant demographic and political entity it is today."[77] To the contrary, 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 capitol 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.[78]

It is true that there was little consideration of how residents would fare in terms of taxation, civil rights, conscription and the like.[79] There is a very

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lack of voting rights but the anticipated power that District residents would wield over the rest of the nation due to "such exclusive emoluments." The Founders' Constitution, *supra*, at 190.

[75] *Id.*

[76] Bowling, *supra*, at 78-79, 182-190.

[77] 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, American Constitutional Society," May 2007, at 3.

[78] *Adams v. Clinton*, 90 F. Supp. 2d 35, 49 n. 24 (D.D.C. 2000).

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

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

good reason for this omission: the drafters understood that these conditions would depend entirely on Congress. Since these matters would be left to the discretion of Congress, the details were not relevant to the constitutional debates. However, the *status* of the residents was clearly debated and understood: residents would be represented by Congress as a whole and would not have individual representation in Congress.

During ratification, various leaders objected to the disenfranchisement of the citizens in the district. In New York, Thomas Tredwell objected that the non-voting status of the District residents "departs from every principle of freedom . . . subjecting the inhabitants of that district to the exclusive legislation of Congress, in whose appointment they have no share or vote."[80]

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

The Federalist Papers No. 43, *supra*, at 280 The drafters correctly believed that the "inducements" for ceding the land would be enough for residents to voluntarily agree to this unique status. Moreover, Madison correctly envisioned that forms of local government would be allowed – albeit in varying forms over the years.

[80] 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787, at 402 (Jonathan Elliot ed., 1888). The whole of Thomas Tredwell's comments merit reproduction:

> The plan of the federal city, sir, departs from every principle of freedom, as far as the distance of the two polar stars from each other; for, subjecting the inhabitants of that district to the exclusive legislation of Congress, in whose appointment they have no share or vote, is laying a foundation on which may be erected as complete a tyranny as can be found in the Eastern world. Nor do I see how this evil can possibly be prevented, without razing the foundation of this happy place, where men are to live, without labor, upon the fruit of the labors of others; this political hive, where all the drones in the society are to be collected to feed on the honey of the land. How dangerous this city may be, and what its operation on the general liberties of this country, time alone must discover; but I pray God, it

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.[81] 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."[82] Indeed, at least two amendments were proposed to give residents representations in that convention alone. Other such amendments were offered in states like North Carolina and Pennsylvania. These efforts to give District residents conventional representation failed despite the advocacy of no less a person than Alexander Hamilton.[83]

Notably, in at least one state convention, the very proposal to give the District a vote in the House but not the Senate was proposed. In Massachusetts, Samuel Osgood sought to amend the provision to allow the residents to be "represented in the lower House."[84] No such amendment was enacted. Instead, some state delegates like William Grayson distinguished the District from a state entity in Virginia. Repeatedly, he stressed that the District would not have basic authorities and thus "is not to be a fourteenth state."[85]

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may not prove to this western world what the city of Rome, enjoying a similar constitution, did to the eastern.

81 5 The Papers of Alexander Hamilton 189 (Harold C. Syrett & Jacob E. Cooke eds., 1962).

82 *Id.*

83 This is not to say that the precise conditions of the cessation were clear. Indeed, some states passed Amendments that qualified their votes – amendments that appear to have been simply ignored. Thus, Virginia ratified the Constitution but specifically indicated that some state authority would continue to apply to citizens of the original state from which "Federal Town and its adjacent District" was ceded. Moreover, Congress enacted a law that provided that the laws of Maryland and Virginia "shall be and continue in force"[83] in the District – suggesting that, unless repealed or amended, Maryland continues to have jurisdictional claims in the District.

84 *Id.*

85 The Founders' Constitution, *supra*, at 223.

Objections to the political status of the District residents were unpersuasive before ratification. The greatest concern was that the District could become create an undue concentration of federal authority and usurp state rights. 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.[86] Antifederalists like George Mason viewed the existence of a district under the exclusive control of Congress to be threatening.[87] He was not alone. Many 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 we are opening?"[88] A member of the New York Ratification Convention compared the new Capitol City to Rome and complained that it could prove so large and powerful as to control the nation as did that ancient city.[89] 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 voting members 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

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86 *Id.*

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

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

88 Bowling, *supra*, at 81.

89 *Id.*

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 ...[90]

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.

iii. Retrocession and the Affirmance of the Non-Voting Status of District Residents.

The knowledge of the non-voting status of the Capitol City was again 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 was clearly understood. Republican Rep. 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."[91] The passionate opposition to the non-voting status of the District was a 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

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90 The Founders' Constitution, *supra*, at 180.

91 10 Annals of Cong. 992 (1801); *see also* Congressional Research Service, *supra*, at 6.

> 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 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.[92]

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."[93] The federal district was characterized as nothing more than 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."[94] 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 Capitol City.[95] 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. Indeed, the retrocession of Virginia highlights the original understanding of the status of the District. Virginians contrasted their situation with those residents of Washington. For them, cessation was "an evil hour, [when] they were separated" from their state and stripped of their political voice.[96] 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."[97]

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92 Mark Richards, Presentation before the Arlington Historical Society, May 9, 2002 (citing Congressional Record, 1805: 910) (quoting Rep. Ebenezer Elmer of New Jersey).

93 Richards, *supra*, at 3

94 *Id.* (quoting Rep. Smilie)

95 *Id.* at 4.

96 *Id.*

97 *Id.*

Thus, during the drive for retrocession that began shortly after ratification, District residents appear to have opposed retrocession and accepted the condition as non-voting citizens in Congress for their special status. Indeed, the only serious retrocession effort focused on Georgetown and not the Capitol City itself. Some in Maryland vehemently objected to the non-voting 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."[98] Yet, even in a vote taken within Georgetown, the Board of Common Council voted overwhelmingly (549 to 139) to accept these limitations in favor of staying with the federal district.[99]

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 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.[100]

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98 *Id.* (quoting memorial submitted by Maryland Senator William D. Merrick).

99 *Id.*

100 *Retrocession of Alexandria to Virginia*, Daily Nat'l Intelligencer, Mar. 20, 1846, at 1 (reprinting committee report).

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.[101] The Virginia land was retroceded 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."[102]

Finally, much is made of the ten-year period during which District residents voted with their original states – before the federal government formally took over control of the District. As established in *Adams*, this argument has been raised and rejected by courts as without legal significance.[103] This was simply a transition period before the District became the federal enclave. Under the Residence Act of 1790, entitled An Act for Establishing the Temporary and Permanent Seat of the Government of the United States, Congress selected Philadelphia as the temporary capitol while authorizing the establishment of the federal district. [104] This law allowed the District to continue under the prior state systems pending the implementation of federal jurisdiction. That 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."[105] Clearly, Congress could use its authority regarding the internal affairs of the District to continue such state functions

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[101] Under the Residence Act of July 16, 1790, Washington was given the task – 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 areas 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).

[102] *Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317, 324 (1820).

[103] *Adams v. Clinton*, 90 F. Supp. 2d 35, 62 (D.D.C. 2000); *Albaugh v. Tawes*, 233 F. Supp. 576, 576 (D.Md. 1964) (per curiam).

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

[105] *Id.*

pending its final takeover – 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,[106] the exclusion of residents from voting was the consequence of the completion of the cessation transaction – which transformed the territory from part of a state, whose residents were entitled to vote under Article I, to being 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.[107]

iv. *Modern Evolution of the District Government as a Non-State Entity*.

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 this District was first created, it was barely a city, let alone a substitute for a state: "The capitol 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."[108]

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 -- as was the council.[109] Congress continued to possess authority over its budget and operations. While 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. After 1874, the city was run through Congress and the Board of Commissioners.[110]

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106 *Reily v. Lamar*, 6 U.S. (2 Cranch) 344, 356-57 (1805).

107 *Adams v. Clinton*, 90 F. Supp. 2d 35, 62 (D.D.C. 2000).

108 Philip G. Schrag, *By the People: The Political Dynamics of a Constitutional Convention*, 72 Geo. L.J. 819, 826 (1984) (noting 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").

109 *Id.* at 826-828.

110 *Id.*

President Lyndon Johnson expressly treated the District as the equivalent of a federal agency when he appointed Walter Washington to be mayor in 1967.[111] Under Johnson's legal interpretation, giving the District a vote in Congress would have been akin to making the Department of Defense a 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, Congress noted that it was simply a measure to "relieve Congress of the burden of legislating upon essentially local District matters."[112] 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. Both of these constructions is 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, no members are subject to the potential manipulation of their home powers by either the federal government or the other states (through Congress).

The historical record belies any notion that either the drafters or later legislators considered the District to be fungible with a state for the purposes of voting in Congress. These sources show that the strongest argument for full representation is equitable rather than constitutional or historical. As will be shown in the final section of this statement, the inequitable status of the District can and should be remedied by other means.

4. A Response to Messrs. Dinh, Starr 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 non-voting status of the District to be permanent or beyond the inherent powers of Congress to change.[113] Indeed, in the last hearing, Professor Dinh repeated his position that this issue was no consideration during the drafting and ratification. He (and Mr. Charnes)

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111 *Id.* at 829-830.

112 D.C. Code 1981, § 1-201(a).

113 Dinh & Charnes, *supra*, at 6.

have written that the non-voting status "was neither necessary nor intended by the Framers" and further assert that the only purpose of establishing a federal district was "to ensure that the national capitol would not be subject to the influences of any state."[114] They insist that the "representation for the District's residents seemed unimportant" at the time.[115] The record, however, directly contradicts these statements. As noted earlier, there were various stated purposes behind the federal district and the non-voting status was repeatedly raised before final ratification. Most importantly, the non-voting status of residents was tied directly to the concept of a seat of government under the control and exclusive jurisdiction of Congress. The non-voting 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,"[116] this does not mean that this unique or "*sui generis*" status empowers Congress to bestow the rights and privileges to the District 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.[117] The extent to which the District has and will continue to enjoy its own governmental systems is due entirely to the will of Congress.[118] 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 constitutionally guaranteed 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 implicated by laws affecting only the federal enclave with "no possible impact on the states."[119]

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114 *Id.*

115 *Id.* at 6.

116 *District of Columbia v. Carter*, 409 U.S. 418, 452 (1973)

117 *Id.*, 409 U.S. at 429 ("The power of Congress over the District of Columbia includes all the legislative powers which a state may exercise over its affairs.").

118 *See* Home Rule Act of 1973, D.C. Code §§1-201.1 *et seq.*

119 Brief for the District of Columbia in *Parker v. District Columbia*, 2007 U.S. App. LEXIS 5519, December 7, 2006 (D.C. Cir. 2007), at 38.

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. However, it cannot use the authority over the internal operations of the District to change its political status vis-à-vis the states. Ironically, just as the non-voting 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." The dangers posed by a "Federal Town" were muted by the fact that Congress would control its operations and Congress' exclusive legislation concerned its internal operations.

It is equally hard to see the "ample constitutional authority" alluded to by Dinh and Charnes for Congress using its authority over the internal operations of the District to change the composition of voting members in a house of Congress.[120] 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."[121] However, this legislation is not simply a District matter. This legislation affects the voting rights of the states by augmenting the voting members of Congress. This is legislation with respect to Congress and its structural make-up. More importantly, Dinh and Charnes go to great lengths to point out how different the District is from the states, noting that the District Clause

> works 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 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

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120 Dinh & Charnes, *supra*, at 4.

121 *Id.*

> reservation under the Tenth Amendment, serves to check the power of Congress vis-à-vis the states.[122]

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 of 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[123] other than their legislative offices and protected them under the Speech or Debate Clause.[124]

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.

It has been argued by both Dinh and Starr that the references to "states" are not controlling because other provisions with such references have been interpreted as nevertheless encompassing District residents. This argument is illusory. The relatively few cases extending the meaning of states to the District often involved irreconcilable conflicts between a literal meaning of the term state and the inherent rights of all American citizens under the equal protection clause and other provisions. 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 Capitol City. It was never intended to turn residents into non-citizens with no constitutional rights. As the Court stated in 1901:

> The District was made up of portions of two of the original states of the Union, and was not taken out of the Union by

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122 *Id.* at 6.

123 U.S. Const. Art. I, Sec. 6, cl. 1.

124 U.S. Const. Art. I, Sec. 6, cl. 2.

> 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.[125]

The upshot of these opinions is that a literal interpretation of the word "states" would produce facially illogical and unintended consequences. Since residents remain U.S. citizens, they must continue to enjoy those protections accorded to citizens.[126] Otherwise, they could all be enslaved or impaled at the whim of Congress.

Likewise, the Commerce Clause is intended to give Congress the authority to regulate commerce that crosses state borders. While the Clause refers to commerce "among the several states," the Court rejected the notion that it excludes the District as a non-state.[127] The reference to several states was to distinguish the regulated activity from intra-state commerce. As a federal enclave, the District was clearly subsumed within the Commerce Clause.

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.[128] The District clause was specifically directed at the meaning of a state – it creates a non-state status related to the seat of government and particularly Congress.

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125 *O'Donoghue v. United States*, 289 U.S. 516, 540-541 (1933) (quoting *Downes v. Bidwell*, 182 U.S. 244, 260-61 (1901)).

126 *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.).

127 *Stoutenburgh v. Hennick*, 129 U.S. 141 (1888).

128 *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.").

Non-voting status directly relates and defines that special entity. In provisions dealing with such rights as equal protection, the rights extend to all citizens of the United States. The 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*.[129]

Supporting the textual interpretation of the District Clause is the fact that 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." Diversity jurisdiction is meant to protect citizens from 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 from citizens of any state and the diversity conflict is equally real.

The decision in *National Mutual Ins. Co. v. Tidewater Transfer Co., Inc.*,[130] is heavily relied upon in the Dinh and Starr analyses. However, the actual rulings comprising the decision would appear to contradict their conclusions. Only two justices indicated that they would treat the District as a state in their interpretations of the Constitution. 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. This point was clearly established in 1805 in *Hepburn v. Ellzey*,[131] 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

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129 *Palmore v. United States*, 411 U.S. 389, 397-398 (1973).

130 337 U.S. 582 (1948)

131 6 U.S. (2 Cranch) 445 (1805).

confederacy only are the states contemplated in the constitution."[132] This view was reaffirmed again 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.[133]

However, the Court also ruled 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."[134] Thus, while residents did not have this inherent right as members of a non-state, 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.[135] Dinh and his co-author Charnes state that "[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."[136] Yet, to make this bill work, a majority of the Court would have to recognize that the District clause gives Congress this extraordinary

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132 *Id.* at 453.

133 *National Mutual Ins.,* 337 U.S. at 588.

134 *Id.* at 592.

135 The Congressional Research Service included an exhaustive analysis of the case in its excellent study of this bill and its constitutionality. Congressional Research Service, *supra*, at 16.

136 Dinh & Charnes, *supra*, at 13.

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, a far more modest proposal than creating a voting non-state entity. It was the fact that five justices agreed *in the result* that produced the ruling, a point emphasized by Justice Frankfurter when he noted with considerable irony in his dissent:

> 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.[137]

When one reviews the insular opinions, it is easy to see what 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. This view, however, was expressly rejected by the Jackson plurality of Jackson, Black, and Burton. The Jackson plurality did not agree with Rutledge that the term "state" had a more fluid meaning – an argument close to the one advanced by Dinh and Starr. Conversely, Rutledge and Murphy strongly dissented from the arguments of the Jackson plurality.[138] Likewise, two dissenting opinions, Justice Frankfurter, Vinson, Douglas and Reed rejected arguments that Congress had such authority under either the District Clause or the Diversity Clause in the case. The Jackson plurality prevailed because Rutledge and Murphy were able to join in the result, not the rationale. 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:

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[137] *Tidewater*, 337 U.S. at 654

[138] *Id.* at 604 ("But I strongly dissent from the reasons assigned to support it in the opinion of MR. JUSTICE JACKSON.")

> [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.

Thus, Rutledge saw that, even allowing for some variation in the interpretation of "states," there was 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.

The citation of *Geofroy v. Riggs*,[139] by Professor Dinh is equally misplaced. It is true that the Court found that a treaty referring to "states of the Union" included the District of Columbia. However, this interpretation was not based on the U.S. Constitution and its meaning. Rather, the Court relied on 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. Halleck on Int. Law, c. 3, §§ 5, 6, 7. The term is used in general jurisprudence and by writers on public law as denoting organized political societies with an established government.[140]

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 in the U.S. Constitution. Indeed, as shown above, the Court begins by recognizing the more narrow

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139 133 U.S. 258 (1890).

140 *Id.* at 268.

meaning under the Constitution before adopting a more generally understood meaning in the context of international and public law for the purpose of interpreting a treaty.

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).[141] This fact is cited 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." Again, the comparison between overseas and District citizens is misplaced. While UOCAVA has never been reviewed by the Supreme Court and some legitimate questions still remain about its constitutionality, a couple of courts have found the statute to be constitutional.[142] 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. This same argument was used and rejected in *Attorney General of the Territory of Guam v. United States*.[143] In that case, citizens of Guam argued (as do Dinh and Charnes) that the meaning of state has been interpreted liberally and the Overseas Act relieves any necessity for being the resident of a state for voting in the presidential election. The court categorically rejected the argument and noted that the act was "premised constitutionally on prior residence in a state."[144] The court quoted from the House Report in support of this holding:

> 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.[145]

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141 Pub. L. 99-410, 100 Stat. 924 (1986), codified at 42 U.S.C. §§ 1973ff et seq. (2003).

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

143 738 F.2d 1017 (9th Cir. 1984).

144 *Id.* at 1020.

145 *Id.* (citing H.R. Rep. No. 649, 94th Cong., 1st Sess. 7, reprinted in 1975 U.S. Code Cong. & Ad. News 2358, 2364).

Given this logical and limited rationale, the Court held that UOCAVA "does not evidence Congress's ability or intent to permit all voters in Guam elections to vote in presidential elections."[146]

Granting a vote in Congress is not some tinkering of "the mechanics of administering justice in our federation."[147] This would touch upon the constitutionally sacred rules of who can create laws that bind the nation.[148] 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 overwhelming case precedent refutes the arguments of Messrs. Dinh and Starr. Indeed, just recently in *Parker v. District of Columbia*,[149] the United States Court of Appeals for the District of Columbia reaffirmed in both majority and dissenting opinions that the word "states" refers to actual state entities.[150] *Parker* struck down the District's gun control laws as

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146 *Id.*

147 *National Mutual Ins.* at 585.

148 In the past, the District and various territories were afforded the right to vote in Committee. However, such committees 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 (D.C. Cir. 1994) (recognizing the constitutional limitation that would bar Congress from granting votes in the full House).

149 *Parker v. District of Columbia*, 2007 U.S. App. LEXIS 5519, December 7, 2006 (D.C. Cir. 2007).

150 The D.C. Circuit is the most likely forum for a future challenge to this law.

violative of the Second Amendment.[151] That amendment uses the term "a free state" and the parties argued over the proper interpretation of this 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.[152]

In the opinion striking down the District's laws, the majority noted that the term "free state" was unique in the Constitution and that "[e]lsewhere the Constitution refers to 'the states' or 'each state' when unambiguously denoting the domestic political entities such as Virginia etc." While the dissent would have treated "free state" to mean the same as other state references, it was equally clear about the uniform meaning given the term states:

> The Supreme Court has long held that "State" as used in the Constitution refers to one of the States of the Union. [citing cases] . . .

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[151] U.S. Const. amend. II ("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.").

[152] Brief for the District of Columbia in *Parker v. District Columbia*, 2007 U.S. App. LEXIS 5519, December 7, 2006 (D.C. Cir. 2007), at 38 (emphasis in original). Adding to the irony, the District's insistence that it was a non-state 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, it was intended to mean a "free society," not a state entity. Reply Brief for the Plaintiff-Appellant in *Parker v. District Columbia*, 2007 U.S. App. LEXIS 5519, December 7, 2006 (D.C. Cir. 2007), at 15 n.4.

> 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.[153]

The dissent goes on to specifically cite the fact that the District is not a state for the purposes of voting in Congress.[154] 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.

B. S. 1257 Would Create Both Dangerous Precedent and Serious Policy Challenges for the Legislative Branch.

The current approach to securing partial representation for the District is fraught with dangers. What is striking is how none of these dangers have been addressed by advocates on the other side with any level of detail. Instead, members are voting on a radical new interpretation with little thought or understanding of its implications for our constitutional system. The Framers created clear guidelines to avoid creating a system on a hope and a prayer. It would be a shame if our current leaders added ambiguity where clarity once resided in the Constitution on such a question. The burden should be on those advocating this legislation to fully answer each of these questions before asking for a vote from Congress. Members cannot simply shrug and leave this to the Court. Members have a sacred duty to oppose legislation that they believe is unconstitutional. While many things may be subject to political convenience, our constitutional system should be protected by all three branches with equal vigor.

i. Partisan Manipulation of the Voting Body of Congress. By adopting a liberal interpretation of the meaning of states in Article I, the Congress would be undermining the very bedrock of our constitutional system. The 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 disparate factional disputes are converted into majoritarian compromises – the defining principle of the

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153 The dissent noted that the three instances involve the use of "foreign state" under Article I, section 9, clause 8; Article III, section 2, clause 1; and the Eleventh Amendment.

154 *Id.*

Madisonian system. By allowing majorities to manipulate the membership rolls, it 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.[155] By taking this approach, the current House could award a vote to District residents and a later majority could take it away. The District residents would continue to vote, not as do other citizens, but at the whim and will of the Congress like some party favor that can be withdrawn with the passing fortunes of politics. Moreover, as noted below in the discussion of the Utah seat, the evasion of the 435 membership 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, award additional seats to other federal enclaves.

ii. Creation of New Districts Among Other Federal Enclaves and Territories. If successful, this legislation would allow any majority in Congress to create other novel seats in the House. This is not the only federal enclave and there is great potential for abuse and mischief in the exercise of such authority. Under Article IV, Section 3, "The Congress shall have Powers to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . ." Roughly thirty percent of land in the United States (over 659 million acres) is part of a federal enclave regulated under the same power as the District.[156] The Supreme Court has repeatedly stated that the

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[155] This latter approach was raised by Judge Leval in *Romeu v. Cohen*, 265 F.3d 118, 128-30 (2d Cir. 2001) when he suggested that Congress would require each state to accept a certain proportion of voters in territories to give them a voice in Congress. This view has been rejected, including in that decision in a concurring opinion that found "no authority in the Constitution for the Congress (even with the states' consent) to enact such a provision." *Id.* at 121 (Walker, Jr., C.J., concurring); *see also Igartua-De La Rosa v. United States*, 417 F.3d 145, 154 n9 (1st Cir. 2005). According to Chief Judge Walker, there are "only two remedies afforded by the Constitution: (1) statehood . . ., or (2) a constitutional amendment." *Id.* at 136.

[156] *See* http://www.gsa.gov/gsa/cm_attachments/GSA_DOCUMENT/FRPR_5-30_updated_R2872-m_0Z5RDZ-i34K-pR.pdf

congressional authority over other federal enclaves derives from the same basic source:[157]

> 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 * * * To 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.' The power of Congress over federal enclaves that comes 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.[158]

Congress could use the same claimed authority to award seats to other federal enclaves. Indeed, since these enclaves were not established with the purpose of being a special non-state entity (as was the District), they could claim to be free of some of these countervailing arguments against the District. Indeed, they are often treated the same as states for the purposes of federal jurisdiction, taxes, military service etc. There are literally millions of people living in these areas, including Puerto Rico (with a population of 4 million people -- roughly eight times the size of the District). These territories are under the plenary authority of Congress.[159] Like the cases involving the District, this authority is stated in often absolute terms. In *Downes v. Bidwell*, the Court held that "[t]he Territorial Clause ... is absolute in its terms, and suggestive of no limitations upon the power of Congress in

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[157] 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."

[158] *Paul v. United States*, 371 U.S. 245, 263-64 (1963).

[159] *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 ... .").

dealing with them."[160] Puerto Rico would warrant as many as six districts.[161] It is not enough to assert that the District has a more compelling political or historical case. Advocates within theses federal enclaves and territories can (and have)[162] 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.[163] 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 23rd 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.[164] 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.

iii. Expanded Senate Representation. While the issue of Senate representation is left largely untouched in the Dinh and Starr analyses,[165]

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160 *Downes v. Bidwell*, 182 U.S. 244, 285 (1901).

161 Indeed, citing this bill, some have already called for Puerto Rico to be given multiple seats in Congress. Jose R. Coleman Tio, *Comment: Six Puerto Rican Congressmen Go to Washington*, 116 Yale L.J. 1389 (2007).

162 *Id.*

163 Bress & McGill, *supra,* at 8.

164 *Id.*

165 In their footnote on this issue, Dinh and Charnes note that there may be significance in the fact that the Seventeenth Amendment refers to the election of two senators "from each state." Dinh & Charnes, *supra*, at n. 57. They suggest that this somehow creates a more clear barrier to District representatives in the Senate – a matter of obvious concern in that body. 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" while the Seventeenth Amendment refers to two senators "from each State" and "elected by the people thereof." Since the object of the

there is no obvious principle that would prevent a majority from expanding its ranks with two new Senate seats for the District. Two Senators and a member of the House would be a considerable level of representation for a non-state with a small population. Yet, this analysis would suggest that such a change could take place without a constitutional amendment. When asked about the extension of the same theory to claiming two Senate seats in the last hearing before the House Judiciary Committee, Professor Dinh once again said that he had not given it much thought. Yet, since his first report in 2004, this issue has been repeatedly raised to Dinh without a response. 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. He also insisted that he had not resolved the question. This month, 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."[166]

In the last hearing, 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.'" However, as I pointed out in the prior hearing, Section 2 has similar language related to the House, specifying that "each State shall have at Least one Representative." It remains unclear why this language does not suggest that same "interests of states qua states" for the House as it does for the Senate. 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 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. He stated that he wanted to see such

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Seventeenth Amendment is to specify the number from each state, it is hard to imagine an alternative to saying "two Senators from each State." It is rather awkward to say "two Senators from each of the several states."

[166] 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, American Constitutional Society, May 2007, at 9.

Senate representation and believed that the same arguments could secure such an expansion. 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.

iv. One Person, One Vote. This legislation would create a bizarre district that would not be affected by a substantial growth or reduction in population. The bill states that "the District of Columbia may not receive more than one Member under any reapportionment of Members."[167] Thus, whether the District of Columbia grew to 3 million or shrank to 30,000 citizens, it would remain a single congressional district – unlike other districts that must increase or decrease to guarantee such principles as one person/one vote. This could ultimately produce another one person/one vote issue. If the District shrinks to a sub-standard district size in population, other citizens could object that the District residents are receiving greater representation. Since it is not a state under Article I, Section 3 (creating the minimum of vote representative per state), this new District would violate principles of equal representation. Likewise, if it grew in population, citizens would be underrepresented and Congress would be expected to add a district under the same principles – potentially giving the District more representatives than some states. The creation of a district outside of the apportionment requirements is a direct contradiction of the Framers' intent.[168]

v. Non-severability. The inevitable challenge to this bill could produce serious legislative complications. With a relatively close House division, the casting of an invalid vote could throw future legislation into question as to its validity. Moreover, if challenged, the status of the two new members would be in question. This latter problem is not resolved by Section 7's non-severability provision, which states "[i]f any provision of this Act, or any amendment made by this Act, is declared or held invalid or unenforceable, the remaining provisions of this Act and any amendment made by this Act shall be treated and deemed invalid and shall have no force or effect of law." However, if the D.C. vote is subject to a temporary or permanent injunction (or conversely, if the Utah seat is enjoined), a provision of the Act would not be technically "declared or held invalid or unenforceable." Rather, it could be enjoined for years on appeal, without

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[167] S. 1257, Sec. 2.

[168] Wesberry, 376 U. S. at 8-11.

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 we could have another cliffhanger with a tie or one-vote margin between the main candidates. The Utah vote could be determinative. Yet, this is likely to occur in the midst of litigation over the current legislation. My challenge to the Elizabeth Morgan Act took years before it was struck down as an unconstitutional Bill of Attainder.[169] 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.

vi. Qualification issues. Delegates are not addressed or defined in Article I, these new members from the District or territories are not technically covered by the qualification provisions for members of Congress. Thus, while authentic members of Congress would be constitutionally defined,[170] these new members would be legislatively defined – allowing Congress to lower or raise such requirements in contradiction to the uniform standard of Article I. Conversely, if Congress treats any district or territory as "a state" and any delegate as a "member of Congress," it would effectively gut the qualification standards in the Constitution by treating the title rather than the definition of "members of Congress" as controlling. As noted above, 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 falling constituencies. The 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.

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169 *Foretich v. United States*, 351 F.3d 1198 (D.C. Cir. 2003).

170 *See* Art. I, Sec. 2 ("No Person shall be a Representative who shall not have attained to the age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.")

vii. 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. S. 1257 would only serve to delay true representational status for district residents. On a practical level, this bill would likely extinguish efforts at full representation in both houses. During the pendency of the litigation, it is highly unlikely that additional measures would be considered – delaying reforms by many years. Ultimately, if the legislation is struck down, it would leave the campaign for full representation frozen in political amber for many years.

IV.
THE CONSTITUTIONAL AND STATUTORY PROBLEMS WITH THE CREATION OF A NEW DISTRICT IN UTAH

While most of my attention has been directed at the addition of a voting seat for the District, I would like to address the second seat that would be added to the House. In my first testimony in the House on this matter, I expressed considerable skepticism over the legality of the creation of an at-large seat in Utah, particularly under the "one-man, one-vote" doctrine established in *Wesberry v. Sanders*.[171] It was decided after the hearing that Utah would take the extraordinary step of holding a special session to create new congressional districts to avoid the at-large problem. The Senate now appears inclined to return to the option of creating a new Utah district. This was a better solution on a constitutional level, but as I argued in a recent article,[172] there seems to be a misunderstanding as to how those seats could be filled.

A. The New Utah Districts Would Present Logistical Barriers to the Inclusion in the 110th Congress.

There has been an assumption that both the D.C. and Utah seats could be filled immediately and start to cast votes. However, since the districts would change, these would not constitute ordinary vacancies that could be filled by the same voters in the same district.[173] This would require the three

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171 376 U.S. 1 (1964).

172 Jonathan Turley, *Too Clever By Half: The Unconstitutional D.C. Voting Rights Bill*, Roll Call, Jan. 25, 2007, at 3.

173 Pursuant to U.S. CONST. art. 1, § 3, states are allowed to address such vacancies and this authority is codified at 2 U.S.C. § 8 (1994) ("The

current members to resign to create vacancies. At a minimum, all four members would have to stand for election and, as new districts (like redistricted districts), the four Utah districts arguably should be filled at the next regular election in two years for the 111th Congress. Reportedly, the prospect of a special election led to the abandonment of the new districts and a return to the more questionable use of an at-large seat.[174]

Thus, while constitutionally superior, the creation of a new seat comes with practical issues that have been largely ignored. If the reciprocity policy contained in this legislation is honored, the District would not begin to exercise its vote until Utah could exercise its vote. However, the non-severability clause refers to portions of the bill being struck down in court rather than simply delayed by the election cycle. The District would be able to exercise its vote immediately while Utah may be delayed until the 111th Congress.

I commend the Senate in adopting this approach to the Utah portion of the legislation. Section 4 of the Senate bill addresses this problem by specifying that these changes would not occur until the 111th Congress at the earliest. This creates a very significant departure from the House bill. While the new districts could always be challenged under conventional gerrymandering allegations, the new language avoids the constitutional problems associated with both an at-large seat and an effort to exercise the new voting district in the 110th Congress.

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time for holding elections in any State, District, or Territory for a Representative or Delegate to fill a vacancy, whether such vacancy is caused by a failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by the laws of the several States and Territories respectively."). The presumption is that any special election would be confined to the preexisting district. *See, e.g.*, N.C. GEN. STAT. § 163-13(a) (1995) ("If at any time after expiration of any Congress and before another election, or if at any time after an election, there shall be a vacancy in this State's representation in the House of Representatives of the United States Congress, the Governor shall issue a writ of election, and by proclamation fix the date on which an election to fill the vacancy shall be held in the appropriate congressional district.").

[174] Elizabeth Brotherton, *Utah Section of D.C. Bill to be Reworked*, Roll Call, at Feb. 27, 2007, at 1.

B. An At-Large Seat in Utah Would Raise Serious Constitutional and Policy Questions.

Since the House bill has the at-large seat provision and the matter might have to be resolved in conference, it is important to understand why the at-large seat option would guarantee that the Utah portion of the legislation would invite a serious constitutional challenge. There is no question that Congress has profound authority over the regulation and recognition of congressional elections.[175] This power includes determinations on matters related to the manipulation of district borders.[176] Obviously, there are limitations on this authority within the structure of the Constitution. Moreover, at-large seats have long been viewed with suspicion by both the courts and Congress, particularly due to their past use to diminish minority voting. For this reason, 2 U.S.C. §2c codifies a congressional policy against the use of such districts:

> In each State entitled in the Ninety-first Congress or in any subsequent Congress thereafter to more than one Representative under an apportionment made pursuant to the provisions of section 2a(a) of this title, there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative.[177]

The Supreme Court has noted that this provision controls in the creation of districts "unless the state legislature, and state and federal courts, have all failed to redistrict" in accordance with the federal law.[178] In this circumstance, there would be no new apportionment or redistricting. Rather, the House would simply pass an at-large district over the full range of all other existing districts.

As opposed to the District portion of the legislation, the Utah at-large seat raises some close questions as well as some fairly metaphysical notions

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175 *See, e.g., Smiley v. Holm,* 285 U.S. 355, 366 (1932); *United States v. Gradwell,* 243 U.S. 476, 483 (1917) .

176 *Vieth v. Jubelirer,* 541 U.S. 267 (2004); *see also Oregon v. Mitchell,* 400 U.S. 112, 131-22 (1970).

177 2 U.S.C. §2c.

178 *Branch v. Smith,* 538 U.S. 254, 274 (2003).

of overlapping representation and citizens with 1.4 representational status.[179] On one level, the addition of an at-large seat would seem to benefit all Utah citizens equally since they would vote for two members. Given the deference to Congress under the "necessary and proper" clause, an obvious argument could be made that it does not contravene the "one person, one vote" standard. Moreover, in *Department of Commerce v. Montana*,[180] the Court upheld the method of apportionment that yielded a 40% differential off of the "ideal." Thus, a good-faith effort at apportionment will be given a degree of deference and a frank understanding of the practical limitations of apportionment.

However, there are various reasons a federal court might have cause to strike down this portion of the House bill. Notably, this at-large district would be roughly 250% larger than the ideal district in the last 2000 census (2,236,714 v. 645,632). In addition, citizens would have two members serving their interests in Utah -- creating the appearance of a "preferred class of voters."[181] On its face, it raises serious questions of equality among voters:

> To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected 'by the People.'[182]

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179 There remains obviously considerable debate over such issues as electoral equality (guaranteeing that every vote counts as much as every other) and representational equality (guaranteeing that representatives represent equal numbers of citizens). *See Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990) (Kozinski, J., concurring in part and dissenting in part). Of course, when Congress is allowing citizens of one state to have two representatives, this distinction becomes less significant.

180 503 U.S. 442 (1992).

181 *Reynolds v. Sims*, 377 U.S. 533, 558 (1964) ("The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications . . . The conception of political equality . . . can mean only one thing – one person, one vote.").

182 *See Wesberry*, 376 U.S. at 7-8.

This massive size and duplicative character of the Utah district draws obvious points of challenge.[183] In *Wesberry v. Sanders,*[184] the Court held that when the Framers referred to a government "by the people," it was articulating a principle of "equal representation for equal numbers of people" in Congress.[185] While not requiring "mathematical precision,"[186] significant differences in the level of representation are intolerable in our system. This issue comes full circle for the current controversy: back to Article I and the structural guarantees of the composition and voting of Congress. The Court noted that:

> It would defeat the principle solemnly embodied in the Great Compromise - equal representation in the House for equal numbers of people - for us to hold that, within the States, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a Congressman than others.[187]

While the Supreme Court has not clearly addressed the interstate implications of "one person, one vote," this bill would likely force it to do so.[188] The Court has stressed that the debates over the original Constitution reveal that "one 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."[189] 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:

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183 *Cf.* Jamie B. Raskin, *Is This America? The District of Columbia and the Right to Vote*, 34 Harv. C.R.-C.L. L. Rev. 39 (1999) (discussing "one person, one vote" precedent vis-à-vis the District).

184 376 U.S. 1 (1964).

185 *Id.* at 18.

186 *Id.*

187 *Id.* at 14.

188 *But see Department of Commerce*, 503 U.S. at 463 ("although 'common sense' supports a test requiring 'a goodfaith effort to achieve precise mathematical equality' within each state, *Kirkpatrick v. Preisler*, 394 U.S. at 530-531, the constraints imposed by Article I, § 2, itself make that goal illusory for the Nation as a whole.").

189 *Wesberry*, 376 U.S. at 10.

> the same historical insights that informed our construction of Article I, 2 ... should apply here as well. As we interpreted the constitutional command that Representatives be chosen "by the People of the several States" to require the States to pursue equality in representation, we might well find that the requirement that Representatives be apportioned among the several States "according to their respective Numbers" would also embody the same principle of equality.[190]

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 while other citizens would limited to one. Given racial and cultural demographic differences between Utah and other states, this could be challenged as diluting the power of minority groups in Congress.

Moreover, while interstate groups could challenge the disproportionate representation for Utah citizens, the at-large seat could also be challenged by some intrastate groups as diluting their specific voting power as in *City of Mobile v. Bolden*.[191] At-large seats have historically been shown to have disproportionate impact on minority interests. Indeed, in *Connor v. Finch*, the Supreme Court noted at-large voting tends "to submerge electoral minorities and over-represent electoral majorities."[192] Notably, during the heated debates over the redistricting of Utah for the special session, there was much controversy over how to divide the districts affecting the urban areas.[193] The at-large seat means that Utah voters in concentrated areas like Salt Lake City will have their votes heavily diluted in the selection of their additional representative. If Utah simply added an additional congressional district, the ratio of citizens to members would be reduced. The additional member would represent a defined group of people who have unique geographical and potentially racial or political

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190 *United States Dep't of Commerce v. Montana*, 503 U.S. 442, 461 (1992).

191 446 .U.S. 55 (1980) (striking down an at-large system); see also *Rogers v. Lodge*, 458 U.S. 613, (1982).

192 431 U.S. 407, 415 (1977).

193 *See, e.g.*, Bob Bernick Jr., *Why is GOP so Nice about Redistricting?*, Deseret Morning News, Dec. 1, 2006, at 2. Lisa Riley Roche, *Redistricting Narrowed to 3 proposals*, Deseret Morning News, Nov. 22, 2006, at 1.

characteristics.[194] However, by making the seat at large, these citizens would now have to share two members with a much larger and more diffuse group – particularly in the constituency of the at-large member. It is likely that the member who is elected at large would be different from one who would have to run in a particular district from the more liberal and diverse Salt Lake City.

Another concern is that this approach could be used by a future majority of Congress to manipulate voting and to reduce representation for insular groups.[195] Rather than creating a new district that may lean toward one party or have increased representation of one racial or religious group, Congress could use at-large seats under the theory of this legislation. Congress could also create new forms of represented districts for overseas Americans or federal enclaves.[196] The result would be to place Congress on a slippery slope where endangered majorities tweak representational divisions for their own advantage.

The lifting of the 435 limit on membership of the House established in 1911 is also a dangerous departure for this Congress.[197] While membership was once increased on a temporary basis for the admission of Alaska and Hawaii to 437, past members have respected this structural limitation. These members knew instinctively that, while there was always the temptation to tweak the membership rolls, such an act would invite future manipulation and uncertainty. After this casual increase, it will become much easier for future majorities to add members. When presented with a plausible argument that a state was short-changed, a majority could simply add a seat. Use of an at-large seat magnifies this problem by abandoning the principle of

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194 *See Davis v. Bandemer*, 4328 U.S. 109, 133 (1986) (reviewing claims of vote dilution for equal protection violations "where the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively.").

195 At-large districts have been disfavored since *Wesberry*, a view later codified in federal law. *See* 2 U.S.C. § 2c.

196 Notably, rather than try to create representatives for overseas Americans as some nations do, Congress enacted a law that allows citizens to use their former state residence to vote if the state complies with the requirements of the Uniformed and Overseas Citizens Absentee Voting Act. 42 U.S.C. §1973ff.

197 Act of Aug. 8, 1911, ch. 5 §§ 1-2, 37 Stat. 13, 14.

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.

Finally, while it is difficult to predict how this plan would fare under a legal challenge, it is certain to be challenged. This creates the likelihood of Congress having at least one member (or two members if you count the District representative) who would continue to vote under a considerable cloud of questioned legitimacy. In close votes, this could produce great uncertainty as to the finality or legitimacy of federal legislation. This is entirely unnecessary. If a new representative is required, it is better to establish a fourth district not just a fourth at-large representative for legal and policy reasons.

V.
THE MODIFIED RETROCESSION PLAN: A THREE-PHASE ALTERNATIVE FOR THE FULL REPRESENTATION OF CURRENT DISTRICT RESIDENTS IN BOTH THE HOUSE AND THE SENATE

In some ways, it was inevitable (as foreseen by Alexander Hamilton) that the Capitol City would grow to a size and sophistication that representation in Congress became a well-founded demand. Ironically, the complete bar to representation in Congress was viewed as necessary because any half-way measure would only lead to eventual demands for statehood. For example James Holland of North Carolina noted that only retrocession would work since 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.[198]

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. Retrocession has always been the most direct way of securing a resumption of voting rights for District residents.[199] 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.[200]

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. 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 in my view. Ironically, in 1910 when some members sought to undo the Virginia retrocession, another George Washington Law Professor, Hannis

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198 Mark Richards, Presentation before the Arlington Historical Society, May 9, 2002 (citing Congressional Record, 1805: 979-980) (quoting Rep. James Holland of North Carolina).

199 An alternative but analogous retrocession plan has been proposed by Rep. Dana Rohrabacher. For a recent discussion of this proposal, *see* Dana Rohrabacher, *The Fight Over D.C.; Full Representation for Washington – The Constitutional Way*, Roll Call, Jan. 25, 2007, at 3.

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

Taylor, supplied the legal analysis that the prior retrocession was unconstitutional without an amendment.[201] I have to 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 terrible policy decision. This land was ceded to Congress, which always had the right to retrocede it. Obviously, no one is suggesting such a step. However, as a constitutional matter, I do not see the barrier to retroceding the Maryland portion of the original federal enclave. As John Calhoun correctly noted in 1846 "[t]he 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."[202]

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, incorporation of public services from education to prisons to law enforcement would occur. In the third phase, any tax and revenue incorporation would occur.

These phases would occur over many years with only the first phase occurring immediately upon retrocession. Indeed, I recommend 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. The fact is that any incorporation is made easier, not more difficult, by the District's historic independence. Like most cities, it would continue to have its own law enforcement and local governing authority. However, the District could also benefit from incorporation into Maryland's respected educational system and other statewide programs related to prisons and other public needs.

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[201] S. Doc. No. 286, 61st Cong., 2d Sess. 4 (1910) (Opinion of Hannis Taylor as to the Constitutionality of the Act of Retrocession of 1846).

[202] *See* Cong. Globe, 29th Cong., 1st Sess. 1046 (1846).

In my view, this approach would be unassailable on a legal level and highly efficient on a practical level. I realize that there remains a fixation with the special status of the city, but much of this status would remain. While the city would not technically be the seat of government, it would obviously remain for all practical purposes our Capitol City.

This is not to suggest that a retrocession would be without complexity. Indeed, the Twenty-Third Amendment represents an obvious anomaly.[203] Section one of that amendment states:

> The District constituting the seat of government of the United States shall appoint in such manner as the Congress may direct:
>
> A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a state, but in no event more than the least populous state; they shall be in addition to those appointed by the states, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a state; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.[204]

Since the only likely residents would be the first family, this presents something of a problem. There are a couple of obvious solutions. One would be to repeal the amendment, which is the most straight-forward and preferred.[205] 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 since it states that electors are to be appointed "as the Congress may direct."[206] Congress can enact a law directing that no such electors may be chosen. The

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203 U.S. Const. amend. XXIII

204 *Id*.

205 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.

206 *See generally* Peter Raven-Hansen, *The Constitutionality of D.C. Statehood*, 60 Geo. Wash. L. Rev. 160, 187-88 (1991); Philip G. Schrag, *The Future of District of Columbia Home Rule*, 39 Cath. U.L. Rev. 311, 317 (1990).

only concern is that a future majority could do mischief by directing an appointment when electoral votes are close.

VI.
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 S. 1257, 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 from of either an amendment or retrocession.

Currently, the drafters of the current bill 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, S. 1257 would replace one grotesque constitutional curiosity in the current status of the District with new curiosity. The creation of a single vote in the House (with no representation in the Senate) would create a type of half-formed citizens with partial representation derived from residence in a non-state. It is an idea that is clearly put forward with the best of motivations but one that is shaped by political convenience rather than constitutional principle.

It is certainly time to right this historical wrong, but, in our constitutional system, it is often more important how we do something than what we do. This is the wrong means to a worthy end. However, it is not the only means and I encourage the Members to direct their considerable efforts toward a more lasting and complete resolution of the status of the District of Columbia in Congress.

Thank you again for the honor of speaking with you today and I would be happy to answer any questions that you might have. I would also be happy to respond to any questions that Members may have after the hearing on the constitutionality of this legislation or the alternatives available in securing full voting rights for District residents.

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