

**VOTING REPRESENTATION IN CONGRESS FOR  
CITIZENS OF THE DISTRICT OF COLUMBIA**

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**HEARING**

BEFORE THE

COMMITTEE ON  
GOVERNMENTAL AFFAIRS  
UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

—————  
MAY 23, 2002  
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## VOTING REPRESENTATION IN CONGRESS FOR CITIZENS OF THE DISTRICT OF COLUMBIA

THURSDAY, MAY 23, 2002

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

The Committee met, pursuant to notice, at 2:36 p.m., in room SD-342, Dirksen Senate Office Building, Hon. Joseph I. Lieberman, Chairman of the Committee, presiding.

Present: Senators Lieberman, Durbin, and Levin.

### OPENING STATEMENT OF CHAIRMAN LIEBERMAN

Chairman LIEBERMAN. Good afternoon. This hearing will come to order. I thank the Hon. Eleanor Holmes Norton for being here. We have two other members of the opening panel. The second Congresswoman is Eddie Bernice Johnson. Senator Feingold is on the way.

This hearing has been called to discuss a question that is for 600,000 Americans an ongoing injustice and is for the Nation as a whole, I think, a stain on the fabric of our democracy. The question is, when will we finally extend full voting rights and voting representation in Congress to citizens of the District of Columbia? This denial is more than an historical anomaly. It is an ongoing and outrageous contradiction of the fundamental principles and rights of citizens of our great country.

The Governmental Affairs Committee, which I am privileged to Chair, has oversight over the municipal affairs of the District of Columbia and in that sense has jurisdiction over the matter that we are discussing today.

To me, it is incomprehensible that in the year 2002, ours is the only democracy in the world in which citizens of the capital city are not represented in the national legislature. Think of what visitors from around the world think when they come to see all of the beautiful landmarks and monuments of this great capital city, which are the symbols worldwide of democracy, if they would know that the people who live in this city alongside those symbols of democracy every day do not have one of the fundamental rights of that democracy, which is voting representation in the Congress.

You know, I was thinking the other day what the reaction would be in Congress if for some reason the residents of Boston or Nashville or Denver or Seattle or El Paso had no voting representation here in Congress, and I pick all of those cities because they are about the same size as Washington, DC. The reality is that the Nation would not let those citizens go voiceless in Congress. So is it

only because this injustice has gone on for so long that we tolerate it here in our Nation's capital?

Obviously, citizens of the District pay Federal taxes. They serve and die in war. Yet, they are denied this fundamental right. Even though they pay taxes, they have no say about how those taxes are levied or on what priority that money from their taxes may be spent.

The vote is a civic entitlement of every American citizen. It is democracy's most essential right and our most effective tool. The citizens who live in our Nation's capital deserve more than a non-voting delegate in the House. Notwithstanding the extraordinarily strong service of the Hon. Congresswoman Eleanor Holmes Norton, who is with us today, non-voting representation just is not good enough. As all who are here, I presume, know, while Ms. Norton may vote in committees, she cannot vote on the House floor. That is wrong and must be changed.

That is why I am proud to be the Senate sponsor of the No Taxation Without Representation Act, which Congresswoman Norton has introduced in the House. I am delighted that Senator Russ Feingold, who is also an original sponsor of the legislation, is with us today.

Of course, the name of our legislation is taken from our own revolutionary history because our forbearers went to war rather than pay taxes without being represented. The citizens of our capital city express by this movement that they believe in the principles the Nation's revolutionary heroes established and they want to benefit now from them.

The bill's title, No Taxation Without Representation, is, if I might say so, pointed and ironic. Obviously, what the people of the District seek is voting representation, not exemption from taxes. In fact, the bill states in its first operative paragraph that District of Columbia residents shall have full voting representation in Congress. The tax provision is in the bill for effect, to remind us of this fundamental American principle that gave birth to our Nation and of the fact that no other taxpaying Americans are required today to pay taxes without representation in Congress.

A recent national poll was of interest to me on this subject and it showed that a majority of Americans believe that District residents already have Congressional voting rights. You cannot blame them for that because it is so unbelievable that residents of the District do not have voting rights. But interestingly, when those who were polled were informed that District residents do not have voting rights, more than 80 percent said that they should.

Well, if we can right this wrong, we would, in that sense, therefore, not only be following the will of the American people, we would be advancing the cause of our Nation's historic destiny and, of course, fulfilling our responsibility.

When we placed our capital, which was not established in their day, under the jurisdiction of Congress, the Framers of our Constitution, in effect, placed with Congress, I think, the solemn responsibility of assuring that the rights of the citizens of the District would be protected in the future. Congress has failed to meet this obligation now for much too long.

In the words of this city's namesake, our first President, "Precedents are dangerous things. Let the reigns of government then be braced and held with a steady hand and every violation of the Constitution be reprehended. If defective, let it be amended, but not suffer it to be trampled on whilst it has an existence."

People of the District of Columbia have suffered this constitutional defect for far too long, so let us reprehend it and amend it together.

I look forward to hearing from all of the witnesses today and I am pleased now to be joined by Senator Durbin, who is also a co-sponsor of this legislation, and would call on him now for an opening statement.

#### **OPENING STATEMENT OF SENATOR DURBIN**

Senator DURBIN. Thank you, Mr. Chairman, for scheduling this hearing to explore the important question of whether the citizens of the District of Columbia should be granted full voting representation in Congress, and I salute your leadership on this issue.

I am Chairman of the District of Columbia Authorizing Subcommittee and a member of the D.C. Appropriations Subcommittee. I have served in that capacity over the last 4 years. I have lived part-time and occasionally full-time in the District of Columbia for about 39 years, so it really has been a second home to me, in addition to my State of Illinois, and I have watched a lot of changes in the District of Columbia. I never dreamed that I would be in this position in the U.S. Senate to help this great city.

But we have passed some important legislation restoring the management and personnel authority of the D.C. Mayor, establishing a program to afford D.C. high school graduates the benefits of in-State tuition at State colleges and universities outside the District, permitting Federal law enforcement agencies to enter into cooperative agreements with D.C. Metropolitan Police, establishing a specialized family court, authorizing the redevelopment through the GSA of the Southeast Federal Center, and many other things.

What I have found interesting in 20 years of service in Congress, and I am sure that Congresswoman Norton would agree with me on this, is how many men and women run for the House of Representatives and for the Senate when their secret desire is to be a mayor, because time and again, when issues come up involving the District of Columbia, these men and women who could not wait to get to Washington want to perform the role of mayor and city council when it comes to the District of Columbia. [Laughter.]

It is startling. There are times, and Congresswoman Norton can back me up on this, when these people will condemn in the District of Columbia the very programs that they have at home. They would not have the nerve to bring up these issues at home, but because the District of Columbia is almost voiceless on Capitol Hill but for your heroic efforts, without a vote, they feel that they can make some sort of a political point. It is nothing short of amazing to watch this spectacle unfold.

Now, I have also over the years taken exception with decisions by the D.C. City Council and I have been pretty vocal about them. But I have always tried to draw the line at taking exceptions. I do not believe it is my role, responsibility, or right to impose my views

on the people of the District of Columbia when it comes to their sovereignty and their judgment of governance. I think that is one of the fundamental elements of a democracy and it is one that has been ignored by this Congress time and time again.

It is long overdue for the 572,000 residents of the District of Columbia to have their voice on Capitol Hill, to have a voting Congressman, voting Senators, and to have representation that speaks for them with a vote in these two chambers. I think we have reached the point where we cannot make excuses any longer.

Now, we all know why the District of Columbia is not a State, because, frankly, there are those who have made the political calculation that it may tip the scales one way or the other. But for goodness sakes, is that not what democracy is all about, to let the people tip the scales as they see fit with their right to vote?

Thank you very much, Mr. Chairman, for this hearing.

Chairman LIEBERMAN. Thank you, Senator Durbin, for your support of the bill and for your excellent statement.

Senator Levin, thank you for joining us.

#### OPENING STATEMENT OF SENATOR LEVIN

Senator LEVIN. Thank you very much, Mr. Chairman, and thank you for calling this hearing on a very fundamental issue, one of the issues that this country was founded upon.

There are just simply no "if"s, "and"s, or "but"s about it. We must correct the denial of representation which so unfairly and undemocratically locks the District of Columbia residents out of Congress. District residents share the same characteristics of citizenship as the residents of the 50 States. They serve in the military. They have lost their husbands and wives, their sons and their daughters in foreign wars, defending our government. They study the Constitution and the obligations of citizenship. They say the same pledge of allegiance to the flag as every other American does. They are governed by the laws of the United States. They pay Federal taxes, in fact, more Federal taxes per capita than the residents of any other State but one.

Yet, because the District is not recognized as a State and because of our failure to act for so long, D.C. residents do not have the full voting representation in Congress that they deserve.

I would ask that the balance of my statement be inserted in the record, Mr. Chairman, because I know you want to proceed with this hearing, but I want to just commend our first panel for all of the tremendous work that they have done. I would also like to commend the Delegate who is before us, Eleanor Holmes Norton. You have performed very nobly under very difficult and limited circumstances which should end.

Chairman LIEBERMAN. Thanks, Senator Levin. Thank you very much.

[The prepared statement of Senator Levin follows:]

#### PREPARED STATEMENT OF SENATOR LEVIN

Good afternoon. Thank you, Mr. Chairman, for holding this hearing on one of the most fundamental issues upon which our country was founded—the right to representation in making the laws that govern you. There are no "ifs," "ands" or "buts"

about it. The time is long past due to remedy the denial of representation which unfairly and undemocratically locks District of Columbia residents out of Congress.

District residents share the same characteristics of citizenship as the residents of the 50 states: they serve in the military and have lost their husbands and wives, sons and daughters, in foreign wars defending our form of government; they study the Constitution and the obligations of citizenship; they say the pledge of allegiance to the flag; they are governed by the laws of the United States; and they pay Federal taxes, in fact more Federal taxes per capita than the residents of any other State except Alaska.

Yet—because the District is not recognized as a State, and because of our failure to act for decades, D.C. residents do not have full voting representation in Congress. That means, very simply, that they are taxed without representation.

I have not cosponsored S. 603, the No Taxation Without Representation Act, because while I understand the depth of frustration reflected in the provision in the bill that would allow citizens of the District to stop paying taxes until they get voting representation, I can't support that provision. Like residents of the 50 States, residents of the District of Columbia receive the protection of our military, the benefits of our social programs, our court system, and the freedoms guaranteed by our Constitution. However, I believe that full congressional representation should be adopted for the citizens of the District of Columbia, and I support legislation to do that. That action is long past due. Hopefully, the time will soon come, and this hearing can help make that happen.

I welcome all of our distinguished panelists. Delegate Eleanor Holmes Norton, clearly we would not be here today without your steadfast leadership and your commitment to bring justice to the people of the District. We've had great communication with your office during the years on a number of matters, and I have a deep appreciation for you and your dedication to this city.

To Representative Eddie Bernice Johnson, Chair of the Congressional Black Caucus, Wade Henderson of the Leadership Conference on Civil Rights, with whom I have been engaged on many issues, Mayor Anthony Williams, D.C. Council Chair Linda Cropp, Statehood Senator Pendleton, Professor Adam Kurland, and Professor Jamin Raskin, we are pleased that you are here.

I know your testimony will further enlighten this Committee and hopefully advance the ball on this important issue.

Chairman LIEBERMAN. Senator Feingold, if you have the time, it would be my inclination to call on Congresswoman Norton first. It is a pleasure to be your cosponsor, your coworker, and without revealing exact dates, to have been your friend and classmate at Yale Law School some considerable period of time ago. [Laughter.]

The Hon. Eleanor Holmes Norton.

**TESTIMONY OF HON. ELEANOR HOLMES NORTON,<sup>1</sup> A REPRESENTATIVE IN CONGRESS FROM THE DISTRICT OF COLUMBIA**

Ms. NORTON. I thank you, Mr. Chairman, and for the record, I want you to know that I was ahead of you.

Chairman LIEBERMAN. That is very gracious of you. I was not going to reveal that. [Laughter.]

You are looking very well. [Laughter.]

Senator LEVIN. I just wonder if the rest of us should excuse ourselves while these two just have their conversation. [Laughter.]

Ms. NORTON. I did not say by how much—

Chairman LIEBERMAN. It was close.

Ms. NORTON [continuing]. But I thought I had to lay the record straight there lest I get an advantage to which I am not entitled.

I begin by thanking you, Mr. Chairman, not only for introducing the No Taxation Without Representation Act, but for going further and holding this hearing on the voting rights provision of the bill. Ever true to high principles, you have always supported equal

<sup>1</sup>The prepared statement of Ms. Norton appears in the Appendix on page 38.

treatment for the residents of the District of Columbia, unfailingly stepping forward to lead and supporting bills for equal representation for D.C. residents.

You have already brought the No Taxation Without Representation Act to the Senate floor during the debate on election reform in February. You submitted the bill as an amendment to the election reform bill because you said you believe that the voting rights issues raised in Florida in the 2000 Presidential election only served to spotlight the denial of any vote at all in Congress to D.C. residents. By agreement with us and all concerned, your amendment was withdrawn until the bill is fully ready for vote.

However, in your remarks, you said that you hope the discussion of the No Taxation Without Representation Act on the Senate floor, a discussion of D.C. voting rights, the first discussion of D.C. voting rights on the Senate floor in memory, would help educate the Senate about the denial here in preparation for granting D.C. the Congressional vote.

I come today on the heels of a highly successful D.C. Lobby Day, last Wednesday, when more than 250 residents, energized by your bill in the Senate, visited every Senate office to seek cosponsors. The sponsors of the Lobby Day, the Leadership Conference on Civil Rights, People for the American Way, D.C. Vote, and Stand Up for Democracy, are in the throes now of making follow-up calls for final answers on sponsorship. I want to thank the Senators who are signing on now with a dozen cosponsors on the bill and follow-up calls still being made.

The significance of the first citywide Lobby Day in the Senate was not lost on another strong supporter, Majority Leader Tom Daschle, who graciously agreed to meet with leaders of the coalition, the city, and the business community, as well as the Chair of the Democratic National Committee, on the morning of Lobby Day.

I want also to thank Senator Max Baucus, who with you and Senator Daschle have worked to make clear that the only point of our bill is and always has been to achieve voting rights and its proper place in this Committee for that purpose. My special thanks also to your able and energetic staff for the magnificent work they have done since you introduced the bill.

We will hear from others today about the damage to democracy and to the District because D.C. residents are denied the Congressional vote. I believe I can be most useful if I testify briefly from the unique perspective of the one official District residents are permitted to send to Congress.

Beyond notions of fairness and equality, the role of the one non-voting delegate whose constituents pay Federal income taxes points up the absurdity of the present arrangement for us and for the Congress. At best, antiquated, inefficient, quite unintended by the Framers, and embarrassing. At worst, discriminatory, undemocratic, and shameful.

The District is seriously harmed by having no representation in the Senate. I have the same privileges on the Senate floor as any House member, but even when the D.C. budget is before you, I can be on the floor, but not speak on the floor on our own budget. To its credit, the House has extended to delegates every privilege of the House except, of course, the most important, the vote on the

House floor. The House has long allowed delegates the valuable vote in Committee. In response to the memo I submitted in 1993, the House even changed its rules to allow delegate voting in the Committee of the Whole, where most of our work is done.

However, Mr. Chairman, measure the Nation's high-sounding rhetoric about democracy, preached unceasingly, particularly today, against the reality that even this delegate vote, which was not the full right other members enjoy, was rescinded by rule when the Republicans gained control of the House.

The indignities to the residents I represent know no bounds. My testimony today will consist of a few among many examples that could be offered to demonstrate this point. It is useless and redundant and insulting enough to our Mayor, Council, and residents, alone in this country who are treated as children by the requirement to send their balanced budget to the Congress, where it is often toyed with and decorated with undemocratic attachments, while I press Congress to allow a local jurisdiction to spend its own local taxpayer-raised money.

After struggling every year to get the D.C. budget to the floor, I must then stand aside, unable to cast a vote on our own budget, while members of the House from 49 States where residents pay less in Federal income taxes per capita than my constituents vote yea or nay on the D.C. budget. Indeed, my colleagues from seven States that have populations about our size each have one vote in the House and two in the Senate on the D.C. budget and on everything else. This pathetic paradox has been acted out on the House floor countless times in the 32 years D.C. has had a delegate.

Sometimes life and death issues have been at stake, such as when, without a vote, I had to fight off two bills that would have wiped out all of the District's gun laws in 1999 in the House, or when the Senate with no representation in this body forced a death penalty referendum on the District that the city turned back two-to-one in 1992.

Even the voting rights that D.C. has won have not been fully realized. Lacking the vote during the House impeachment proceedings, my only recourse to preserve D.C.'s 1996 Presidential vote, as guaranteed by the 23rd Amendment, was to bring a privileged resolution to the House floor. I argued that the vote for President that residents had cast required that a D.C. vote also be cast in the House concerning whether the President should be removed from office. The Speaker ruled against the District.

Yet never, Mr. Chairman, have I felt more deeply about the denial of the vote to our residents than when our Nation has been called to war. I spoke but could not vote on the commitment of troops in the Persian Gulf War and most recently on the resolution authorizing the war against terrorism.

I know you understand how deeply the denial of the vote in time of war cuts, Mr. Chairman. You said as much in your remarks on the Senate floor when you submitted the No Taxation Without Representation Act as an amendment to the election reform bill. You said that D.C. residents have disproportionately suffered casualties in America's wars. You informed the Senate that in World War I, the District suffered more casualties than three States, in World

War II, more casualties than four States, in Korea, more casualties than eight States, and in Vietnam, more casualties than ten States.

I believe it is fair to say that the examples in this testimony would shock most Americans, the great majority of whom say in the polls that we should have the Congressional vote. The examples I have cited and many more like them stand out like a disfiguring scar that, at best, robs our country of international credibility, and at worst, leaves us open to charges of hypocrisy.

The denial of the vote to the 600,000 citizens who reside in the Nation's capital stunts the otherwise determined logic and progression about democracy, the 14th Amendment guaranteeing equal protection of the laws, the 15th Amendment guaranteeing the vote regardless of race, the 17th Amendment providing for direct popular election of Senators, the 19th Amendment enfranchising women, the 23rd Amendment affording District residents the right to vote for President, the Supreme Court's "one person, one vote" decisions, the 1965 Voting Rights Act barring impediments to voting regardless of race.

Today, we ask the Congress that brought us this far along the way to democracy and equality not to stop now. Do not hold back the tide. The Senate saw that tide roll into this chamber on Lobby Day. D.C. residents came here in large numbers for the first time to show that they are free Americans, that the Senate is not off limits to them, and that they are entitled to representation here.

Today, we ask the Senate to respond to these D.C. residents who represented the entire city when they came to lobby last Wednesday. We ask you to give them what they are due as Americans. We ask you to give them the Congressional vote that is the democratic hallmark of our republic. We ask you to pass the No Taxation Without Representation Act and we thank you, Mr. Chairman.

Chairman LIEBERMAN. I thank you, Delegate Norton, for your eloquent statement and for your passionate advocacy and I look forward to continuing to work with you in this cause.

It is very important to state, I think, that neither of us or those at the table with you who support this cause or Senator Durbin and I have any illusions about the political difficulties in advancing it. But our hope in introducing the No Taxation Without Representation proposal was to bring our colleagues, and hopefully others throughout the country, back to the principle that you have just spoken to so effectively, which is this outrageous reality that 600,000 Americans are denied full voting rights in the year 2002.

So by one way or the other, I know that you and I and Congresswoman Johnson, Senator Feingold, Senator Durbin, and others are committed to continuing to push forward until we are able to not only create or at least encourage, if not coerce, people to express the consensus that is undeniable, that this is wrong, and then to figure out how we together can go forward to make it right.

Congresswoman Eddie Bernice Johnson from Texas, Chair of the Congressional Black Caucus, thank you very much for taking the time to come and join us today.

**TESTIMONY OF HON. EDDIE BERNICE JOHNSON, A  
REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS**

Ms. JOHNSON. Thank you very much, Mr. Chairman. It is my privilege to testify before the Senate Governmental Affairs Committee today on behalf of the 38 members of the Congressional Black Caucus. We salute you, Mr. Chairman, for your stand-up leadership in moving to eliminate discrimination in representation endured for too long by the citizens of the capital of the United States.

Thank you for leading the Senate in sponsoring the No Taxation Without Representation Act and for holding this important hearing on the bill. All 38 members of the Congressional Black Caucus are sponsors of the bill in the House. Congress gave the District of Columbia the right to elect a delegate to the House shortly after the Caucus was founded in 1969. The D.C. Delegate has always represented people of all races equally. However, from the beginning, the Congressional Black Caucus took special umbrage that a member of our Caucus whose constituents paid Federal income taxes could not vote on the House floor.

Today, Mr. Chairman, 32 years after the District got a delegate in this century, and 33 years after the formation of the Congressional Black Caucus, our umbrage has become anger. The CBC was formed during a high point of the civil rights movement and our members have always felt a special obligation to the District because the city is largely an African American city. A member of our Caucus has been deliberately handicapped in her work by the Congress. Although she is in every way equal to the rest of us, especially in the Federal income tax her constituents pay, she is treated unequally in the House in which we serve because of the intentional denial of voting representation to her constituents, and even more unequally in the Senate, where her constituents are without any representation.

Congresswoman Eleanor Holmes Norton knows how to use her considerable voice and intelligence to benefit her constituents, but she has to do it with one hand tied behind her back. However, the Caucus concern goes well beyond the regard we have for one of our own or the special effort the CBC makes to help ensure that the District's interests are protected in the House, where residents have no vote.

African Americans in this country identify strongly with the denial of voting representation to the District of Columbia. More than half of the districts of the Congressional Black Caucus members experienced a similar denial in Congress until the passage of the Voting Rights Act of 1965, including my own State of Texas. We emphasize that we of the Congressional Black Caucus make no difference based on race in our insistence on the sanctity of the vote and of the right of all people to a full and equal vote. We have worked hard on an election reform bill that is now before the House—and before that was precipitated by the 2000 Presidential election that robbed thousands of citizens of every race and ethnic background of their vote and determined an outcome at odds with the popular vote.

However, if you want to get African Americans in this country angry today, just tell them that there is a majority black city any-

where in America where blacks and other Americans are treated as second-class citizens. Tell them that city is our Nation's capital and you spur them to especially strong action.

We are engaged in such action today. The CBC, like the Leadership Conference on Civil Rights, has made the No Taxation Without Representation Act a priority. Our constituents expect no less from us because Congressional voting rights for the District of Columbia residents is a civil rights issue of historic importance whose time is long overdue. Many African Americans question the commitment of Members of the Congress to equal treatment if Members are timid about equal Congressional representation for all tax-paying Americans, including the residents of our capital. The denial of voting rights to taxpaying Americans who have fought in all of our wars raises profound moral issues.

If we are to fight terrorism and help create democratic institutions abroad, we must first clean our own house. Our Nation is the leader of democracy and freedom and I find it incredulous that we deny the vote to 600,000 residents in the high-profile capital of this country.

Let me assure you, Mr. Chairman, Congressional voting rights for the citizens of the Nation's capital has the laser-like attention of the Congressional Black Caucus. Our members and our constituents are watching. We ask the rest of the Senate to follow your lead and we ask that the Senate please not let us down. I thank you very much.

Chairman LIEBERMAN. Thank you, Congresswoman Johnson, for an excellent and very principled statement. I appreciate it very much.

Senator Feingold, thanks for being here. There are probably those in America who think that Senator Feingold's first name is McCain. [Laughter.]

But it is Russell, Senator Russell Feingold, and I cannot thank him enough for joining me in this effort in the Senate because he really brings to it the same principle, personal principle, and sense of purpose that he brought to campaign finance reform. It took him a while, but he got it done. It may take us a while, but we are going to get it done. Senator Feingold.

**TESTIMONY OF HON. RUSSELL D. FEINGOLD,<sup>1</sup> A U.S. SENATOR  
FROM THE STATE OF WISCONSIN**

Senator FEINGOLD. Thank you, Mr. Chairman. My official name change is going to come through before the next election. It will look good on the ballot. [Laughter.]

Thank you for inviting me to join you today and for allowing me to make a brief statement in support of our effort to secure full voting representation in Congress for the residents of the District of Columbia. I want to commend you, Mr. Chairman, as the others have, for your leadership and your work on this and your comments about how truly unbelievable it is that this can be the case in the United States of America in the year 2002. I want my colleagues in the House to know that when my constituents in Wisconsin find out about this, they are surprised, astonished, and they

<sup>1</sup>The prepared statement of Senator Feingold appears in the Appendix on page 41.

do not think it is right, and I am hoping that this is a message that can get clear throughout the country.

I am very pleased, in fact, honored to be here today with Delegate Eleanor Holmes Norton. She has been a longtime, tireless champion of this important issue in Congress. It is an honor to work with her and with the Chairman and, of course, with Representative Johnson. I recently benefitted from her tremendous leadership skills in that very ability you were just kidding me about. Were it not for Representative Johnson and her leadership, I am not at all sure that we would have succeeded in the House of Representatives, and that bill had to do with the integrity of the vote and this one has to do with the right to vote, which is even more fundamental. So I thank you for your help on that.

Mr. Chairman, our Nation, the greatest democracy on earth, was born out of a struggle against taxation without representation. Before the Revolutionary War, the British Government levied taxes on American colonists, but while these colonists were required to pay taxes to the British Government, they had no say, no voice, no power over how they would be governed. Just a few years before the first battle of the Revolutionary War, the British continued the imposition of Federal taxes with the Stamp Act and the Sugar Act.

As we all know, in 1773, the Boston Tea Party took place. American colonists raided the three British ships in Boston Harbor and threw the tea overboard to protest the British tea tax. Soon thereafter, the colonists began to mobilize and to fight for independence, and "no taxation without representation" became a rallying cry. A few years later, of course, after a long and hard-fought struggle, a free and independent America was born.

Yet more than 200 years later, Mr. Chairman, Americans in the District of Columbia, home to over half-a-million residents, remain disenfranchised. They are in a situation not all that different from that of the American patriots who fought so hard and sacrificed their lives to someday live free.

Mr. Chairman, when the District of Columbia was created as our Nation's capital 200 years ago, its residents lost their right to full Congressional representation. These Americans, as we have pointed out, served in our Nation's Armed Forces, pay Federal taxes, and keep our Federal Government and capital city running day and night. They live in the shadows of the monuments of our forefathers and in this country's most highly praised defenders of democracy.

They fight and die for this country in armed conflict, and yet they have no voice in the Senate and only a limited voice in the House. They do not even have the right to vote on basic administrative matters that other States and cities decide for themselves. Virtually every other Nation grants the residents of its capital city equal representation in its legislature. It is simply an embarrassment that in these modern times, we, as the world's most powerful democracy, deny voting representation to over half-a-million Americans.

Since the ratification of the Constitution in 1788, the United States has forged its own suffrage history, guaranteeing the right to vote to all Americans regardless of race, gender, wealth, marital status, or land ownership. Through our interpretation of the "one

person, one vote" doctrine, we have made great strides in overcoming inequality and under-representation. There remains, however, this unresolved obstacle to suffrage for all Americans, the disenfranchisement of D.C. residents.

Mr. Chairman, it is past time for Congress to undo this injustice, and so I was pleased to join you earlier this year as a cosponsor of the amendment that Representative Eleanor Holmes Norton mentioned to the election reform bill on the issue of voting representation for D.C. residents. I am told that this was probably the first time since 1978, when the Senate considered a constitutional amendment, that the issue of voting representation for D.C. residents was even debated on the floor of the Senate. After debate, you withdrew the amendment, but it was important to begin debating this issue in the Senate again. It is long overdue.

So I again commend you, Mr. Chairman, for continuing the debate by holding a hearing on this issue today. Particularly at this time when D.C. residents are members of our Nation's military, the National Guard, the Capitol Police, who are serving in so many other important roles to fight terrorism and to protect our Nation from future terrorist attacks, it is, in fact, shameful, to pick one of the words that Representative Norton used, it is shameful that we deny them the right to full representation in Congress.

It is past time for Congress to act. I urge our colleagues to join Senator Lieberman and me as cosponsors of the No Taxation Without Representation Act. This is an important bill to send a message that taxation without representation is unfair and un-American, and so I urge my colleagues to join us in ensuring full voting representation for Americans who call the District of Columbia their home. Thank you for the opportunity, Mr. Chairman.

Chairman LIEBERMAN. Thank you, Senator Feingold, for an excellent statement.

I thank the three of you. Obviously, I have a position here, but I think the three statements have been very eloquent and moving and speaking from principle. I cannot say clearly enough that your presence and your words, as well as those of Senator Durbin and Senator Levin, both of whom had to go, make the point that we are not engaged here today in an act of symbolism. We have begun again a very serious effort to obtain what the citizens of the District of Columbia deserve under our Constitution, which is full voting rights and full representation, and we are going to continue in every way we can on every field we can to fight for this until we achieve it.

Our numbers are growing. Your words encourage me and I look forward to working with you until we achieve the victory we all seek. Thank you very much, the three of you.

We will call now on the second panel, who represent the Government of the District of Columbia and representation from the District of Columbia, Hon. Anthony Williams, Mayor of the District of Columbia, the Hon. Linda W. Cropp, Chair of the Council of the District of Columbia, and the Hon. Florence H. Pendleton, District of Columbia Statehood Senator.

I also want to welcome Senator Pendleton's two colleagues, Statehood Senator Paul Strauss and Statehood Representative Ray Brown, who are also here today. If the two of you are here, why

do you not stand. I thank you for all you have done. You are already acting like full-fledged Members of Congress by yielding to Statehood Senator Pendleton on the basis of seniority. [Laughter.]

But we thank you for what you have done on behalf of this cause.

Mayor Williams, thanks for being here. I know if I dwell for too long on our Yale contacts, I will be considered to be parochial, but I do want to state for the record that you were there long after I was. [Laughter.]

I say as a matter of personal privilege, which you know, how proud I am to have watched your career come from Yale undergraduate to Lieberman ward worker to member of the Board of Aldermen in New Haven, to official of the State of Connecticut Government, to official of the Federal Department of Agriculture, to the Emergency Financial Board—I am not giving the right title to it—and then to be a truly superb Mayor of this Nation's capital city. I do not get the chance to do that too much on the record, and with those words, I welcome you and look forward to your testimony now.

**TESTIMONY OF HON. ANTHONY A. WILLIAMS,<sup>1</sup> MAYOR,  
DISTRICT OF COLUMBIA**

Mayor WILLIAMS. Mr. Chairman, let me thank you, when you are Mayor, you will take compliments wherever you can get them, and I appreciate your remarks. I really do. [Laughter.]

Thank you for your leadership over these years, not only in regards to the District but in general, on a national level and certainly for Connecticut. You have my appreciation and certainly my recognition as a friend and as your Mayor while you are here in Washington.

Chairman LIEBERMAN. Thank you.

Mayor WILLIAMS. I want to take the opportunity as Mayor of our city and on behalf of the citizens of our city to also commend Senator Levin and Senator Durbin for coming in here today and pledging their support for an important effort.

As you mentioned, more than 200 years ago, the founders of this country fought a revolution to end the tyranny of taxation without representation and I have no doubt that the authors of the Constitution did not intend to force almost 600,000 Americans to live under that same tyranny in the 21st Century. In fact, this body was established to create and amend laws as the needs of the people required. We are here today because a need has arisen, because you are vested with a power and a responsibility to make sure all Americans can exercise their rights.

Full voting representation in Congress is a fundamental right held by every citizen of the District of Columbia. You have acted on behalf of disenfranchised women. You have acted on behalf of disenfranchised African Americans, Latinos, Native Americans, and other groups, and we now ask that you act on behalf of disenfranchised citizens of our Nation's capital and pass the No Taxation Without Representation Act.

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<sup>1</sup>The prepared statement of Mayor Williams with an attachment appears in the Appendix on page 44.

As Mayor of this city, I have had the privilege of representing our city across this country and abroad, from school children visiting our monuments to athletes participating in the Olympics, from diplomatic delegations working here in the District to State and local elected officials meeting in Washington. I have been amazed at the myths and misconceptions held about the power and status of the District of Columbia and they mirror your remarks, Mr. Chairman. I would like to share just a few.

The Federal Government completely funds the District Government. That is a myth. There are no real people living in Washington, perhaps only pundits and Beltway Bandits. Washington residents already have full voting rights and complete self-government. Another one, Washington residents all have a second address and, therefore, representation in another State, and so what is the problem?

To be clear about many of these and other myths, you should know that the budget for the District of Columbia is funded primarily by the people who live and do business in this city. Yes, the District receives some Federal funding, virtually the same amount as other cities our size receive from the Federal Government, but not nearly at the same level required to ensure the consistent delivery of essential services and certainly not commensurate with that provided by other nations to their capitals.

Almost three-fourths of our operating budget comes from our local tax revenue, property tax, income tax, and business taxes. In fact, our residents are some of the most heavily taxed people in the country. I am not proud of that and I do not advertise that too much, but it is a fact.

There are more than 572,000 real people living within ten square miles known as the District of Columbia. These are people who attend school, who work, who raise families, who pay taxes, both Federal and local, and it has been mentioned in testimony and in your comments, Senator, that we are the second highest Federal tax-paying citizens per capita in the country.

It has been mentioned we serve in the Armed Forces, and in many parts of the District, we live on fixed incomes. And while a few of our residents come here and serve in the Federal Government and maintain a permanent address elsewhere, the vast majority do not. These are people who love their country, and in the wake of September 11 are keenly aware of what can be demanded of them during a national emergency.

Washington residents were granted the right to vote for President in 1961, but we do not have full representation in the House and Senate. When legislation that directly affects our lives is drafted, debated, and adopted, we have virtually no voice in the process. Our residents elect a Mayor and 13 members of the Council, a Chair of the Council, but every local law and every local budgetary decision made by this elected body must be approved by Congress, and this Council passes an endless series of emergency acts and temporary acts, and I see the enormous amount of paperwork to keep our government going while waiting for Congress to officially approve our government's action.

No other jurisdiction in the country must submit its local budget to an outside authority elected by people from other States. No

other jurisdiction must wait to invest funds in new programs while Members of Congress decide what is appropriate for the District.

Over the years, the District of Columbia evolved into a living, breathing city, a city where streets need to be paved, homes built, children educated, trash and snow removed, trees trimmed, people protected from crime, and homes protected from fire. It became a city that needed to provide services to all of its residents and businesses, including those who live at 1600 Pennsylvania Avenue and those who work and act as legislators on Capitol Hill.

I am proud of the progress the District has demonstrated in the last several years. Last week, the Labor Department reported that the District has seen job growth in the last few months while surrounding jurisdictions have experienced a growth in unemployment. Over the past 5 years, we have balanced the budget, maintained the cash surplus, improved our credit rating, and met every goal set out by Congress to demonstrate the ability to self-govern. The District is on the verge of achieving its full potential as the heart of a vibrant region in a global economy, but to do so, we must be put on a level playing field.

As you know, Senator, and all of us know, Webster defines democracy well as, I quote, "A government in which the supreme power is vested in the people and exercised by them directly or indirectly through a system of representation, usually involving periodically held free elections." I say to the Committee, why are the people of the Nation's capital excluded from this system of representation?

Well, the lack of voting rights is an economic issue in the District of Columbia. While the Congress has the power to impose restrictions on our city and limit our ability to tax, we will never have a level playing field. More than 50 percent of our land cannot be taxed. Income earned in the city commutes to Maryland and Virginia every day. We export dollars out of our city. State functions such as road construction, motor vehicle administration, and special education must be funded on the city's tax base. How can we continue to grow and be fiscally responsible when the city leaders have no authority over their own financial resources and no representation to negotiate with Congressional members?

If the District had full voting rights, our representation could work towards greater parity for District residents and greater parity for the District with other jurisdictions across this region and the country.

The lack of voting rights is a matter of justice in the District of Columbia. The inability of District residents to vote for voting Representatives and Senators in Congress violates our rights to equal protection and to a republican form of government.

In the court case for full voting rights, *Alexander v. Daley*, the court did not determine that District citizens should not have voting rights. It determined that the courts lacked the power under the U.S. Constitution to require Congress to grant such rights. Congress has the opportunity and the power to correct this injustice by taking action now to guarantee justice by granting the citizens of the District their full voting rights.

Finally, the lack of voting rights is a civil rights violation in the District of Columbia. African Americans and women and others

have fought for and died for the right to vote, yet here in the capital of democracy lives one of the largest blocks of disenfranchised voters in the world. District residents fight for freedom abroad and pay more than \$2 billion a year in Federal income taxes at home as the world's leading democracy. It is unacceptable that the United States does not grant voting rights to the residents, to the citizens of this capital city.

The issue of District voting rights has resonated across the country. A number of local and national organizations have taken actions in support of full voting rights for our city, and I want to commend Shadow Representative Ray Brown for his leadership and support in this effort. Such organizations include the National League of Cities, the National Conference of Black Mayors, and the Executive Committee of the U.S. Conference of Mayors, which have all passed resolutions or adopted policy positions in support of the District.

In addition, resolutions from cities across the country supporting voting rights have been adopted by the cities of Chicago, Philadelphia, Cleveland, Baltimore, Los Angeles, New Orleans, and San Francisco, and as you have mentioned, Mr. Chairman, national polls indicate that a huge majority of people across the country support full representation for District residents. I ask that these resolutions be entered into the record of this Committee hearing.<sup>1</sup>

Chairman LIEBERMAN. Without objection.

Mayor WILLIAMS. Once again, Mr. Chairman, I commend you for your leadership in general, your support for this city in voting rights in particular, and as always, I am ready, willing, and able to answer any questions you may have. Thank you for the opportunity to testify.

Chairman LIEBERMAN. Thank you, Mayor. We will have some questions. Thanks for describing not only the cause and the principle here, but the practical realities of the interaction, including the additional fiscal responsibilities placed on the city as a result of the presence of the Federal Government here and how that adds to the injustice of no voting representation.

Chairwoman Cropp, thank you for being here. I look forward to your testimony now.

**TESTIMONY OF HON. LINDA W. CROPP,<sup>2</sup> CHAIRMAN, COUNCIL  
OF THE DISTRICT OF COLUMBIA**

Ms. CROPP. Thank you very much, Chairman Lieberman. Good afternoon. Let me begin by thanking you, Mr. Chairman, for sponsoring legislation and holding this public hearing on the denial of voting representation in Congress for the 600,000 American citizens who live in the District of Columbia.

This is the first Senate hearing on District voting rights in an extremely long time, so we very much appreciate this historic opportunity to urge you and your colleagues to use the power that you have to bring democracy to the Nation's capital. I am joined today with Adrian Fenty, another member of the Council.

<sup>1</sup>Memorandum and Resolutions submitted by Mayor Williams appear in the Appendix on pages 89 through 109.

<sup>2</sup>The prepared statement of Ms. Cropp with an attachment appears in the Appendix on page 53.

Attached to my testimony is a resolution and report adopted unanimously by the D.C. Council earlier this month supporting the No Taxation Without Representation Act that has been introduced by you, Senator, and Senator Feingold in the Senate and Congresswoman Norton in the House. The Council's findings in the resolution essentially mirror the findings contained in the No Taxation Without Representation Act that I would like to highlight here.

For far too long, District citizens have been invited to dinner, but we have not been allowed to eat. As you know, U.S. citizens residing in Washington, DC, have no voting representation in the House and no elected voice in the Senate. This was not always the case. For approximately 10 years after ratification of the U.S. Constitution and selection of the Federal District, residents of the District of Columbia were allowed to vote for Members of Congress. In 1800, Congress voted to end this practice and thereby disenfranchised District residents.

Throughout the past two centuries, there have been various efforts to restore the franchise. There are many reasons full voting rights should be restored, but each evolves from a single principle: The right to vote is a fundamental principle of our democracy. Americans throughout the Nation agree, or would agree if they knew. Many, as you have heard from our Mayor, just do not believe that we do not have the right to vote. I have encountered them on numerous occasions.

A survey conducted in October 1999 found that 72 percent of the respondents supported full voting rights in the House and Senate for District residents. The same poll showed high levels of support across party lines. Polling conducted a month later found that 55 percent of college graduates who were registered to vote were unaware that District citizens do not have Congressional voting representation.

You have heard these facts before, but until there is a remedy to the fundamental injustice of our subordinate status, they must be reiterated. The residents of the District of Columbia are the only Americans who pay Federal income taxes but are denied voting representation in the House and the Senate. The District of Columbia is second per capita in income taxes paid to the Federal Government. The District is the source of over \$2 billion in Federal taxes each year, an amount per capita greater than 49 other States. Yet, we have no say in Congress in how these dollars are spent.

More District citizens have died in wars protecting the Nation than have the citizens of 20 other States. Congress has the exclusive right to declare war, and again, we have no say in this decision. The impeachment proceedings in Congress a few years ago highlighted the glaring anomaly of our lack of vote on an issue of removing from office the President of the United States whom we had a vote to elect.

The United States is the only democracy in the world in which residents of the capital city are denied representation in the national legislature equal to that enjoyed by their Federal citizens. The denial of voting representation in Congress locks District residents not only out of our national legislature, but also out of what is a structural sense of our State legislature, a legislature that has

extraordinary approval authority over all of the District's local legislation and all of the District's locally raised dollars, as articulated earlier by the Mayor.

We who are elected representatives of the District's citizens are reminded daily, sometimes painfully, of the exclusive jurisdiction that Congress exercises over the District of Columbia pursuant to Article I, Section 8 of the United States Constitution. We believe that this same broad jurisdiction provides Congress with the constitutional authority to enact a bill by simple majority to restore Congressional voting rights to District citizens. The Congress and the Constitution treat the District as a State for hundreds of purposes, whether they are Federal benefits, burdens, or rights. Why not the most precious and fundamental right in a free and democratic society, the right to vote?

The denial of District citizens the right to Congressional voting representation is the last unbreached frontier of civil and human rights in America. As the United States rightly tries to be a model and a defender of democracy around the world, we implore you to find a remedy to remove this inexcusable hypocrisy of democracy denied in our Nation's capital.

We have tried in the past and without success thus far to obtain Congressional voting rights through a constitutional amendment, through a Statehood bill, through litigation. The Supreme Court, while sympathetic, has essentially stated that it is Congress where the remedy to this problem must be resolved.

As we ask the Senate to take action this year to remedy our lack of voting representation in Congress, we also request that you take favorable action as soon as possible on legislative and budget autonomy for the District of Columbia. District residents have been invited to dinner but we have not been allowed to eat. D.C. residents are hungry for democracy. D.C. residents are starving for voting representation in Congress. It is past time for Congress not only to talk about the wrongs around the world regarding voting rights. It is now time to correct this injustice to the citizens of the District of Columbia. It is time for the plate of democracy to be passed to the citizens of the District of Columbia.

Mr. Chairman, thank you again so very much for this opportunity to testify before the Committee today. As always, the Council looks forward to working with you in partnership to right this injustice.

Chairman LIEBERMAN. Thank you. Thank you for that excellent statement and I look forward to working with you and the Council, as well.

The final witness on this panel is Statehood Senator Florence H. Pendleton. I do want to point out that, as I mentioned earlier, Senator Pendleton is the senior member of the delegation, but it is a delegation, I should state for the record and for those who do not know, that has been elected by the citizens. That is, Senator Pendleton, Senator Strauss, and Representative Ray Brown have been elected by the citizens of the District of Columbia to come before Congress and advocate the cause of Statehood. We are honored to have you here and look forward to your testimony now.

**TESTIMONY OF HON. FLORENCE H. PENDLETON, DISTRICT OF  
COLUMBIA STATEHOOD SENATOR**

Ms. PENDLETON. Thank you so very much. Good afternoon, Senator Lieberman and Members of your Committee. It is so good that you are having this meeting today. It is a different kind of notice from the one I have had before. We have had Statehood meetings before. However, things have been tossed out and we are not applying for Statehood but we are asking for voting rights.

No Taxation Without Representation is noteworthy because we are simply asking not to pay taxes unless we vote. The request is simple, no taxation without representation, and the answer can be straightforward. I would like to see the Senator or the member of the House of Representatives advocate that the people he represents are not entitled to representation and then give up his seat. You must not sit to represent a government and say that one is equal and one is unequal.

All of the elected officials of the District of Columbia must speak with one voice on behalf of the residents of the District of Columbia. United we stand. I do not want to leave our children or our children's children in bondage. Let us put differences aside and work for the benefit of the people. Working together, we can unite the people, ignite their power, and focus their strength on the goal of freedom now.

District residents have been paying Federal income taxes since 1943 and that was before the end of World War II. Our time has come. We must come out with a solid, united front for democracy, and the time is now.

We must not take the crimes of persecution, enslavement, hatred, and greed from the 19th Century into the 21st Century. These evils have caused us pain and they have almost ruined our voting rights. We must lift up humanity and seize the day.

Failing to do your duty, will you be able to stand and face the people, speak to the Congress on behalf of those citizens who have declared their desire to vote? If not you, who? And if not now, when?

We must move this ship of freedom together if we are to be successful in combatting the oppression facing us here in the District of Columbia. The voting rights of the District of Columbia are begging for us to come forward, and forward we have come. It is not everything, but it is something and voting for this is what we want and any no vote should give up his seat.

I sincerely thank you for having this session and I certainly do appreciate being able to speak.

Chairman LIEBERMAN. Thank you, Senator Pendleton. Thanks very much.

The three of you anticipated most of the questions I wanted to ask in your opening statements, but let me ask this. As I listened to the first panel and the three of you speak, it really does seem to me that it would be hard for somebody to make a case against the principle here and the reality, the fact that District residents do not have voting rights, and, therefore, the concerns I presume that make this a more difficult effort for Congresswoman Norton and me and others are political, worries about how people would vote.

So I want to give you, those of the three of you who wish to respond, an opportunity to respond to that political concern about the political result of voting rights here in the District as opposed to the principle, and then if you have heard other arguments that I am not considering, as they used to say to us in law school, against voting rights, whether you would share those with us, and if you care to provide the argument against.

Mayor, do you want to begin with a response to either of those questions?

Mayor WILLIAMS. I have often heard as we have traveled around that full voting rights for the District might result in tilting the balance politically one way or the other. But I would agree with other Members of the Committee who have mentioned that the rub in our Constitution is that we honor fundamental rights regardless of the consequences. We honor fundamental rights regardless of how difficult it is to honor those rights.

The Fourth Amendment is often honored in very difficult circumstances, the Sixth Amendment, we know, in very difficult circumstances, a franchise in very difficult circumstances that we have seen as recently as a couple of years ago.

So I think the fact that the electoral balance might be tipped one way or the other is at, I think, the point of our whole Declaration of Independence and Constitution and Pantheon of Rights. It is not that it is the province of elected officials to decide. It is the province of citizens to decide.

While it is not our job to give all the arguments against voting rights for the city, you often hear the argument that Congress has plenary authority over the District and the Constitution is settled, and I would say two things to that. There are many individuals or organizations, sectors, if you will, that have power in the Constitution. Within our constitutional framework, the exercise of those powers always has to be balanced against and in the context of the overall framework of the Constitution.

For example, the President has executive power under the Constitution, but certainly he has to or she has to exercise that executive power with due cognizance of the rights of others in the Constitution, rights specified in the Constitution, and certainly the fundamental right of the people.

So the fact that Congress has power over the District to me does not, in my mind, excuse it of the responsibility to exercise that authority in the overall context of our Constitution based on principles of democracy.

The second thing you often hear is, well, it is in the Constitution and that is that. As soon as our Constitution was written, it was already being amended with a Bill of Rights. If the Constitution had not been amended, I would not be sitting here as Mayor. Many of us would not be sitting here. So we have often, as you mentioned in President Washington's quotation, the Constitution was not written as a shrine before which we all worship but as a living, breathing document based on the fundamental rights of citizens.

Chairman LIEBERMAN. Well said. The third panel is composed of some legal experts and I might ask them to speak to the constitutional history here, but I believe I recall that the fact is that the District Clause was first inserted in the Constitution after the

State of Philadelphia failed to protect the Continental Congress from protesting Revolutionary War veterans. Is that your recollection?

Mayor WILLIAMS. That is my recollection, and as I often tell people, a perverse thing has happened. In order to insulate the Congress from parochial interests, exactly the inverse or converse has happened. The District is now exposed to the whim and the fancies and the predilections of 535 people often acting as a city council for the District.

Chairman LIEBERMAN. I guess I would add, being part of protecting Congress from any number of protesting groups that come here in a given year, bearing the cost of that protection, as a matter of fact.

Chairwoman Cropp, do you want to add at all to the questions that I have asked?

Ms. CROPP. Let me just concur with what the Mayor stated. But I think in addition to that, it is very clear that the intent was not to deny the District citizens the right to vote. The clear intent was for District citizens to have the right to vote and that is why we were franchised initially.

Chairman LIEBERMAN. Right.

Ms. CROPP. As stated by the Mayor, we have erasers on pencils in order to correct mistakes, and if, in fact, anyone thinks that it was a mistake, then it is time to use that eraser and correct this very basic and fundamental principle for the District citizens.

We have an opportunity, even if the Federal Government believes that it ought to protect itself, to still protect the Federal enclave in the format of Federal buildings and keep that sacrosanct, while at the same time not disenfranchising 600,000 other people who make the District of Columbia their home and who are citizens.

I believe that the court case that was just before the Supreme Court really spelled out some very excellent legal principles. I am not a lawyer so I cannot address them as they did, but it is just common sense. My grandmother said when I went to college, she was very thrilled and she hoped that it was just one of many degrees that I may have, but always remember, if you do not have common sense, none of the degrees will matter to a hill of beans.

Chairman LIEBERMAN. That is right.

Ms. CROPP. And it is just common sense that the District citizens should not be disenfranchised, and particularly when the intent initially was for us to have voting representation.

Chairman LIEBERMAN. Senator Pendleton, would you like to add anything?

Ms. PENDLETON. I would just like to say that I have not heard any persons say too much against this particular bill. Now, the Statehood bill, yes. This bill, for just voting rights, no, because, in fact, there are those who say that this bill will pass. The other bill you had will not. So they are thinking that this bill, this voting bill, this bill to just vote, will pass and that those persons who are for the Constitution and for saying what we are going to do and everything, that one bill is for now and, therefore, we should just push and push all of our efforts into the voting bill and let it rest.

Chairman LIEBERMAN. Thank you. I thank the three of you very much for joining this cause, for articulating it very effectively, and also for giving real texture to the relationship between the Federal Government and the Government of the Capital City and the Capital City, which just to me, in practical terms, strengthens the argument for voting rights. I appreciate your being here.

Mayor WILLIAMS. Thank you, Mr. Chairman.

Ms. CROPP. Thank you.

Ms. PENDLETON. Thank you.

Chairman LIEBERMAN. Thank you very much.

We will now call the third panel, Wade Henderson, Executive Director, Leadership Conference on Civil Rights; Adam Kurland, Professor of Law, Howard University School of Law; and Jamin Raskin, a Professor at Washington College of Law, American University.

Gentlemen, thanks for being here. I appreciate the opportunity to hear from your experience and expertise on the subject before us.

Mr. Henderson, you are a familiar, and in this case that is a positive statement, face and voice in the halls of Congress and always a very effective one on behalf of the Constitution and the basic rights that define our Nation, much more than its borders do, so we look forward to your testimony now.

**TESTIMONY OF WADE HENDERSON,<sup>1</sup> EXECUTIVE DIRECTOR,  
LEADERSHIP CONFERENCE ON CIVIL RIGHTS**

Mr. HENDERSON. Thank you, Mr. Chairman, and thank you especially for the opportunity to testify this afternoon on voting representation in Congress for the citizens of the District of Columbia.

My name is Wade Henderson and I am privileged to be the Executive Director of the Leadership Conference on Civil Rights. The Leadership Conference consists of more than 180 national organizations representing persons of color, women, children, labor unions, individuals with disabilities, older Americans, major religious groups, gays and lesbians, civil liberties and human rights organizations. Together, over 50 million Americans belong to organizations that comprise the Leadership Conference on Civil Rights.

The Leadership Conference strongly supports efforts to give citizens of the District of Columbia full voting representation in the U.S. Congress. At the outset of this hearing, I want to commend you, Mr. Chairman, for your leadership on this important issue and on the introduction of your bill, S. 603, the No Taxation Without Representation Act. The Leadership Conference fully supports this bill, along with its counterpart in the House of Representatives, introduced, as you noted, by Representative Eleanor Holmes Norton.

The right to vote is fundamental in our democracy. The struggle to obtain voting rights for all Americans has long been at the heart of the fight for civil rights. The Congress has enacted many important laws over the years protecting and enhancing the right to vote, such as the 13th, 14th, and 15th Amendments to the Constitution, the Voting Rights Act of 1965, and the National Voter Registration Act of 1993.

<sup>1</sup>The prepared statement of Mr. Henderson appears in the Appendix on page 62.

Your bill, Mr. Chairman, continues the distinguished path of providing the full measure of the right to vote for all Americans. It is a top priority on the legislative agenda of the Leadership Conference.

As you have noted, Mr. Chairman, voting is the language of democracy. Without it, the citizens of the District are the silent voice in the wilderness, spectators to democracy, right in the literal shadow of the very governing institutions that serve as a shining beacon to the rest of the world. This is not right, this is not fair to have two distinct classes of citizens, those of the 50 States and those of the District of Columbia.

Now, the Leadership Conference holds as one of its guiding tenets that all citizens of the United States must be treated equally under the law. We have long supported the civil rights movement here in our Nation's capital, championing the voting rights for the citizens of the District and the popular election of local officials.

The tragedy of this past September 11 terrorist attacks on our Nation pointed out the importance of the District of Columbia and the paradox of denying D.C. residents the full measure of participation in our government. On that terrible day, terrorists struck at our financial center in New York City and our government center here in Washington. The attack was one on all Americans, without regard to race, color, religion, sex, national origin, disability or sexual orientation, and Americans from around the Nation opened their hearts with unparalleled generosity to help the victims of this tragedy.

The citizens of the District of Columbia were no exception. D.C. residents were part of the first responders to the Pentagon attack. Members of the District of Columbia National Guard were among the first to be called up to serve our Nation during this time of crisis. And, sadly, D.C. had its share of victims in the September 11 attack. Yet D.C. residents have no voting representation in the very government they seek to preserve and defend.

Now, the Leadership Conference believes it is now time to move forward on this important legislation under discussion today. Residents of the District dutifully comply with their civic responsibilities and obligations under our democratic form of government. They pay taxes and they serve in our Armed Forces. And yet residents of the District are blatantly denied and deprived many of the essential rights and privileges of citizenship enjoyed by all other Americans. This issue, therefore, is one of simple justice and fairness.

Now, we have noted, of course, that we pay income tax and that we serve, and you have noted all of this, as well, and as you referred in just your past comments, the fact that the District has been denied voting representation has not always been the case. Before the District was established in 1800, residents of the City of Washington were able to vote for Representatives in Congress as either citizens of Maryland or Virginia. There is no prohibition on restoring voting representation in Congress for the citizens of the District of Columbia.

This issue has long had bipartisan support in Congress and I would hope that it would do so again today. In 1978, both the Senate and the House passed a constitutional amendment to grant full

representation to D.C. residents, and although that amendment failed to be ratified by the required 38 States, it was supported by many prominent Republicans and Democrats, and in my written testimony, Mr. Chairman, I note various individuals, from Senator Bob Dole to President Richard Nixon to Senator Robert Byrd, among others, who have noted the importance of voting representation for the District.

Before I conclude, Mr. Chairman, let me address the issue of taxation without representation. Some will argue that if this bill were enacted, it would turn the District of Columbia into a haven for tax dodgers, and certainly nothing could be further from the truth. This bill is aimed at achieving full voting representation in Congress for the citizens of the District, and as we have noted, they do pay more taxes and do all those things that are required by citizens of the Nation. Its title, that is the No Taxation Without Representation, of course, harkens back to the historic foundations of American democracy.

This bill is aimed at moving the Congress to take positive action on this issue but does not, in fact, create voting representation in Congress for Representatives of the District of Columbia. The bill merely makes clear that until full voting representation is achieved, residents of the District should be treated more like their counterparts in the territories of the United States who do not pay Federal taxes.

While the Leadership Conference supports providing full voting representation for the citizens of the District, we also believe that until this happens, it is important that District residents should be treated for tax purposes like their similarly situated counterparts in the territories of the United States.

Since the attacks on the United States in September, we have been eloquently advocating to the international community for democracy abroad, and rightfully so. But it is now time to preach democracy at home, as well. We urge Congress to pass your bill, Mr. Chairman, and to bring democracy home to the citizens of the District of Columbia, and we should give those who live within the shadow of the capitol the basic right to enjoy full voting representation in the Congress of the United States. Thank you for the opportunity to appear before you today.

Chairman LIEBERMAN. Thanks, Mr. Henderson, for a very thoughtful statement. I look forward to asking some questions afterward.

Professor Kurland, welcome. I look forward to your statement.

**TESTIMONY OF ADAM H. KURLAND,<sup>1</sup> PROFESSOR OF LAW,  
HOWARD UNIVERSITY SCHOOL OF LAW**

Mr. KURLAND. Mr. Chairman, thank you very much for inviting me to testify before this proceeding today. This hearing is a welcome and constructive step because the issue is, I believe, now being debated in the appropriate forum. However, Congress cannot by simple legislation grant D.C. citizens voting rights in Congress. A constitutional amendment is required.

<sup>1</sup>The prepared statement of Mr. Kurland appears in the Appendix on page 68.

The makeup of the Federal legislature is an essential ingredient of our federalism. Every school child is, or should be, familiar with the story of the Constitutional Convention and the so-called Great Compromise which resulted in each State's proportional representation in the lower House and equal representation in the Senate, and most historians agree that without this compromise, the work of the Constitutional Convention would never have been completed. In addition, the importance of this compromise can also be gleaned from the final clause in Article V of the Constitution, which concerns the constitutional amendment process, and it says, "that no State without its consent shall be deprived of its equal suffrage in the Senate."

Representation in the Federal legislature is defined by clear, unambiguous constitutional requirements. The Constitution provides that the Senate of the United States shall be composed of two Senators from each State. It also requires that the House of Representatives be composed of members chosen by the people of the several States and that each member of Congress be an inhabitant of the State from which he shall be chosen.

The District of Columbia, or in constitutional parlance, the seat of the Government of the United States, as it is referred to in Article I, Section 8, Clause 17, I believe, as presently constituted is not a State. Therefore, as presently constituted, the citizens of the District are not entitled to representation in the House or the Senate. The only way the District as presently constituted can achieve full voting representation in the House of Representatives and in the Senate is by constitutional amendment.

The Statehood alternative, which raises other constitutional issues, is discussed in my written testimony and obviously is not part of the proposed bill before the Senate now.

The controlling constitutional principle must be emphasized. Congress has a critical but non-exclusive role to play in the political process necessary to achieve any change in D.C.'s present status of no representation in the Federal legislature. Congress cannot by simple legislation provide the present District of Columbia citizens with voting rights. Such legislation would be unconstitutional.

Legal arguments have been made that a variety of constitutional principles require that District citizens receive Congressional representation. Those arguments have been uniformly rejected by the courts. Moreover, any attempt to rely on Congress's enforcement powers to legislate pursuant to Section 5 of the 14th Amendment is also, in my view, misplaced. The present lack of D.C. representation in the Federal legislature is a feature of American federalism, is part of the current constitutional structure, and does not violate equal protection, due process, or any other constitutional principle.

It is true that Congress in other contexts often treats the District "as if it were a State" for a variety of legislative purposes, principally for funding allocation of various Federal programs pursuant to Congress's Article I powers. However, Congress does not possess the legislative authority to decree the District a State for the purposes of providing or allocating representation in the national legislature.

With respect to the proposed legislation to either grant the District representation or to make it a tax-free haven, exempting D.C.

residents from taxes until representation is achieved, that particular proposal is flawed for a couple of reasons. First, the either/or tradeoff has essentially been acknowledged as, basically, a well-placed rhetorical device, but the proposal has very little chance of ever being enacted.

Second, the “taxation without representation” slogan is actually inapposite and has been conclusively refuted in many other fora over the last several decades. In short, District residents are simply not victims of a far-off imperial power imposing taxes selectively as a means of economic exploitation.

Third, the either/or tradeoff is based on a faulty legal premise because Congress, in any event, does not possess the unilateral authority to enact legislation conferring D.C. voting rights.

And fourth, despite Mr. Henderson’s comments, it would not make the District a tax evader haven or a tax dodge haven, but if the District was set up as a tax-free zone, there are many Americans, and I am quoting Professor Raskin, who even kind of half-jokingly but half-seriously has commented that a lot of Americans do not like taxation with representation, let alone taxation without representation, that if the District were made a tax-free haven, it would be very alluring, if that is the proper word, so that people might want to move in and say they would rather not pay Federal income taxes than vote. And we can laugh about that and that obviously deprecates the principle, and I do not mean to make light of it, Mr. Chairman, but given the low voter turnout in many elections, it cannot be just laughed off as a joke.

Upon two-thirds of the vote of both Houses of Congress, Congress can propose a constitutional amendment to be submitted to the States for ratification. Ratification of a proposed constitutional amendment requires approval of three-fourths of the State legislatures or three-fourths of specifically called State constitutional conventions. A proposed constitutional amendment could provide for the District to elect a member of the House only or could provide for Senate representation, either with one or two Senators.

A proposed constitutional amendment to provide the District with representation in the Federal legislature failed in 1978, as has been mentioned several times. It would seem to me that if equal voting rights is the goal sought to be achieved, that would seem to militate in favor of a proposal that the District receive proportional representation in the House and two U.S. Senators. Political reality must acknowledge that this formula would appear to guarantee two additional Democratic Senators for the foreseeable future.

However, the body politic must demonstrate the ability to rise above partisan politics. President Bush has often said that political Washington too often focuses on what is good for a particular party instead of what is good for America. This issue actually provides all involved an opportunity to demonstrate that America both inside and outside of the beltway will do what is best for America.

Upon two-thirds vote of both Houses of Congress, Congress should send a proposed constitutional amendment out to the States for ratification, or Congress could choose to sidestep their respective State legislatures altogether. Article V of the Constitution gives Congress the option of the means of ratification. Congress can choose to send the proposed amendment to State legislatures or to

State constitutional conventions expressly convened to consider the sole issue of ratification of the proposed constitutional amendment.

Congress clearly possesses the authority to propose a constitutional amendment to provide the District with voting rights for Federal elective office. Congress took an analogous path in 1960 when it submitted the 23rd Amendment to the States for ratification and thus provided for the District's participation in Presidential elections through the Electoral College, and I believe that constitutional amendment was ratified in less than a year.

Just to conclude, there are three related points that I think warrant brief measure.

Chairman LIEBERMAN. You can take a moment or two to finish your statement. Go right ahead.

Mr. KURLAND. All right. Thank you. Three related points, then, warrant mention. One could argue that it is unconstitutional to provide voting rights in the Senate to a non-State entity such as the District of Columbia even by purported constitutional amendment. As noted above, the language that I set forth in Article V provides that no State without its consent shall be deprived of equal suffrage in the Senate. What exactly does that mean? It obviously has never been litigated.

I do not advocate this position, but some have argued that it perhaps could imply that the constitutional provision concerning the make-up of the Senate is, in effect, unamendable and that it would take a unanimous vote of the States to ratify a constitutional amendment providing for D.C. voting rights as opposed to creating a new State. How such an amendment would be challenged if it were ratified by less than all of the States raises an interesting legal question, to say the least.

Second, in a similar vein, one might argue that the inherent fabric of the Great Compromise includes the core principle that the citizens were represented in the House and the States as States are the only body that gets representation in the Senate. It is also undeniable that the founders rejected pure majoritarian democracy in the original makeup of the Constitution. Under that scenario, the District should get a House vote but no Senate vote.

However, if one goes through the process of amending the Constitution today, the 18th Century principles should not be determinative. It is contrary to most of the modern equal voting rights principles that have evolved over the last half-century, notwithstanding some of the language in the Supreme Court decision of *Bush v. Gore*, which I am sure the Chairman is well familiar with.

Chairman LIEBERMAN. It rings familiar to me. It gives me a headache. [Laughter.]

Mr. KURLAND. Moreover, regardless of whether these above principles accurate reflect the original nature of the Union, the concept of a State as a distinct political entity apart from its citizens was substantially eroded, if not effectively eliminated, with the passage of the 17th Amendment in 1913, which provided for the direct election of Senators.

Third, providing the District with only one Senate vote, which reflects another sort of compromise proposal that has been bantered about in the last 20 or 30 years, would actually abrogate the constitutional role of the Vice President to break ties. Although the

Vice President has been called on to break ties on Senate votes infrequently throughout history, the Vice President's role as Senate tie-breaker is constitutionally significant and should not be eliminated as an unintended consequence of an apparently unrelated constitutional amendment that would provide for an odd number of Senators. And I also note that just, I believe, yesterday, Vice President Cheney cast a tie-breaking vote, so the situation is not simply one that academics fiddle with. In conclusion—

Chairman LIEBERMAN. We will have your whole statement printed in the record.

Mr. KURLAND. Thank you, Mr. Chairman. The U.S. Conference of Mayors recently has come out in support of D.C. voting rights. This is a positive indication that the political process quest for D.C. voting rights has moved to the grassroots level State by State, where I believe it is absolutely constitutionally necessary to achieve D.C. voting rights in the Federal legislature. If the denial of D.C. voting rights in the national legislature is so antithetical to the democratic ideals which Americans cherish, a proposed constitutional amendment for D.C. voting rights should be able to win passage in three-fourths of the States easily, and to the extent that the statistics have been mentioned here concerning 80 percent in polls, that is consistent with that proposition.

To the extent Americans wear democratic ideals more openly on our sleeves in the post-September 11 world, that should work in favor of passage of a constitutional amendment. We should not be afraid to "have to resort to" an inconvenient or even difficult constitutional amendment process. As Abraham Lincoln said, "A majority held in restraint by constitutional checks and limitations is the only true sovereign of a free people."

Americans of all political parties should cherish and embrace the solemn challenge and opportunity to amend the Constitution. That is good not only in some grand civics lesson sense, not only good in some academic sense, but it is good for the citizens of the District of Columbia, the citizens of our Nation, and it is a shining example for the world. All who embrace D.C. voting rights should embrace the opportunity to make the case for constitutional reform to the people of the States. If 21st Century equal voting rights principles cannot prevail in the political marketplace of ideas over one small aspect of 18th Century structural principles of federalism, that would suggest to me that the American people still find contemporary value in those original constitutional federalism principles. If the poll numbers are correct, that should not be the case and the constitutional amendment process is the appropriate legal and constitutional way to achieve the result.

Thank you very much for your time, Mr. Chairman.

Chairman LIEBERMAN. Thank you, Professor Kurland. So if I can paraphrase or summarize, you do support voting rights for District residents?

Mr. KURLAND. I support voting rights for District residents, yes.

Chairman LIEBERMAN. Right. But your argument is that can only be achieved by constitutional amendment?

Mr. KURLAND. I am—I should not say absolutely certain—I speak with a reasonable degree of certainty that any D.C. voting rights legislation passed by the Congress would be unconstitutional and

that the voting rights representation in both Houses of Congress requires a constitutional amendment.

Chairman LIEBERMAN. Thank you.

Professor Raskin, I do not want to push your testimony in a particular direction, but am I correct that you disagree with that contention?

Mr. RASKIN. Yes.

Chairman LIEBERMAN. And you will speak to it as part of your testimony?

Mr. RASKIN. Indeed, I will, and I will skip over several pages of moral outrage and get right to the constitutional analysis. [Laughter.]

**TESTIMONY OF JAMIN B. RASKIN,<sup>1</sup> PROFESSOR, WASHINGTON COLLEGE OF LAW, THE AMERICAN UNIVERSITY**

Mr. RASKIN. I would like to say—

Chairman LIEBERMAN. You can give us a little moral outrage. That is fine. [Laughter.]

Mr. RASKIN. Has there not been enough of that already? Actually, hearing your statement, Professor Kurland, gave me a little more moral outrage. I never yet heard before floated the proposition that a constitutional amendment could itself be unconstitutional. I thought that enemies of voting rights for D.C. were gathering the idea that you needed a constitutional amendment, and apparently for some of them, even that is not going to be enough. Presumably, an act of God or an amendment to the Bible would be required to make it happen.

Mr. KURLAND. I did not make that up.

Mr. RASKIN. I trust you did not.

The founding idea of the country is that governments derive their just powers from the consent of the governed, as Jefferson put it in the Declaration of Independence, which was actually signed by several people who represented the land that the District of Columbia is now on.

Our whole history has been a struggle to become a democracy, to transform the original republic of Christian, white, male, property owners over the age of 21 into what that great Republican President Abraham Lincoln called government of the people, by the people, and for the people.

The purpose of the District Clause, as you noted, Senator Lieberman, and as I describe in detail in this law review article<sup>2</sup> I will leave with you, was to assure the police security and military defense of the capital city, not to disenfranchise a large population of American citizens.

Chairman LIEBERMAN. Talk about that a little bit in the historical context, if you would.

Mr. RASKIN. I would, indeed. It goes back to June 21, 1783, when the Continental Congress in Philadelphia was meeting in the Pennsylvania State House and there was an unruly band of disgruntled Revolutionary War soldiers who had not been paid yet and they had actually come to confront not Congress, but the Executive

<sup>1</sup>The prepared statement of Mr. Raskin appears in the Appendix on page 79.

<sup>2</sup>Article entitled "Is This America? The District of Columbia and the Right to Vote," appears in the Appendix on page 111.

Council of Pennsylvania, which was meeting on the second floor as opposed to the first floor. When the Congressmen on the first floor appealed to the Executive Council upstairs to get the Pennsylvania militia to put down this brewing uprising outside, they refused to do it because they did not want a violent confrontation.

Madison later called this incident disgraceful and used it during the constitutional debates to argue for the need for exclusive Federal jurisdiction over the seat of Federal Government. If you go look at the constitutional debates, you see references replete throughout the debates to this incident.

Chairman LIEBERMAN. But again, no comment there or no action regarding the voting rights of residents of the capital city.

Mr. RASKIN. No, and there were very few people—well, first of all, we did not even know where the new District was going to be. It had not been sited yet. And so all of the members of the Constitutional Convention were voting on it in sort of the original position, if you will, not knowing where it would be, and no one was thinking that voting rights would ever be at stake. After all, they had just fought a revolution against the principle “no taxation without representation” and it was assumed that would not happen in the new United States.

And, indeed, when the Federal District was finally sited on the banks of the Potomac in 1791 with Congress accepting the lands from Maryland and Virginia, the residents continued to vote for a decade in Federal elections in Maryland or in Virginia and that only ended with the passage of the Organic Act in 1801. No one thought that it was unconstitutional.

Now, the D.C. Corporation Counsel brought a lawsuit in 1998, *Alexander v. Daley*, which pointed out this history and argued that the modern “one person, one vote” guarantee makes disenfranchisement unconstitutional and asked for restoration of the right to vote that was lost in 1801. By a two-to-one vote, the panel rejected the argument and found continuing permission for disenfranchisement in the structure of State-based representation, which was the argument that Professor Kurland was making.

Nonetheless, the majority observed that there is “a contradiction between the democratic ideals upon which this country was founded in the exclusion of District residents from Congressional representation.” It remarked that none of the parties, including the Justice Department, “contests the justice of the plaintiffs’ cause.” Yet the judges in the majority accepted the argument that the court was powerless to order a change and that any relief “must come through the political process.”

So the ball is in your court, and this could mean three things. First, Statehood, which is not on the table.

Second, it might mean a statute conferring full voting rights and Congressional representation, a kind of Voting Rights Act for Washington, which is how I understand the No Taxation Without Representation bill submitted by Congresswoman Norton. Would it be constitutional, back to your question? To my mind, yes. Congress treats the District explicitly as though it were a State for 537 statutory purposes that I laboriously counted in my Harvard Civil Rights-Civil Liberties law review article, from Federal taxation to

military conscription to highway funds, education funds, national motor-voter, and so on.

Chairman LIEBERMAN. It counts as a State in the sense that it is treated in all those statutes—my question, I guess, answers itself—but as if it were a State?

Mr. RASKIN. There is a line in almost every statute which says, for the purposes of this statute, the District of Columbia shall be treated as though it were a State.

Chairman LIEBERMAN. So it is quite explicit. OK.

Mr. RASKIN. Moreover, Congress and the Supreme Court have treated District residents as residents of a State for constitutional purposes, from the Full Faith and Credit Clause to diversity jurisdiction under Article III, and there is an interesting litigation history to that. Originally, back in the 1800's, the Supreme Court said that because Article III of the Constitution referred to diversity jurisdiction as applying to citizens among the States, it did not apply to D.C., and said the District residents could not get into Federal Court on diversity grounds. Congress passed a statute saying the District should be treated as a State for diversity purposes and the Supreme Court upheld that in the 20th Century. So why can Congress not treat the District as though it were a State for the even more fundamental purpose of representation?

Now, some, like Professor Kurland, would invite us to believe that the District Clause gives Congress power to do anything it wants to people in the District except give them the right to vote, but this straightjacket approach undermines the idea of the Constitution as the charter of democratic sovereignty for we the people. This seminal phrase should include all of us, and certainly did include everyone who was on the lands that would become the District when the Constitution was written.

As Justice Kennedy wrote in *U.S. v. Thornton* in 1995, the Congress is not a confederation of nations in which separate sovereigns are represented by appointed delegates, but is instead a body composed of the representatives of the people. So I have no problem in saying that Judge Louis Oberdorfer, who was the senior and dissenting judge on the three-judge panel in *Alexander v. Daley*, was right. Not only can Congress use its ample powers over the District to fully enfranchise the people, it must do so, and I am submitting with my statement a complete and very thoughtful legal analysis of this problem by two fine lawyers, Walter Smith and Elise Dietrich, who were co-counsel with me and the Corporation Counsel in *Alexander v. Daley*.

Now, there are those like Professor Kurland who attack a D.C. Voting Rights Act as unconstitutional, and indeed, voting rights advocates should be sober about the fact that conservative views are more prevalent on the Supreme Court today than the progressive views of, say, Justices Marshall and Brennan.

Senator Lieberman, you certainly do not need any tutorials about the distinctive judicial activism that has appeared recently on the Supreme Court to control elections and voting rights. Even looking at the broader canvas, a narrow majority in this court in the past few years has struck down in whole or in part the Gun Free School Zones Act, the Violence Against Women Act, the Religious Freedom Restoration Act, the Brady Handgun Violence Prevention Act, the

Fair Labor Standards Act, the Low-Level Radioactive Waste Policy Act, and so on.

How much faith should we have that the Court's majority would ultimately accept a D.C. Voting Rights Act as constitutional? I do not know. But all that you need to know as legislators is that you, like Thomas Jefferson, see the Constitution's legitimacy as resting on the consent of the governed and that you are convinced that Congress's powers over the District must be sufficient to effectuate not just the burdens but the rights of democratic citizenship.

There is, finally, the possibility of a constitutional amendment treating the District as though it were a State for purposes of representation. A D.C. voting rights amendment, at least I thought until I heard Professor Kurland's testimony, would definitely be constitutional. It would require a two-thirds vote in both Houses and ratification by three-quarters of the States. As an amendment, it should be safe from judicial attack and would be more durable than a statute, which could be more easily repealed. Congresswoman Norton referred to her experience in voting in the Committee of the Whole, where she won, through really brilliant parliamentary persuasion, the right to vote, only to see it taken away a few years later when the House changed hands.

Now, one strong argument for a constitutional amending strategy is that Washington can actually do America a big favor this way. I say this because as we saw in the 2000 election, the right to vote nationally is a vulnerable thing. As the Supreme Court's majority found in *Bush v. Gore*, "there is no federally protected constitutional right to vote in Presidential elections." In this sense, we can see Washington's status as not just exceptionally egregious in its nearly categorical disenfranchisement, but as exemplary and illustrative of the weakness of the right to vote generally.

Now, Congresswoman Norton herself is a professor of constitutional law who has done everything in her power to advance democracy for Washington within the existing constitutional structure and her perseverance is really astounding. I think she understands that the moment may come—it may not come, but it may come when current restrictive understandings of the Constitution become an obstacle to democracy and the amending strategy that was tried in 1978 may have to be revived. That moment has not necessarily arrived yet and there may, indeed, be the political will in Congress to pass the No Taxation Without Representation Act.

The point she brings before America today is that, ultimately, what counts most is not the means, but the end, full voting rights and representation for everyone in Washington, which is the birth-right of all American citizens, including her constituents.

Chairman LIEBERMAN. Thanks very much, Professor Raskin.

Mr. Henderson, do you want to get into this debate between the two law professors on the question of the—

Mr. HENDERSON. Well, I— [Laughter.]

Chairman LIEBERMAN. Of course, the question is on whether, by statute, we can give voting rights to residents of the District.

Mr. HENDERSON. Thank you, Mr. Chairman. I also teach and am the Joseph Rowe Professor of Public Interest Law at the University of the District of Columbia Law School.

Chairman LIEBERMAN. Right. I apologize for not remembering—

Mr. HENDERSON. No.

Chairman LIEBERMAN [continuing]. But I see you in your Director position.

Mr. HENDERSON. Well, no, and it is a privilege to be here on behalf of the Leadership Conference, but I do want to pick up on one point that Professor Kurland noted.

To assume that one is required to resort to a constitutional amendment, which is a process of last resort when all other permissible means of achieving the end result that we desire, in this instance, it seems to me is premature. Now, he does make note, and I found it interesting because it is seemingly contradictory on its face, on the one hand, he notes his support for the right to vote on behalf of District residents. He notes, however, the need to pursue a constitutional amendment, but then further in his remarks suggests that a constitutional amendment itself may prove to be unconstitutional and for that reason raises questions about the validity of that process as it relates to addressing the problem of achieving the right to vote on District residents.

I thought the brilliance of the bill that both you and Congresswoman Norton have submitted is that it isolates first the fundamental principle at stake, which is providing the citizens of the District of Columbia their right to vote not so much as citizens of the District of Columbia, but rather hearkening back to their status as citizens of the United States and arguing first and foremost that because they are citizens of the United States, they have to be treated equally with other citizens of the United States. Now, it happens that they live in the District of Columbia, and yes, there is a District Clause in the Constitution that regulates certain functions as citizens of the District of Columbia. But it does not ultimately pertain to their status as citizens of the United States, nor does it preclude their right to vote in that capacity.

It seems to us that the argument that you have made, which is first provide voting rights for the District, let us decide that question first, and then the issue of what form the rights will take does obviously have to be decided subsequently. But let us isolate that principle first. Let us have Congress vote on the determination of whether citizens of the District of Columbia in their role as citizens of the United States should have that right to vote is exactly the way to go.

Second, what you have said is that until that voting right has been achieved, citizens of the District should be given status comparable to citizens in the territories, which is to say if you cannot vote with the full rights and privileges pertaining thereto, as with other citizens, you should be given an exemption from Federal taxation comparable to those residents who live in the territories, and it does seem to me that frames the issue in its most simple and yet its purest term, to allow voting rights to be conferred on behalf of the citizens.

Now, in the event that Congress, or rather that the courts determine that is an unconstitutional grant of authority on behalf of District residents, the amendment process is still open and certainly the way has been cleared to determine that anything less

than that would be inadequate. But as a first step, it seems to me that getting Congress to recognize the importance of the right, isolating that issue, asking Members of Congress to vote on the pure question of whether they believe District residents are entitled to the right to vote, and if they are not entitled to the right, or are entitled to the right to vote, should they have it or should they not in terms of the taxation that they pay it seems to me is the way to go.

So I would suggest that while Professor Kurland's arguments may have some relevance and pertinence down the road, it is only after we have tried this first step, it seems to me, before we then get to the question of whether a constitutional amendment is required, and I see that, therefore, as a straw man, an issue that, in fact, has been raised as a barrier but, in fact, has never been legitimately tested in terms of its functions.

Chairman LIEBERMAN. I thank you for that statement. I cannot speak for Congresswoman Norton, but I say for myself, I do not think I could have said it better myself. The point is that we are trying to get our colleagues here to focus on the principle and the rights that go to residents of the District because they are citizens of the United States, and then to go to what the exact form of remedy is, if you will, or of granting those rights.

But the other point, although we understand that, practically, residents of—we are not asking for no taxation nor is it a practical goal. On the other hand, the underlying principle that we are trying to elevate and educate our colleagues with is, in fact, validated by the reference you make and one other witness made to the territories, because there, the residents of territories do not have voting rights and they pay no taxes. So this is not just a rhetorical flourish based on the no taxation without representation history, but it, I think, underlines the principle that we are trying to make here.

I regret that there is a vote on now and so I cannot stay as long as I would like, but Professor Kurland, do you want to give me a quick response to the comments of your colleagues on this panel? Now, I would say that two law professors are on either side.

Mr. KURLAND. It is not uncommon that in any forum on this issue I am always outnumbered. [Laughter.]

But again, I am here doing, I believe, a civic duty in raising legitimate constitutional legal issues. I have no stake in this one way or another. It is only when I am with Professor Raskin that I get castigated as a conservative, which I think I am not. I mean, I am a registered Democrat. I voted for Presidential electors for Lieberman and Gore in the State of Maryland proudly. [Laughter.]

Mr. KURLAND. Recognizing that I had no direct vote—

Chairman LIEBERMAN. My respect for your judgment is improving, increasing. [Laughter.]

Mr. KURLAND. But what is important is that while it might be easy to kind of try to marginalize the constitutional issues I raised, it is done in manners that, I respectfully submit, is really not intellectually accurate, and let me just make a couple of brief points because I know we are short on time.

The abomination of slavery was not taken out of the Constitution by Civil War. It required a constitutional amendment. The women's right to vote required a constitutional amendment. D.C.'s ability to

cast electoral votes for President, constitutional amendment. The District to be treated even temporarily as a territory, well, the District gets to vote for President, your three electoral votes. But if the No Taxation Without Representation, if the argument is to be just like the territories, that would unravel a variety of other legal issues where the District is treated differently than the territories. I am not sure that makes a lot of sense.

Chairman LIEBERMAN. Forgive me, because I am going to miss the vote. It also gives me the chance to have the last word, and in this case to say that, on the other hand, Statehood is conferred by statute. Now, I understand it implicates different provisions of the Constitution, but the grant of Statehood, notwithstanding all the instances you have given of what had to occur through constitutional amendments—

Mr. KURLAND. That is correct. Statehood is granted by statute, but that would put the—there are a variety of other constitutional issues which Statehood raises that we have not discussed here, but Statehood is passed by a simple majority of both Houses, signed by the President, and that would make New Columbia or whatever the 51st State would be called on equal footing and would be a State, entitled to representation in the Federal legislature in both Houses of Congress.

Chairman LIEBERMAN. Thank you. This has been a very stimulating panel and maybe we will do it again sometime soon when we come back.

I thank you all. It has been for me a very important day. All the documents that have been referred to will be entered into the formal record of the hearing. We will leave the record of the hearing open for 2 weeks, if others wish to submit testimony or additional submissions for the record.

I would like to insert in the record a statement from Betty Ann Kane<sup>1</sup> on behalf of the Board of Directors of the Committee for the Capital City and an article entitled "Implicit Statehood" by Timothy Cooper, Charles Wesley Harris, and Mark David Richards.<sup>2</sup>

I just want to state again, and I hope this message is clear after the hearing, Congresswoman Norton and I and our cosponsors are quite serious about this and we are going to pursue it to the best of our ability in the months and years ahead. I thank all of you for contributing to a very important hearing.

We are adjourned.

[Whereupon, at 4:30 p.m., the Committee was adjourned.]

<sup>1</sup>The prepared statement of Ms. Kane with attachments appears in the Appendix on page 171.

<sup>2</sup>Article entitled "Implicit Statehood" by Timothy Cooper, Charles Wesley Harris, and Mark David Richards appears in the Appendix on page 174.



## A P P E N D I X

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### PREPARED STATEMENT OF SENATOR BUNNING

Thank you, Mr. Chairman.

Today this Committee is discussing voting rights for the residents of the District of Columbia. I realize this is an important issue to many of the people who live in the city. Over the past several years, there have been several proposals to deal with this issue, including granting statehood to the District which would add two Senators and at least one Representative to Congress. Others have suggested giving the District's non-Federal area back to Maryland or allowing D.C. residents to vote in Maryland.

One of the most important things we should remember is that the nation's capital was created on land originally part Virginia and Maryland. The founders didn't consider the city a state and didn't provide for representation in Congress.

Even the city's name reflects the fact that it is not a State. It's a "district."

As for allowing Maryland to take control of the District's non-Federal land, this at least makes sense. In fact, the areas of Arlington and Alexandria in Virginia which were originally part of the District were given back to Virginia in the 1840's, so there is at least some precedence for this.

I have a feeling that this issue won't be resolved anytime soon. However, I appreciate the time our witnesses have taken to be here today, and I am looking forward to hearing from them.

Thank you.

ELEANOR HOLMES NORTON  
DISTRICT OF COLUMBIA

**COMMITTEE ON  
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**Congress of the United States  
House of Representatives  
Washington, D.C. 20515**

**COMMITTEE ON  
GOVERNMENT REFORM**

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DISTRICT OF COLUMBIA  
CIVIL SERVICE AND  
AGENCY ORGANIZATION

**Statement of Congresswoman Eleanor Holmes Norton  
Senate Governmental Affairs Committee Hearing  
No Taxation Without Representation Act**

**May 23, 2002**

I begin by thanking you, Mr. Chairman, not only for introducing the No Taxation Without Representation Act, but for going further and holding this hearing on the voting rights provision of the bill. Ever true to high principle, you have always supported equal treatment for the residents of the District of Columbia, unfailingly stepping forward to lead in supporting bills for equal representation for D.C. residents. You have already brought the No Taxation Without Representation Act to the Senate floor. During the debate on election reform in February, you submitted the bill as an amendment to the election reform bill because you said you believed that the voting rights issues raised in Florida in the 2000 presidential election only served to spotlight the denial of any vote at all in the Congress for D.C. residents. By agreement with us and all concerned, your amendment was withdrawn until the bill is fully ready for a vote. However, in your remarks, you said that you hoped the discussion of the No Taxation Without Representation Act on the Senate floor for the first time in memory would help educate the Senate about the denial here, in preparation for granting D.C. the congressional vote.

I come today on the heels of a highly successful D.C. Lobby Day, last Wednesday, where more than 250 residents, energized by your bill in the Senate, visited every Senate office to seek cosponsors. The sponsors of the Lobby Day, the Leadership Conference on Civil Rights, People For the American Way, D.C. Vote, and Stand Up for Democracy, are now making follow up calls for final answers on sponsorship. I want to thank the Senators who are signing on, with a dozen co-sponsors now and follow-up phone calls still being made. The significance of the first Citywide Lobby Day in the Senate was not lost on another strong supporter, Majority Leader Tom Daschle, who graciously agreed to meet with leaders of the coalition, the city, and the business community on the morning of Lobby Day. I want also to thank Senator Max Baucus, who with you and Senator Daschle, has worked to make clear that the only point of our bill is and always has been to achieve voting rights and its proper place in this committee for that purpose. My special thanks also to your able and energetic staff for the magnificent work they have done since you introduced the bill.

You will hear from others today about the damage to democracy and to the District, because D.C. residents are denied the congressional vote. I believe I can be most useful if I

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testify briefly from the unique perspective of the one official District residents are permitted to send to Congress. Beyond notions of fairness and equality, the role of the one non-voting delegate whose constituents pay federal income taxes points up the absurdity of the present arrangement—for us and for the Congress—at best, antiquated, inefficient, quite unintended by the Framers, and embarrassing; at worst, discriminatory, undemocratic, and shameful.

The District is seriously harmed by having no representation in the Senate. I have the same privileges on the Senate floor as any House member, but even when the D.C. budget is before you, I can be on the floor, but not speak on the floor for our own budget. To its credit, the House has extended to delegates every privilege of the House except, of course, the most important, the vote on the House floor. The House has long allowed delegates the valuable vote in committee. In response to the memo I submitted in 1993, the House even changed its rules to allow delegate voting in the Committee of the Whole. However, Mr. Chairman, measure the nation's high-sounding rhetoric about democracy, preached unceasingly, particularly today, against the reality that even this delegate vote, which was not the full right other members enjoy, was rescinded by rule when the Republicans gained control of the House.

The indignities to the residents I represent know no bounds. My testimony today will consist of a few among many examples that could be offered to demonstrate this point. It is useless and redundant and insulting enough that our Mayor, Council, and residents, alone in this country, are treated like children or worse by the requirement to send their balanced budget to Congress, where it is often toyed with and decorated with undemocratic attachments, while I press Congress to allow a local jurisdiction to spend its own local taxpayer-raised money. After struggling every year to get the D.C. budget to the House floor, I must then stand aside, unable to cast a vote on our own budget while Members of the House from 49 states, where residents pay less in federal taxes per capita than my constituents, vote yea or nay on the D.C. budget. However, my colleagues from seven states that have populations about our size each have one vote in the House and two in the Senate on the D.C. budget and on everything else.

This pathetic paradox has been acted out on the House floor countless times in the 32 years D.C. has had a delegate. Sometimes, life and death issues have been at stake, such as when, without a vote, I had to fight off two bills that would have wiped out all the District's gun laws in 1999, or when the Senate, with no D.C. representation in this body, forced a death penalty referendum on the District that the city turned back 2 to 1 in 1992.

Even the voting rights that D.C. has won have not been fully realized. Lacking the vote during the House impeachment proceedings, my only recourse to preserve D.C.'s 1996 presidential vote, as guaranteed by the 23<sup>rd</sup> Amendment, was to bring a privileged resolution to the House floor. I argued that the vote for President that residents had cast required that a D.C. vote also be cast in the House concerning whether the President should be removed from office. The Speaker ruled against the District.

Yet never, Mr. Chairman, have I felt more deeply about the denial of the vote to our residents than when our nation has been called to war. I spoke but could not vote on the commitment of troops in the Persian Gulf War and most recently on the resolution authorizing

the war against terrorism. I know you understand how deeply the denial of the vote in time of war cuts, Mr. Chairman. You said as much in your own remarks on the Senate floor when you submitted the No Taxation Without Representation Act as an amendment to the election reform bill. You said that D.C. residents have disproportionately suffered casualties in America's wars. You informed the Senate that in World War I, the District suffered more casualties than 3 states; in World War II, more casualties than four states; in Korea, more casualties than 8 states; and in Vietnam, more casualties than 10 states.

I believe it is fair to say that the examples in this testimony would shock most Americans, the great majority of whom say in polls that we should have the congressional vote, and most of whom believe we already do. The examples I have cited, and many more like them stand out like a disfiguring scar that at best robs our country of international credibility and at worst leaves us open to charges of hypocrisy. The denial of the vote to the 600,000 citizens who reside in the nation's capital stunts the otherwise determined logic and progression of our democracy--- the 14<sup>th</sup> Amendment guaranteeing equal protection of the laws; the 15<sup>th</sup> Amendment guaranteeing the vote regardless of race; the 17<sup>th</sup> Amendment, providing for direct popular election of Senators; the 19<sup>th</sup> Amendment enfranchising women; the 23<sup>rd</sup> Amendment affording District residents the right to vote for President; the Supreme Court's one person, one vote decisions; and the 1965 Voting Rights Act barring impediments to voting regardless of race. Today, we ask the Congress that brought us this far along the way to democracy and equality not to stop now. Do not hold back the tide.

The Senate saw that tide roll into this chamber on Lobby Day. D.C. residents came here in large numbers for the first time to show that they are free Americans, that the Senate is not off-limits to them, and that they are entitled to representation here. Today, we ask the Senate to respond to these D.C. residents who represented the entire city when they came here to lobby last Wednesday. We ask you to give them what they are due as Americans. We ask you to give them the congressional vote that is the democratic hallmark of our republic. We ask you to pass the No Taxation Without Representation Act.

**Governmental Affairs Committee Hearing on  
“Voting Representation in Congress for Citizens of the District of Columbia”  
May 23, 2002**

**Statement of U.S. Senator Russell D. Feingold**

Thank you, Mr. Chairman, for inviting me to join you today and for allowing me to make a statement in support of our effort to secure full voting representation in Congress for the residents of the District of Columbia. I want to commend you, Mr. Chairman, as the others have, for your leadership and work on this issue.

I want my colleagues in the House to know that when my constituents in Wisconsin hear that over half a million people in the District of Columbia are denied the right to voting representation in Congress, they are shocked. I also want to thank Representative Eddie Bernice Johnson for her efforts on the Campaign Finance Reform bill. Without her efforts, that legislation very well may not have had success in the House. That bill, of course, had to do with the integrity of the vote, and this issue has to do with the right to vote.

I am also very pleased to be here today with Delegate Eleanor Holmes Norton. She has been a long-time, tireless champion of this important issue in Congress. It is an honor to work with both Delegate Norton and you, Mr. Chairman, to secure full voting representation for D.C. residents.

Mr. Chairman, our nation, the greatest democracy on earth, was born out of a struggle against taxation without representation. Before the Revolutionary War, the British government levied taxes on American colonists. But while these colonists were required to pay taxes to the British government, they had no say, no voice, no power over how they would be governed. Just a few years before the first battle of the Revolutionary War, the British continued the imposition of federal taxes with the Stamp Act and the Sugar Act.

In 1773, the Boston Tea Party took place. American colonists, led by Samuel Adams, raided three British ships in Boston harbor and threw the tea overboard to protest the British tea tax. Soon thereafter, the colonists began to mobilize and to fight for independence. And “no taxation without representation” became a rallying cry. A few years later, of course, after a long and hard-fought struggle, a free and independent

America was born.

Yet, more than two hundred years later, Mr. Chairman, Americans in the District of Columbia – home to over half a million residents – remain disenfranchised. They are in a situation not too different from that of the American patriots who fought so hard and sacrificed their lives to someday live free.

Mr. Chairman, when the District of Columbia was created as our nation's capital 200 years ago, its residents lost their right to full congressional representation. These Americans serve in our nation's armed forces, pay federal taxes, and keep our federal government and capital city running day and night. They live in the shadows of the monuments of our forefathers and this country's most highly-praised defenders of democracy. They fight and die for this country in armed conflict. And yet they have no voice in the Senate and only a limited voice in the House. They don't even have the right to vote on basic administrative matters that other states and cities decide for themselves.

Virtually every other nation grants the residents of its capital city equal representation in its legislature. It is simply an embarrassment that in these modern times, we, as the world's most powerful democracy, deny voting representation to over half a million Americans.

Since the ratification of the Constitution in 1788, the United States has forged its own suffrage history, guaranteeing the right to vote to all Americans regardless of race, gender, wealth, marital status, or land ownership. Through our interpretation of the one-person, one-vote doctrine, we have made great strides in overcoming inequality and underrepresentation. There remains, however, this unresolved obstacle to suffrage for all Americans: the disenfranchisement of D.C. residents. Mr. Chairman, it is past time for Congress to un-do this injustice.

And so, I was pleased to join you, Mr. Chairman, earlier this year as a cosponsor of an amendment to the election reform bill on the issue of voting representation for D.C. residents. I am told that this was probably the first time since 1978 – when the Senate considered a constitutional amendment – that the issue of voting representation for D.C. residents was even debated on the floor of the Senate. After debate, you withdrew the amendment, but it was important to begin debating this issue in the Senate again. It is long overdue. So I again commend you, Mr. Chairman, for continuing the debate by holding a hearing on this issue today.

Particularly at this time when D.C. residents are members of our nation's military, the National Guard, the Capitol police, or serving so many other important roles to fight

terrorism and to protect our nation from future terrorist attacks, it is, in fact, shameful that we deny them the right to full representation in Congress.

It is past time for Congress to act. I urge our colleagues to join Senator Lieberman and me as cosponsors of the "No Taxation Without Representation Act." This is an important bill to send the message that taxation without representation is unfair and un-American. I urge my colleagues to join us in ensuring full voting representation for Americans who call the District of Columbia their home.

Thank you for the opportunity again, Mr. Chairman.

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GOVERNMENT OF THE DISTRICT OF COLUMBIA



EXECUTIVE OFFICE OF THE MAYOR

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Committee on Governmental Affairs  
United States Senate

Senator Joseph I. Lieberman, Chairman  
Senator Fred Thompson, Ranking Member

*"Voting Representation in Congress for  
Citizens of the District of Columbia"*

Statement of  
**Anthony A. Williams**  
Mayor  
District of Columbia

May 23, 2002  
432 Dirksen Senate Office Building  
2:30 P.M.

Good afternoon Chairman Lieberman, Senator Thompson, members of the Committee, and other distinguished guests. On behalf of the more than 570,000 residents of the District, I thank you for the opportunity to speak before this Committee.

More than 200 years ago, the founders of this country fought a revolution to end the tyranny of taxation without representation. I have no doubt that the authors of the Constitution did not intend to force almost 600,000 Americans to live under that same tyranny in the 21<sup>st</sup> century. In fact, this body was established to create and amend laws as the needs of the people required. We are here today because the need has arisen and because you are vested with the power and responsibility to make sure that all Americans can exercise their rights. **Full voting representation in Congress is a fundamental right held by every citizen of the District of Columbia.** You have acted on behalf of disenfranchised women; you have acted on behalf of disenfranchised African Americans, Latinos, Native Americans, and other groups and we now ask that you act on behalf of the disenfranchised citizens of our nation's capital and pass the "No Taxation Without Representation Act."

### **Myths about the District of Columbia**

As Mayor of the Nation's Capital, I have had the privilege of representing our city across this country and abroad. From school children visiting the monuments to athletes participating in the Olympics; from diplomatic delegations working here in the District to state and local elected officials meeting in Washington, I have been amazed at the myths and misperceptions that are held about the power and status of the District of Columbia. I would like to share just a few:

- The federal government completely funds the DC Government;
- There are no "real people" living in Washington;
- Washington residents already have full voting rights and complete self-government;
- Washington residents all have a second address and therefore have representation in another state.

To be clear about many of these and other myths, you should know that:

The budget for the District of Columbia is funded primarily by the people who live and do business in the city. Yes, the District receives some federal funding – virtually the same amount as other cities our size receive from the federal government, but not nearly at the same level required to ensure the consistent delivery of essential services and certainly not commensurate with that provided by other nations to their capital city. Almost three-fourths of our operating budget comes from local tax revenue – property tax, income tax, and business taxes. In fact, our residents are some of the most heavily taxed people in the country.

There are 572,000 “real people” living within the 10 square miles known as the District of Columbia. These are people who attend school, work, raise families, pay taxes (both federal and local), serve in the armed forces, and in many parts of the District live on fixed incomes. And while a few of our residents come here to serve in the federal government and maintain a permanent address elsewhere, the vast majority do not. These are people who love their country and in the wake of September 11 are keenly aware of what can be demanded of them during a national crisis.

Washington residents were granted the right to vote for president in 1961, but we do not have full representation in the House or Senate. When legislation that directly affects our lives is drafted, debated, and adopted, we have virtually no voice in the process. Our residents elect a mayor and 13 members to the Council of the District of Columbia, but every local law and every local budgetary decision made by this elected body **must be approved by Congress**. No other jurisdiction in the country must submit its local budget to an outside authority elected by people from other states. No other jurisdiction must wait to invest funds in new programs while members of Congress decide what is appropriate for the District.

### **A Living City**

Over the years, the District of Columbia evolved to a living breathing city; a city where streets needed to be paved, homes built, children educated, trash and snow

removed, trees trimmed, people protected from crime and homes protected from fire. It became a city that needed to provide services to all of its residents and businesses, including those who live at 1600 Pennsylvania Avenue and work on Capitol Hill.

I am proud of the progress the District has demonstrated in the last several years. Last week, the Labor Department reported that the District has seen job growth in the last few months while our surrounding jurisdictions have experienced a growth in unemployment. Over the past five years, we have balanced the budget, maintained a cash surplus, improved our credit rating, and met every goal set out by Congress to demonstrate the ability to self govern. The District is on the verge of achieving its full potential as the heart of this vibrant region. But to do so, we must be put on a level playing field.

### **Democracy in the District**

Democracy is defined in *Webster's Collegiate Dictionary* as "...a government in which the supreme power is vested in the people and exercised by them directly or indirectly through a system of representation usually involving periodically held free elections." I say to the committee, why are the people of the Nation's Capital excluded from this system of representation?

#### **The lack of voting rights is an economic issue in the District of Columbia.**

While Congress has the power to impose restrictions on our city and limit our ability to tax, we will never have a level playing field. More than 50 percent of our land cannot be taxed. Income earned in the city commutes to Maryland and Virginia every day. State functions such as road construction, motor vehicle administration, and special education must be funded on a city's tax base. How can we continue to grow and be fiscally responsible when the city leaders have no authority over their own finances, and no representation to negotiate with congressional members? If the District had full voting rights, our representatives could work towards greater parity for District residents on these and other issues.

#### **The lack of voting rights is a matter of justice in the District of Columbia.**

The inability of District residents to vote for voting representatives and senators in Congress violates their rights to equal protection and to a republican form of government. In the court case for full voting rights, *Alexander v. Daley*, the court did not determine that District citizens **should not** have voting rights, it determined that the courts lacked the power under the U.S. Constitution to require Congress to grant such rights. Congress has the opportunity and the power to correct this injustice by acting now to guarantee justice by granting the citizens of the District their voting rights.

**But most importantly, the lack of voting rights is a civil rights violation in the District of Columbia.** African-Americans and women have fought for and died for the right to vote. Yet here, in the capital of democracy, lives one of the largest blocs of disenfranchised voters in the world. District residents fight for freedom abroad and pay more than \$2 billion a year in federal taxes at home. As the world's leading democracy, it is unacceptable that the United States does not grant voting rights to the residents of its capital city.

The issue of District Voting Rights has resonated across the country resulting in a number of local and national organizations taking actions in support of full voting rights for District of Columbia. Such organizations include the National League of Cities, the National Conference of Black Mayors, and the Executive Committee of the U.S. Conference of Mayors which have all passed resolutions or adopted policy positions in support of the District. In addition, resolutions from cities across the country supporting voting rights have been adopted by the cities of Chicago, Philadelphia, Cleveland, Baltimore, Los Angeles, New Orleans, and San Francisco and national polls indicate that 72 percent of people across the country support full voting representation for District residents. I ask that these resolutions be entered into the record.

The people of the District have been disenfranchised for almost 200 years. I do not believe the framers of our democracy intended for this to happen. This country was founded on the principles of fair and equitable treatment for all people. Our citizens (including District residents) fight in wars to protect our freedom and fundamental rights. The District of Columbia shares this responsibility, and sometimes burden, because it is a privilege to represent this free society. The District residents should have a voice in the

laws we live by, and that can only be done with full voting representation. The members of this committee as well as other members of Congress have the unique opportunity to see the District of Columbia as an attractive place to live, a historic place to visit, and an international center. How can you live, work, and enjoy this city without wondering why the District residents are not represented as the constituents you serve at home? I ask this committee to lead the charge in ensuring that the residents of the District of Columbia are no longer disenfranchised and that full voting representation in the House and Senate is provided in 2002. I ask you to pass the "No Taxation Without Representation Act."

**Now.**

Thank you for giving me the opportunity to testify. I would now be happy to address any questions.

## DISTRICT of COLUMBIA VOTING RIGHTS HISTORICAL TIMELINE

**July 13, 1787:** The Office of the Delegate to Congress is created when Congress of the Confederation enacts the Northwest Ordinance of 1787.

**June 21, 1788:** U.S. Constitution is ratified by the states. Article I, Section 8, Clause 17 gives Congress authority ‘to exercise exclusive legislation in all cases whatsoever, over such District (not exceeding 10 miles square) as may be cession of particular States, and the acceptance of Congress, become the seat of the government of the United States...’

**1789:** Upon ratification of the U.S. Constitution, Congress gives full statutory effect to the Northwest Ordinance.

**January 22, 1791:** George Washington appoints Thomas Johnson, David Carroll, and Dr. David Stuart as “Commissioners for surveying the District Territory accepted by the said Act for the permanent seat of the Government of the United States.”

**January 24, 1791:** President George Washington selects a site that includes portions of Maryland and Virginia.

**March 30, 1791:** President Washington issues a proclamation fixing the boundaries of “the territory, of ten miles square, for the permanent seat of Government of the United States.”

**December 1, 1800:** Federal capital is transferred from Philadelphia to site on Potomac River now called City of Washington, in the territory of Columbia.

**May 3, 1802:** Congress grants the City of Washington its first municipal charter. Voters, defined as white males who pay taxes and have lived in the city for at least a year, receive the right to elect a 12-member council. The mayor is appointed by the President.

**March 15, 1820:** Congress amends the Charter of the City of Washington for the direct election of the mayor by resident voters.

**July 9, 1846:** Congress and the President approve the retrocession, to Virginia, of the portion of the District that Virginia had initially ceded to the United States.

**January 8, 1867:** Congress grants black males the right to vote in local elections.

**June 1, 1871:** The elected mayor and council are abolished by Congress and replaced by a governor and council appointed by the president. An elected House of Delegates and a non-voting Delegate to Congress are created. In this act, the jurisdiction and territorial government came to be called the District of Columbia.

**June 20, 1874:** Congress revokes territorial government and the position of the non-voting Delegate is abolished. Congress creates presidentially-appointed Board of Commissioners on a temporary basis.

**June 11, 1878:** Congress makes the Board of Commissioners permanent.

**July 4, 1906:** The District Building on 14<sup>th</sup> and Pennsylvania Avenue becomes the official City Hall.

**March 29, 1961:** The 23<sup>rd</sup> Amendment is ratified, granting District residents the right to vote in presidential elections for the first time. The District is entitled to the same number of electors as though it were a state.

**September 22, 1970:** The *District of Columbia Delegate Act of 1970* restores the position of Delegate to the District of Columbia.

**March 23, 1971:** The Rev. Dr. Walter E. Fauntroy is elected Delegate to the District of Columbia.

**July 25, 1977:** Representative Don Edwards introduces H.J.Res. 554 to amend the Constitution to provide for representation of the District of Columbia in the Congress.

**March 2, 1978:** U.S. House of Representatives passes H.J.Res. 554 by two-thirds majority.

**August 22, 1978:** Senate also approves the District of Columbia Voting Rights Amendment by two-thirds and sends to the States for ratification.

**1985:** DC Voting Rights Amendment expires without receiving the required number of states needed for ratification (38). Only sixteen states support the amendment.

**November 6, 1990:** Eleanor Holmes Norton succeeds Delegate Fauntroy as the second elected delegate.

**June 3, 1992:** Representative James Moran introduces H.J.Res. 105 to amend the Constitution to provide for representation of the District of Columbia in the Congress.

**1993:** The U.S. House of Representatives votes to allow the delegates from the District of Columbia, American Samoa, U.S. Virgin Islands, Guam and Resident Commissioner of Puerto Rico to vote in the Committee of the Whole and on the floor of the House.

**1995:** The DC delegate is terminated from the official House roster and no longer has voting privileges.

**March 20, 2000:** By a vote of 2-1, in the case of *Alexander v. Daley*, a 3-judge Federal District Court rejects a case brought by District residents and the D.C. government to gain full voting representation in Congress stating that the court lacks authority to grant voting representation. U.S. Supreme Court summarily affirmed the 3-judge decision without opinion.

**November 4, 2000:** The District adopts the new license plate, "Taxation Without Representation."

**March 22, 2001:** H.R. 1193, the "*No Taxation Without Representation Act of 2001*"

is introduced in the U.S. House of Representatives by Delegate Norton.

**March 23, 2001:** Senator Joseph I. Lieberman introduces S. 603, the Senate companion bill to H.R. 1193.

**2001:** Election Reform Bill is introduced in the House and Senate.

**May 15, 2002:** District elected officials, Delegate Norton, civic organizations and residents go to Capitol Hill to lobby for voting rights for the District of Columbia.

**May 23, 2003:** Senate Governmental Affairs Committee convenes "*Voting Representation in Congress for Citizens of the District of Columbia*" hearing.

**TESTIMONY OF  
CHAIRMAN LINDA W. CROPP  
COUNCIL OF THE DISTRICT OF COLUMBIA**

**BEFORE THE  
UNITED STATES SENATE  
COMMITTEE ON GOVERNMENTAL AFFAIRS**

**THURSDAY, MAY 23, 2002  
2:30 P.M.  
DIRKSEN SENATE OFFICE BUILDING  
ROOM 342**

Chairman Lieberman, Senator Thompson, and members of the Committee on Governmental Affairs, good afternoon! Let me begin by thanking you, Mr. Chairman, for sponsoring legislation and holding this public hearing on the denial of voting representation in Congress for the 600,000 American citizens who live in the District of Columbia. This is the first Senate hearing on the District's voting rights in an extremely long time, so we very much appreciate this historic

opportunity to urge you and your colleagues to use the power that you have to bring democracy to the nation's capital.

Attached to my testimony is a resolution and report, adopted unanimously by the D.C. Council earlier this month, supporting the "No Taxation Without Representation Act" that has been introduced by Senators Lieberman and Feingold in the Senate and by Congresswoman Norton in the House. The Council's findings in its resolution essentially mirror the findings contained in the "No Taxation Without Representation Act," which I would like to highlight here.

As you know, United States citizens residing in Washington, D.C. have no voting representation in the House, and no elected voice at all in the Senate. This was not always the case. For approximately 10 years after ratification of the U.S. Constitution and selection of the federal district, residents of the District of Columbia were allowed to vote for members of Congress. In 1800 Congress voted to end this practice, and thereby disenfranchised District residents. Throughout the past two centuries there have been various efforts to restore the franchise.

There are many reasons full voting rights should be restored, but each evolves from a single principle: the right to vote is a fundamental principle of our democracy. Americans throughout the nation agree, or would agree if they knew. A survey conducted in October 1999 found that 72% of respondents support full voting rights in the House and Senate for District residents. That same poll showed high levels of support across party lines. Polling conducted a month later found that 55% of college graduates who were registered to vote were unaware that District citizens do not have Congressional voting representation.

You have heard these facts before, but until there is a remedy to the fundamental injustice of our subordinate status, they must be reiterated:

- The residents of the District of Columbia are the only Americans who pay

federal income taxes but are denied voting representation in the House and Senate.

- The District of Columbia is second per capita in income taxes paid to the federal government. The District is a source of over \$2 billion dollars in federal taxes each year -- an amount per capita greater than 49 other states. Yet we have no say in Congress in how these tax dollars are spent.
- More District citizens have died in wars protecting the nation than have the citizens of 20 other states. Congress has the exclusive right to declare war, and again we have no say in this decision.
- The impeachment proceedings in the Congress a few years ago again highlighted the glaring anomaly of our lack of vote on the issue of removing from office the President of the United States whom we had a vote to elect.
- The United States is the *only* democracy in the world in which residents of the capital city are denied representation in the national legislature equal to that enjoyed by their fellow citizens.
- The denial of voting representation in Congress locks District residents not only out of our national legislature but also out of what is in a structural sense our state legislature -- a legislature that has extraordinary approval authority over all of the District's local legislation and all of the District's locally raised dollars.

We who are the elected representatives of District citizens are reminded daily, sometimes painfully, of the "exclusive jurisdiction" that Congress exercises over the District of Columbia pursuant to Article I, Section 8 of the United States Constitution. We believe that this same broad jurisdiction provides Congress with the constitutional authority to enact a bill by simple majority to restore Congressional voting rights to District citizens. The Congress and the

Constitution treat the District as a state for hundreds of purposes, whether they are federal benefits, burdens or rights -- why not the most precious and fundamental right in a free and democratic society: the right to vote?

The denial of District citizens' right to Congressional voting representation is the last unbreached frontier of civil and human rights in America. As the United States rightly tries to be a model and defender of democracy around the world, we implore you to find a remedy to remove the inexcusable hypocrisy of democracy denied in our nation's capital.

We have tried in the past -- and without success thus far -- to obtain Congressional voting rights through a constitutional amendment, through a statehood bill, and through litigation. The Supreme Court, while sympathetic, has essentially stated that it is the Congress where the remedy to this problem must be resolved. As we ask the Senate to take action this year to remedy our lack of voting representation in the Congress, we also request that you take favorable action as soon as possible on legislative and budget autonomy for the District of Columbia.

Thank you again for this opportunity to testify before the Committee today. As always, I look forward to working with you to ensure a brighter tomorrow for the nation's capital and for all who live, work and visit here.

## **Council of the District of Columbia Report**

1350 Pennsylvania Avenue, N.W. Washington, D.C. 20004

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**To:** Members of the Council of the District of Columbia

**From:** Linda W. Cropp, Chairman  
Committee of the Whole

**Date:** May 7, 2002

**Subject:** PR 14-569, "Sense of the Council Supporting the 'No Taxation Without Representation Act' Resolution of 2002"

### **Committee Recommendation**

The Committee of the Whole reports favorably on PR 14-569, "Sense of the Council Supporting the 'No Taxation Without Representation Act' Resolution of 2002", and adopts the attached report and committee print on this measure as approved by the Committee of the Whole Subcommittee on Labor, Voting Rights, and Redistricting, and recommends adoption of PR 14-569 by the Council of the District of Columbia.

### **Committee Action**

On May 7, 2002, the Committee of the Whole met to consider PR 14-569. Chairman Cropp recognized Councilmember Mendelson, Chairperson, Subcommittee on Labor, Voting Rights, and Redistricting, to present the Subcommittee report to PR 14-569. Chairman Cropp moved for approval of the committee print and report to PR 14-569, which were approved by a voice vote. Councilmembers present: Chairman Cropp and Councilmembers Allen, Ambrose, Brazil, Catania, Chavous, Evans, Fenty, Graham, Mendelson, Orange, Patterson and Schwartz.

### **Attachments**

- (A) Committee Print
- (B) Subcommittee on Labor, Voting Rights,  
and Redistricting Report on PR 14-569

**Subcommittee on Labor, Voting Rights and Redistricting**  
April 29, 2002  
**COMMITTEE PRINT**

A PROPOSED RESOLUTION

PR 14-569

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

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To declare the sense of the Council on supporting Congresswoman Eleanor Holmes Norton and Senator Joseph Lieberman's "No Taxation Without Representation Act of 2001."

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Sense of the Council Supporting the 'No Taxation Without Representation Act' Resolution of 2001."

Sec. 2. The Council finds that:

(a) District of Columbia residents are an exclusive group of American citizens forced to pay federal income taxes but refused voting representation in the United States House of Representatives and the Senate.

(b) The principle of "one person, one vote" demands that citizens who have met all prerequisites of American citizenship should reap all benefits of American citizenship, including voting representation in the U.S. House of Representatives and the Senate.

(c) District of Columbia residents are refused equal representation twofold because they do not have voting representation like other tax-paying American citizens and they are required to pay federal income taxes unlike the Americans who live in the territories.

(d) Regardless of the refusal of voting representation, Americans in the District of Columbia are second per capita in income taxes paid to the federal government.

(e) Unequal voting representation in our representative democracy is inconsistent with

the founding principles of the nation and the firm principles held by the American people of today.

(f) H.R.1193, the No Taxation Without Representation Act of 2001 has been introduced in the U.S. House of Representatives by Congresswoman Eleanor Holmes Norton, with 111 bipartisan cosponsors, and a companion bill, S.603, has been introduced in the Senate by Senator Joseph Lieberman with four cosponsors.

(g) It is the intent of the Council to have equal voting rights as well as equal responsibility to pay taxes and share all the other burdens of U.S. citizenship.

Sec. 3. It is the sense of the Council that the United States Congress should expeditiously pass H.R.1193 (also known as S.603) the "No Taxation Without Representation Act of 2001," to promote District of Columbia residents having voting representation in the U.S. House of Representatives and Senate, in addition to taxation.

Sec. 4. The Secretary of the Council shall transmit a copy of this resolution to the officers of both houses of Congress, to the committee chairs which have jurisdiction over District of Columbia affairs, and to the Congresswoman for the District of Columbia.

Sec. 5. This resolution shall take effect immediately upon the first date of publication in the District of Columbia Register.

ENROLLED ORIGINAL

A RESOLUTION

14-435

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

May 7, 2002

To declare the sense of the Council on supporting Congresswoman Eleanor Holmes Norton and Senator Joseph Lieberman's No Taxation Without Representation Act of 2001.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Sense of the Council Supporting the No Taxation Without Representation Act Resolution of 2002".

Sec. 2. The Council finds that:

(1) District of Columbia residents are an exclusive group of American citizens forced to pay federal income taxes, but refused voting representation in the United States House of Representatives and the Senate.

(2) The principle of "one person, one vote" demands that citizens who have met all prerequisites of American citizenship should reap all benefits of American citizenship, including voting representation in the U.S. House of Representatives and the Senate.

(3) District of Columbia residents are refused equal representation twofold because they do not have voting representation like other taxpaying American citizens, and they are required to pay federal income taxes, unlike the Americans who live in the territories.

(4) Regardless of the refusal of voting representation, Americans in the District of Columbia are second per capita in income taxes paid to the federal government.

(5) Unequal voting representation in our representative democracy is inconsistent with the founding principles of the nation and the firm principles held by the American people of today.

(6) H.R. 1193, the No Taxation Without Representation Act of 2001, has been introduced in the U.S. House of Representatives by Congresswoman Eleanor Holmes Norton, with 111 bipartisan cosponsors. A companion bill, S.603, has been introduced in the Senate by Senator Joseph Lieberman, with 4 cosponsors.

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**ENROLLED ORIGINAL**

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WADE HENDERSON  
EXECUTIVE DIRECTOR  
LEADERSHIP CONFERENCE ON CIVIL RIGHTS

Mr. Chairman and members of the Committee, thank you very much for the opportunity to testify this afternoon on voting representation in Congress for the citizens of the District of Columbia. My name is Wade Henderson, and I am the Executive Director of the Leadership Conference on Civil Rights. The Leadership Conference consists of more than 180 national organizations, representing persons of color, women, children, labor unions, individuals with disabilities, older Americans, major religious groups, gays and lesbians and civil liberties and human rights groups. Together, over 50 million Americans belong to the organizations that comprise the Leadership Conference on Civil Rights.

The Leadership Conference strongly supports efforts to give citizens of the District of Columbia full voting representation in the United States Congress. At the outset of this hearing I want to commend you, Mr. Chairman, for your leadership on this important issue, and on your bill, S. 603, the *No Taxation Without Representation Act of 2001*. The Leadership Conference fully supports this bill, along with its counterpart in the House of Representatives, introduced by Representative Eleanor Holmes Norton.

The right to vote is fundamental in our democracy. The struggle to obtain voting rights for all Americans has long been at the center of the fight for civil rights. The Congress has enacted many important laws over the years protecting and enhancing the right to vote, such as the Voting Rights Act of 1965 and the National Voter Registration Act of 1993. S. 603 continues the distinguished path of providing the full measure of the right to vote for all Americans. It is a top priority on the legislative agenda of the Leadership Conference.

Voting is the language of our democracy. Without it, the citizens of the District of Columbia are the silent voice in the wilderness, spectators to democracy, right in the literal shadow of the very governing institutions that serve as a shining beacon to the rest of the world.

This is not right, this is not fair, to have two distinct classes of citizens – those of the 50 states, and those of the District of Columbia. No other democratic nation in the world denies the residents of its capital representation in the national legislature.

The Leadership Conference holds as a guiding tenet that all citizens of the United States must be treated equally under the law. We have long supported the civil rights movement here in our nation's capital, championing voting rights for the citizens of the District of Columbia and the popular election of local officials.

The tragedy of the September 11<sup>th</sup> terrorist attacks on our nation pointed out the importance of the District of Columbia and the paradox of denying D.C. residents the full measure of participation in our government. On that day, terrorists struck at our financial center in New York City and our government center here in Washington. Their attack was on all Americans, without regard to race, color, religion, sex, national origin, disability, or sexual orientation. And Americans from around the nation opened their hearts, with unparalleled generosity, to help the victims of this tragedy.

The citizens of the District of Columbia were no exception. D.C. residents were part of the first responders to the Pentagon attack. Members of the District of Columbia National Guard were among the first to be called up to serve our nation during this time of crisis. And sadly, D.C. had its share of the victims in the September 11<sup>th</sup> attacks. Yet, D.C. residents have no voting representation in the very government they seek to preserve and defend.

The Leadership Conference believes it is now time to move forward on the important legislation under discussion today. Residents of the District of Columbia dutifully comply with the civic responsibilities and obligations required by our democratic form of government, they pay taxes and they serve in our armed forces. Yet residents of the District are blatantly deprived of many of the essential rights and privileges of citizenship enjoyed by all other Americans. This is an issue of simple justice and fairness.

Residents of the District of Columbia are the only United States citizens today who pay federal income tax each year (and pay at the second highest per capita rate in the nation) yet are denied voting representation in the Congress. Unlike citizens residing in the 50 states, residents of the District of Columbia are not fully represented in the Congress of the United States.

As you know, this has not always been the case. Before the District was established in 1800, residents of the city of Washington were able to vote for representatives in Congress, as citizens of either Maryland or Virginia. There is no prohibition on restoring voting representation in Congress for citizens of the District of Columbia.

This issue has long had bipartisan support in the Congress, and I would hope that it would today as well. In 1978, both the Senate and the House passed a constitutional amendment to grant D.C. residents full representation in Congress. Although that amendment failed to be ratified by the required 38 states, it was supported by many prominent Republicans and Democrats.

In preparing for today's hearing, I was struck by the breadth of support for D.C. voting rights in the years leading up to the 1978 Constitutional Amendment. Listen to some of the voices, voices you might not have expected to hear:

President Richard Nixon -- *It should offend the democratic sense of this nation that the citizens of its capital... have no voice in the Congress.*

Senator Robert Dole -- *The Republican party supported DC voting representation because it was just, and in justice we could do nothing else.*

Senator Robert Byrd -- *The people of the District... suffered more lives lost in the Vietnam War than 10 states... conscription without representation.*

Assistant Attorney General (now Supreme Court Chief Justice) William Rehnquist -- *The need for an amendment at this late date in our history is too self-evident for further elaboration; continued denial of voting representation from the District of Columbia can no longer be justified.*

Senator Howard Baker (now Ambassador to Japan) -- *We simply cannot continue to deny American citizens their right to equal representation in the national government... this basic right is a bedrock of our Republic that cannot be overturned.*

Like most pieces of enacted civil rights legislation, voting rights for the citizens of the District of Columbia has long had strong bipartisan support.

Before I conclude, let me address the issue of taxation without representation. Some will argue that this bill, if enacted, will turn the District of Columbia into a haven for tax dodgers. Nothing can be further from the truth.

This bill is aimed at achieving full voting representation in the Congress for the citizens of the District of Columbia, citizens who now pay more than their fair share of federal taxes. It's title – No Taxation Without Representation – dates back to the historic foundation of American democracy. It is aimed at moving the Congress to take positive action on this issue, but does not in fact create voting representation in Congress for representatives of the District of Columbia.

The bill merely makes clear that until full voting representation is achieved, residents of the District should be treated more like their counterparts in the Territories of the United States, who do not pay federal taxes. The Leadership Conference supports providing voting representation in Congress for citizens of the District of Columbia, and until that happens, believes that residents of the District should be treated for tax purposes like their similarly situated counterparts in the Territories of the United States.

Since the attacks on America, we have been eloquently advocating to the international community for democracy abroad, and rightfully so. But it is now time to preach democracy at

home, as well. I urge the Congress to pass your bill, Mr. Chairman, and to bring democracy home to the citizens of the District of Columbia. We should give those who live within the shadow of the Capitol the basic American right to enjoy full representation in the Congress of the United States.

Thank you for the opportunity to appear before the committee this afternoon. Again, I commend you, Mr. Chairman, for your leadership on this very important civil rights issue.

**Statement of  
ADAM H. KURLAND  
Professor Law, Howard University School of Law**

**INTRODUCTION**

The issue of voting representation in the federal legislature for citizens of the District of Columbia is now before the Congress. This hearing is a welcome and constructive step because the issue is now being debated in the appropriate forum. However, Congress cannot simply pass legislation granting DC Citizens voting rights in Congress. A constitutional amendment is required.

The make-up of the federal legislature is an essential ingredient of "Our Federalism." Every school child should be familiar with the story of the Constitutional Convention and the "Great Compromise," which resulted in each state's proportional representation in the lower house and equal representation in the Senate. Most historians agree that, without this compromise, the work of the Constitutional Convention would have never been completed. The importance of this compromise can also be gleaned from the final clause in Article V of the Constitution ( concerning the amendment process ), which provides "that no state, without its consent, shall be deprived of its equal suffrage in the Senate." U.S. Const. Art. V. One might even argue that this constitutional language means that the structural make-up of the Senate can never be modified.

Representation in the federal legislature is defined by clear, unambiguous, constitutional requirements. The Constitution provides that "[t]he Senate of the United States shall be composed of two Senators from each State." U.S. Const. Art. I, § 3. It also requires that the House of Representatives be composed of members chosen by the people of the several states, and that each member of Congress be an inhabitant of the state from which he shall be chosen. U.S. Const. Art. I, § 2.

The District of Columbia, or, in constitutional parlance, "the Seat of the Government of the United States," as presently constituted, is not a state. Therefore, it is not entitled to any

representation in the House or the Senate. The only way the District, as presently constituted, can achieve full voting representation in the House of Representatives and in the Senate is by constitutional amendment. Another alternative, which would alter the District as presently constituted, is for the District of Columbia ( or a portion thereof ) to be admitted as a state, with some smaller geographic enclave remaining as the constitutionally required "Seat of the Government of the United States."

Those two options will be briefly discussed below. The controlling constitutional principle must be emphasized. Congress has a critical, but non exclusive, role in the political process necessary to achieve any change in D.C.'s present status of no representation in the federal legislature. However, Congress cannot, by "simple" legislation, provide the present District of Columbia citizens with voting rights in the national legislature. Such legislation would be unconstitutional.

Legal arguments have been made that a variety of constitutional principles require that District citizens receive congressional representation. Those arguments have been uniformly rejected. Moreover, any attempt to rely on Congress' enforcement powers to legislate pursuant to section five of the fourteenth amendment is also misplaced. The present lack of D.C. representation in the federal legislature is a feature of American federalism, is part of the constitutional structure, and does not violate equal protection, due process, or any other constitutional principle.<sup>1</sup>

Congress, in other contexts, often treats the District as if it were a state for other legislative purposes ( principally for funding allocation of various federal programs pursuant to Congress'

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<sup>1</sup> In addition, since the current lack of voting status emanates from the constitutional structure itself, there appears to be no state action involved.

Article I powers). However, Congress does not possess the legislative authority to decree the District as a state for purposes of providing and allocating representatives in the national legislature.<sup>2</sup>

Delegate Eleanor Holmes Norton has authored proposed legislation either granting the District representation in the House and Senate, or exempting DC residents from paying federal income tax. This proposal is flawed for many reasons. First, Delegate Norton has reportedly acknowledged that the “either-or trade-off” is basically a rhetorical device and that the proposal has no realistic hope of being enacted. Second, the “taxation without representation” slogan is inapposite-- and has been conclusively refuted in many other fora over the last two decades.<sup>3</sup> Lastly, the “either-or trade-off” is based on a faulty premise because Congress, in any event, does not possess the unilateral authority to enact legislation conferring DC voting rights.

#### **PROPOSED CONSTITUTIONAL AMENDMENT PROVIDING DISTRICT CITIZENS WITH VOTING RIGHTS IN CONGRESS**

Upon two thirds vote of both houses of Congress, Congress can propose a constitutional amendment to be submitted to the states for ratification. U.S. Const. Art. V. Ratification of a proposed constitutional amendment requires approval of three fourths of the state legislatures, or three fourths of specifically called state constitutional conventions. A proposed constitutional amendment could provide for the District to elect a member of the House only, or could also provide

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<sup>2</sup> Many of these unsuccessful constitutional and legal arguments are analyzed in detail in Adams v. Clinton, 90 F. Supp. 2d 35 ( D.D.C. 2000 )( three judge court ).

<sup>3</sup> See, e.g., Stephen Markman, STATEHOOD FOR THE DISTRICT OF COLUMBIA: IS IT CONSTITUTIONAL? IS IT WISE? IS IT NECESSARY? 42 ( 1988 )( noting that District residents are not the victims of a far off imperial power, imposing taxes selectively as a means of economic exploitation ).

for Senate representation ( either with one or two senators ).

A proposed constitutional amendment to provide the District with representation in the House and Senate “as if it were a State” passed Congress and was submitted to the state legislatures for ratification in 1978. Despite bipartisan support at the federal level-- including the support of Senator Robert Dole, the 1996 Republican standard bearer for President-- the proposed amendment fell well short of ratification.

As a basic issue of fairness and democratic principles, it is hard to argue against D.C. voting rights in the national legislature. President Richard Nixon aptly summarized, “[i]t should offend the democratic sense of this nation that citizens of its Capital ... have no voice in the Congress.”<sup>4</sup>

If “equal” voting rights is the goal sought to be achieved, that would seem to militate in favor of a proposal that the District receive proportional representation in the House, and two U.S. senators. Political reality must acknowledge that this formula would appear to guarantee two additional Democratic senators for the foreseeable future. However, the body politic must demonstrate the ability to rise above raw partisan politics. President Bush has often said that political Washington too often focuses on what is good for a particular political party instead of what is good for America. This issue provides all involved with an opportunity to demonstrate that America inside and outside of the Beltway will do what is right for America, and will support the democratic principles that we as Americans rhetorically espouse throughout the world. Upon a two thirds vote of both Houses of Congress, Congress should send the proposed constitutional amendment out to the States for ratification.

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<sup>4</sup> *But see* Markman, *supra* note 3 at 37 ( noting that Founders consciously rejected a pure majoritarian democracy ).

Or Congress could choose to sidestep the respective state legislatures altogether. Article V gives Congress the option of the means of ratification-- Congress can choose to send the proposed amendment to the state legislatures *or* to state constitutional conventions expressly convened to consider the sole issue of ratification of the proposed constitutional amendment.<sup>5</sup>

As to the wisdom of the policy of providing District citizens with two Senate votes ( above and beyond the oft repeated "equality-one person one vote" principles ), there is much to be said for a formula that, at the dawn of the twenty-first century, would provide for increased representation of urban interests in the Senate. Moreover, the District economy is more diversified, and less dependent on the federal government than ever before. Thus, the D.C. Senators are unlikely to be simply "voting lobbyists" for the federal workforce. Lastly, the political demographics of the District are not static. That the District would elect two Democratic senators in perpetuity is not necessarily the case, and certainly not an appropriate reason to oppose this amendment.

Congress possesses the authority to propose a constitutional amendment to provide the District with voting rights for federal elective office. Congress took an analogous path in 1960 when it submitted the 23<sup>rd</sup> amendment to the states for ratification, and thus provided for the District's participation in presidential elections through the Electoral College.

Four related points of particular interest to me warrant brief mention here. First, one could argue that it is unconstitutional to provide voting rights in the Senate to a non-State entity such as the District of Columbia, even by purported constitutional amendment. As noted above, article V,

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<sup>5</sup> It should be noted that these conventions, convened for one express purpose, are NOT the omnibus constitutional convention required to be called on application of two-thirds of the state legislatures, a type of convention that some fear would become a "runaway convention" that might rewrite the entire Constitution. *See generally* JAMES L. SUNDERQUIST, CONSTITUTIONAL REFORM AND EFFECTIVE GOVERNMENT 244-45 ( 1986 ).

which sets forth the constitutional amendment process, provides in its last sentence that “no State, without its consent, shall be deprived of its equal suffrage in the Senate.” What exactly does this mean? Does it imply that the constitutional provision concerning the make-up of the Senate is, in effect, unamendable, and that it would take a unanimous vote of the States to ratify a constitutional amendment providing for D.C. voting rights ( without creating a new State ). How such an amendment would be challenged if it were ratified by three fourths, but not all of the states, raises an interesting question to say the least.<sup>6</sup>

Second, in a similar vein, one might argue that the inherent fabric of the Great Compromise includes the core principle that the citizens were represented in the House, and the States-- as States-- were represented in the Senate. Thus, perhaps the District should get a full House vote, but no Senate vote.

If one amends the Constitution in 2002, this 18<sup>th</sup> century principle should not be determinative. It is contrary to most of the modern equal voting rights principles that have evolved over the last half-century, notwithstanding some language in *Bush v. Gore*. Moreover, regardless of whether the principle accurately reflects the original nature of the Union, the concept of a State as a distinct entity apart from its citizens was substantially eroded, if not effectively eliminated, with the passage of the 17<sup>th</sup> amendment in 1913, which provided for the direct election of senators.

Third, providing the District with only one Senate vote -- reflecting another sort of compromise-- would abrogate the constitutional role of the Vice President to break ties. U.S. Const. Art. I, § 3, cl. 4. Although the Vice-President has been called on to break tie senate votes infrequently throughout history, the Vice-President's role as Senate tie breaker is constitutionally

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<sup>6</sup> See Markman, *supra* note 3, at 30-32.

significant nonetheless, and should not be eliminated as an unintended consequence of an apparently unrelated constitutional amendment that would provide for an odd number of senators. The issue should at least be recognized.

Fourth, a Senator from the District of Columbia should recognize the unique aspects of the federal courts of the District of Columbia Circuit, and should be aware that the “normal” Senatorial prerogatives on judicial appointments may not apply. This is because of the presence of some unique jurisdictional grants conferred upon the district courts and the U.S. Court of Appeals for the District of Columbia Circuit. These legislative grants include subject matter jurisdiction over various federal administrative and executive branch agencies. As such, these courts are more national in scope than other federal courts.<sup>7</sup> While different presidents have taken different approaches as to the deference afforded to home state Senator input in the federal judicial selection process, the issue with respect to the role of a Senator from District of Columbia in the federal judicial selection process may warrant *sui generis* treatment.

#### **STATEHOOD**

The arguments for and against D.C. Statehood have been exhaustively debated on numerous occasions and will not be recounted here. It is suffice to say that Statehood raises additional practical and legal complexities that can be avoided with a D.C. Voting Rights amendment discussed above.

One must be realistic about any proposed Statehood alternative. Because of the geographic presence of the federal government as well as its pervasive presence in other matters as well, New

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<sup>7</sup> Not surprisingly, a disproportionate number of present Supreme Court Justices have been elevated from the D.C. Circuit bench ( Justices Ginsburg, Thomas, Scalia ).

Columbia would always have an extensive symbiotic relationship with federal government, even after statehood. To illustrate but one example, virtually all of the foreign embassies would be located in the State of New Columbia. At the very least, this would result in a continuing roaming federal police presence throughout the state. Thus, any quest for true equal footing could lead the federal government to consider whether it should relocate its 10 miles square elsewhere in a more convenient location ( e.g. outside of Denver ).

Congress has the authority to admit a new state into the Union by act of Congress. U.S. Const. Art. IV, § 3, cl. 1. The great weight of authority indicates that Presidential approval is also required. On a few occasions, Statehood has been defeated because of a presidential veto. All of the “defeated” proposed states eventually were admitted.<sup>8</sup>

D.C. Statehood would result in the new state being entitled to proportional representation in the House, and two seats in the United States Senate. However, any Statehood bill for New Columbia would also have to provide for a geographic area remaining that would constitute a greatly reduced “Seat of the Government of the United States,” which is constitutionally required. The

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<sup>8</sup> The power of Congress to admit new states is not an article I legislative power that would obviously require presidential approval. On the other hand, a statehood bill requires concurrence of both houses of Congress, and thus may require Presidential approval under Article 1 § 7, cl. 3. In 1992, the Congressional Research Service concluded that “after the President signs the congressional resolution approving admission, the statehood process is complete.” CRS REPORT TO CONGRESS, STATEHOOD PROCESS OF THE 50 STATES, at 3 ( Oct. 15, 1992 ). Moreover, Presidents Andrew Johnson and William Taft vetoed acts providing for admission of various proposed states. See Luis R. Davila-Colon, *Equal Citizenship, Self-Determination, and the U.S. Statehood Process: A Constitutional and Historical Analysis*, 13 Case. W. Res. L.J. Int’l L. 315, 318 n.21 ( 1981 ). But compare Resolution for the Admission of Missouri, March 2, 1821, reprinted in 1 DOCUMENTS IN AMERICAN HISTORY 227 ( Henry Steel Commanger 10<sup>th</sup> ed. 1988 ) ( stating that Missouri shall be admitted, and that role of President is that he “shall announce the fact [of admission],” arguably implying no discretion in Presidential role ).

Constitution requires that the federal Seat of Government of the United States “not exceed 10 miles square [ 100 square miles ],” but there is no constitutionally required minimum size.<sup>9</sup> This greatly reduced Seat of Government of the United States with a minuscule population would be entitled to three electoral votes in presidential elections as mandated by the 23<sup>rd</sup> amendment.<sup>10</sup>

To avoid this absurdity, the 23<sup>rd</sup> amendment would have to be repealed. Therefore, as a practical matter, D.C. Statehood also requires resort to the constitutional amendment process. However, the states should be compelled to consider for ratification a constitutional amendment in order to eliminate an intentional congressionally created absurdity. Such a scenario is contrary to the purpose of the constitutional amendment process. As Alexander Hamilton observed in *Federalist No. 85*, a proposed amendment to the Constitution that would alter our basic charter of government should face “mature consideration” as to whether the amendment “be thought useful.” To avoid this problem, Congress should choose the politically responsible route-- any proposed statehood legislation should be made contingent upon repeal of the 23<sup>rd</sup> amendment.

D.C. statehood would also impact on the federal courts in the District of Columbia. The present federal courts in the District of Columbia could not simply be redesignated as the federal courts of the State of New Columbia. The State of New Columbia does not require its own Circuit Court of Appeals. No federal circuit court of appeals consists of only one state. Moreover, as noted above, the federal nature of the D.C. Circuit is different from other circuits. The State of New

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<sup>9</sup> U.S. Const. Art. I, §. 8, cl. 17.

<sup>10</sup> Issues relating to the 23<sup>rd</sup> amendment are discussed in Adam H. Kurland, *Partisan Rhetoric, Constitutional Reality and Political Responsibility: The Troubling Constitutional Consequences of Achieving D.C. Statehood by Simple Legislation*, 60 GEO. WASH. L. REV. 475 (1992).

Columbia should be moved into the Fourth Circuit, additional judgeships for the Fourth Circuit should be authorized, and the remaining D.C. Circuit would have to undergo a fundamental reevaluation-- perhaps merging into the already existing Federal Circuit with a corresponding modification of its jurisdictional grant. Also, venue in many cases brought in the federal courts of the District of Columbia is based on acts occurring in Congress, the White House, and various federal agencies as being within the present geographic boundaries of the District of Columbia. If those entities are placed geographically outside of the State of New Columbia and remain in the truncated Seat of Government of the United States, then that geographic fact alone would fundamentally alter the jurisdiction of the local federal courts in New Columbia. In short, DC Statehood would require a substantial restructuring of the local federal courts.

#### CONCLUSION

The U.S. Conference of Mayors recently came out in support of D.C. voting rights. This is a positive indication that the political process quest for D.C. voting rights has moved to the grass roots level-- state by state. If the denial of DC voting rights in the national legislature is so antithetical to the democratic ideals which Americans cherish, a proposed constitutional amendment for DC voting rights should be able to win passage in three fourths of the states. To the extent we Americans wear democratic ideals more openly on our sleeves in the post 9/11 world, that should work in favor of passage. Accordingly, we should not be afraid to "have to" resort to the "inconvenient" and even "difficult" constitutional amendment process. As Abraham Lincoln said, "[a] majority held in restraint by constitutional checks and limitations... is the only true sovereign of a free people."

Nor should we devote substantial time considering the provocative but legislatively unobtainable option of either providing voting rights or a federal tax exemption. As a freedom loving people, Americans-- Democrats, Republicans, and Independents alike-- should cherish and embrace the solemn challenge and opportunity to amend the constitution. This is good not only in some grand "civics lesson" sense, but is good for citizens of DC, the citizens of our nation, and is a shining example to the world.

TESTIMONY OF PROFESSOR JAMIN B. RASKIN,  
WASHINGTON COLLEGE OF LAW, THE AMERICAN UNIVERSITY  
BEFORE THE UNITED STATES SENATE  
COMMITTEE ON GOVERNMENTAL AFFAIRS  
May 23, 2002

Thank you, Mr. Chairman, for this invitation to testify.

Surely Washington does not need to make an elaborate case for democratic representation to America. It is the founding idea of the nation, inscribed in the Declaration of Independence by Thomas Jefferson, who wrote that governments "deriv[e] their just powers from the consent of the governed."

In the Revolutionary War, the rallying cry of "no taxation without representation" unified people of diverse politics. They all despised King George's arrogant disregard for the liberty and sovereignty of the Americans and his theory of "virtual representation," which held that the American colonists were already effectively represented by Members of Parliament chosen by people *just like them* in England.

Our whole political history has been a struggle to perfect the ideal of real democracy, to move a Republic of Christian white male property holders over the age of 21 ever closer to what President Lincoln, standing on the Gettysburg battlefield, called "government of the people, by the people, and for the people."

The Equal Protection command of "one person-one vote" is the modern constitutional expression of this imperative. It began as the slogan of Civil Rights workers challenging the reign of terror in the South. Robert Moses tells us that the cry of "one person, one vote" in 1960 gave "Mississippi sharecroppers and their allies" a principle of "common conceptual cohesion" that was picked up by the Justice Department and embraced by the Warren Court in the redistricting

cases. As Justice Hugo Black wrote in *Wesberry v. Sanders* in 1964, "Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges that right."

The logic of universal suffrage has since swept the world, from Poland to South Africa to Haiti to Chile. But it has not yet come here, to Washington, D.C., the nation's capital where nearly 600,000 loyal, taxpaying, draftable American citizens are disenfranchised and locked out of the body that doubles as their national and state legislature, the body that controls their budget, their taxes, their laws, their participation in wars, their tacit consent to Cabinet officials and Supreme Court appointments.

Washington's political status is unique. We have three kinds of entities in our constitutional structure: *states*, which are permanent units in the nation whose citizens experience both federal taxation and representation; *territories*, potentially transitory units in the nation whose citizens are neither taxed nor represented; and the *District of Columbia*, a permanent part of the country whose residents uniquely face the worst of both worlds: federal taxation without congressional representation. Congresswoman Norton is right to call America's attention to this anomaly.

Washington's disenfranchisement is unique again in the global context. It is the only nation's capital on earth whose citizens are locked out of their national legislature. All others have managed to reconcile security for the government with suffrage for the residents. It is hard to imagine the people of Paris not being represented in the French National Assembly or the people of Mexico City having no voice and vote in the Mexican legislature. The political domination over capital residents here is an unnecessary injury and escalating insult.

This failure of democracy can be traced back to June 21, 1783, when the Continental Congress was meeting in Philadelphia in the Pennsylvania state house. Outside, an unruly crowd of Revolutionary War veterans waiting to get paid for their service threatened to storm the building to confront Pennsylvania's Executive Council, which was meeting on the second floor. When the federal congressmen appealed to the Executive Council to summon the Pennsylvania Militia, the leaders refused. Madison called this incident "disgraceful" and during the constitutional debates a few years later, "the Philadelphia incident became a key exhibit in support of the need for exclusive federal jurisdiction over . . . the seat of federal government."<sup>1</sup>

This was the genesis of the District Clause contained in Article I, Section 8, Clause 17, that grants Congress power "[t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding Ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States."

The purpose of the District Clause was to assure the police security and military defense of the federal district, not to disenfranchise a large population of American citizens yet to be identified in a capital city yet to be located. This would have been an utterly bizarre intention for the Framers who just fought a revolution to vindicate the principle of the consent of the governed.

Indeed, when the federal District was finally sited on the banks of the Potomac in 1791, with Congress accepting cessions of land from Maryland and Virginia,

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<sup>1</sup> Whit Cobb, *Democracy in Search of Utopia: The History, Law and Politics of Relocating the National Capital*, 99 Dick. L. Rev. 530-31 (1995).

residents continued to vote in congressional elections in Maryland and Virginia for the first decade after cession, which is decisive contemporaneous refutation of the proposition that the purpose of the District Clause was to disenfranchise. There is no recorded challenge to this practice, and the first Congress clearly accepted it, which is a fact pregnant with constitutional meaning. The practice ended in 1801 with organization of a local government under the Organic Act when these District residents stopped paying taxes to Maryland and Virginia. But there were even members of the House of Representatives from both Maryland and Virginia whose permanent residences were within the boundaries of the District, both before and after 1800.

The D.C. Corporation Counsel brought a lawsuit in 1998, *Alexander v. Daley*, which pointed out this history of unintended political consequences and argued that the modern one person-one vote guarantee under Equal Protection makes disenfranchisement of Washingtonians unconstitutional today.

By a 2-1 vote, the 3-judge panel rejected the argument and found continuing permission for disenfranchisement in the constitutional structure of exclusively state-based representation in Congress. Nonetheless, the majority observed that there is "a contradiction between the democratic ideals upon which this country was founded and the exclusion of District residents from Congressional representation."<sup>2</sup> It also remarked that none of the parties, including the Justice Department, "contests the justice of the plaintiffs' cause."<sup>3</sup> Yet, the judges in the majority finally accepted the Defendants' argument that the court was powerless to order a change and any relief

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<sup>2</sup> *Alexander v. Daley*, 90 F. Supp 2d 35, 72 (D.D.C. 2000).

<sup>3</sup> *Id.* at 37.

"must come through the political process."<sup>4</sup>

So the ball is now in your court. This could mean three things. First, statehood, which is not on the table today. Second, it might mean a statute conferring full voting rights and congressional representation on D.C. residents: a kind of Voting Rights Act for Washington, which is how I understand H.R. 1193.

Would it be constitutional? To my mind, yes. Congress treats the District explicitly as though it were a state for at least 537 statutory purposes I counted in my *Harvard Civil Rights-Civil Liberties Law Review* article (which I submit for the record),<sup>5</sup> from federal taxation to military conscription to highway funds and education funds to national motor voter registration and so on. Congress and the Supreme Court have treated District residents as residents of a state for *constitutional* purposes as well, from the Full Faith and Credit Clause to diversity jurisdiction under Article III to the trial by jury provisions. So why can't Congress treat the District as though it were a state for the fundamental constitutional purpose of democratic representation?

Certain scholars would invite us to believe that the District Clause gives Congress power to do anything it wants to people in the District except give them voting rights in Congress. Article I and the Seventeenth Amendment must be read, they say, to confine all voting in congressional elections to citizens voting in states or through states (such as overseas citizens).

But this straitjacket approach undermines the idea

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<sup>4</sup> *Id.*

<sup>5</sup> Jamin B. Raskin, *Is This America? The District of Columbia and the Right to Vote*, 34 *Harvard CRCL* 39, 92, n.271 (1999).

of the Constitution as the charter of democratic sovereignty for "we, the people." This seminal phrase should include all of us and certainly *did* include all inhabitants of the lands that would become the District when the Constitution was written. As Justice Kennedy wrote in *U.S. Term Limits v. Thornton* (1995), "The Congress of the United States. . . is not a confederation of nations in which separate sovereigns are represented by appointed delegates, but is instead a body composed of the representatives of *the people*."<sup>6</sup> This echoes Chief Justice John Marshall's statement in *McCulloch v. Maryland* (1819) that, "The government of the union . . . is, emphatically, and truly, a government of the people . . . . Its powers are granted by them, and are to be exercised directly on them, and for their benefit."<sup>7</sup>

Thus, I have no problem in saying that Judge Louis Oberdorfer, the senior and dissenting judge on the three-judge panel in *Alexander v. Daley*, was right. Not only can Congress directly use its ample powers over the District to fully enfranchise the American people living in the District, but it must do so. I am submitting with my statement a thoughtful and intricate defense of the constitutionality of enfranchisement by statute written by two fine lawyers, Walter Smith and Elise Dietrich, who were co-counsel with the D.C. Corporation Counsel and myself in *Alexander v. Daley*.

I understand that there are those, like Professor Kurland, who are attacking a D.C. Voting Rights Act as unconstitutional. Voting rights advocates should indeed be sober about the fact that his constitutional views are more prevalent today on the Supreme Court. Senator Lieberman, you certainly do not need any tutorials about the distinctive judicial activism that has emerged recently to control elections and voting

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<sup>6</sup> 514 U.S. 779, 821 (1995) (emphasis added).

<sup>7</sup> 17 U.S. (4 wheat.) 316, 404-05 (1819).

rights. But, even looking at the broader canvass, a narrow majority on this Court in the past few years has struck down, in whole or in part, the Gun-Free School Zones Act,<sup>1</sup> the Violence Against Women Act,<sup>2</sup> the Religious Freedom Restoration Act,<sup>3</sup> the Brady Handgun Violence Prevention Act,<sup>4</sup> the Fair Labor Standards Act,<sup>5</sup> the Low-Level Radioactive Waste Policy Act,<sup>6</sup> the Age Discrimination in Employment Act,<sup>7</sup> the Endangered Species Act,<sup>8</sup> and Title I of the Americans With Disabilities Act,<sup>9</sup> to name just a few.

How much faith should we have that the Court's majority would accept a D.C. Voting Rights Act as constitutional? I don't know. But all that you need to be certain of as legislators is that you, like Thomas Jefferson, see the Constitution's legitimacy as resting on the consent of the governed and that you are convinced that Congress' powers over the District must be sufficient to effectuate not just the burdens but the basic rights of democratic citizenship.

But there is, finally, the possibility of a constitutional amendment that would explicitly treat the District as though it were a state for purposes of representation. A D.C. Voting Rights *Amendment* would, by definition, be constitutional. However, it would require a two-thirds vote in both houses of Congress and ratification by three-fourths of the states. As an Amendment it would be safe from judicial attack and would be far more durable than a statute, which can be more easily repealed. I recall what happened to Congresswoman Norton's right to vote in the Committee of the Whole, which she won through brilliant parliamentary persuasion only to see the whole thing swept away when the House changed hands and the rule was repealed.

Now, Congresswoman Norton is a professor of constitutional law who has done everything in her power to advance political democracy for Washingtonians within the existing constitutional structure. Her

perseverance and creativity are astounding. I think she understands that the moment may come when current restrictive understandings of the Constitution become an obstacle to democracy and the constitutional amending strategy that was tried in 1978 may have to be revived. That moment has not necessarily arrived yet, and there may indeed be the political will in Congress to pass the statute. The point she brings before America today is that, ultimately, what counts most is not the means but the end--full voting rights and representation for everyone in Washington, which is the birthright of all American citizens, including are her constituents.

When the 1978 Amendment passed Congress by two-thirds in each chamber, a strong bipartisan political consensus formed behind the justice of the cause. Senator Robert Dole said that, "The absence of voting representation for the District in Congress is an anomaly which the Senate can no longer sanction." Senator Strom Thurmond said, and I quote, "We are advocating one man, one vote. We are advocating democratic processes int his country. We have more than 700,000 people in the District of Columbia who do not have voting representation. I think it is nothing but right that we allow these people that representation. We are advocating democratic processes all over the world. We are holding ourselves up as the exemplary Nation that others may emulate in ideas of democracy. How can we do that when three-quarters of a million people are not allowed to have voting representation in the capital city of this Nation?"

The Amendment failed in the states last time when only 16 ratified it. Such a strategy should not be undertaken again unless there is the serious political will on the part of Congress not only to pass the Amendment but to take the cause directly to the state legislatures, which may be tempted to view the amendment in partisan, sectional or racial terms rather than as an historic democratic imperative.

We are obviously in a time of war and national security crisis, but times like these actually have a strong relationship to broadening the circle of democracy. The Revolutionary War established democratic process. The War of 1812 led to the dismantling of the property qualification. The Civil War gave us the 15<sup>th</sup> Amendment and black voting in Reconstruction. World War I led to the 19<sup>th</sup> Amendment and woman suffrage. The Vietnam War led to the 26<sup>th</sup> amendment and 18-year old voting. Times of heightened patriotism are times when people seek democratic expansion and inclusion.

The terrorism of September 11 and the resulting military mobilization have obviously had a profound effect on the capital city and have, in one sense, vindicated the wisdom of the Founders. Congress obviously needs to guarantee the security of the capital city. But the Framers' failure to foresee the democratic deficit that would develop in the nation's capital must now be corrected. And they would want us to do it. For as Thomas Jefferson, who detested the "sanctimonious reverence" some men had for whatever the Founders did, himself put it, "we should avail ourselves of our reason and experience to correct the crude essays of our first and inexperienced councils."

Our whole development as a political nation makes full representation for the people of Washington both necessary and inevitable. Whether by act or amendment, now is the time to do it.

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1. See *United States v. Lopez*, 514 U.S. 549, 561 (1995) (striking the law down as exceeding Congress' Commerce Clause powers).

2. See *United States v. Morrison*, 529 U.S. 598, 609 (2000) (invalidating the law in part as exceeding Congress' Commerce Clause powers).
3. See *City of Boerne v. Flores*, 521 U.S. 507, 532-33 (1997) (striking down the law as exceeding Congress' enforcement powers under the Fourteenth Amendment).
4. See *Printz v. United States*, 521 U.S. 898, 933-34 (1997) (holding unconstitutional the law as an impermissible commandeering of state officials for a federal program).
5. See *Alden v. Maine*, 527 U.S. 706, 758-759 (1999) (invalidating as an abrogation of state sovereign immunity Fair Labor Standards Act provision authorizing private actions against states in state courts).
6. See *New York v. United States*, 505 U.S. 144, 169-70 (1992) (finding unconstitutional in part a law requiring states to regulate waste according to Congress' instructions).
7. See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 72-3 (2000) (holding that the ADEA cannot strip immunity away from the states).
8. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (finding that the environmental groups did not have sufficient standing).
9. See *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 372-73 (2001) (holding that the legislative history of the ADA did not show a pattern of discrimination towards the disabled, thus no obligation of the states 11<sup>th</sup> Amendment immunity from suits from money damages under Title I was supported).

## MEMORANDUM

**TO:** Hon. Eleanor Holmes Norton, District of Columbia Delegate to Congress  
Hon. Anthony Williams, Mayor of the District of Columbia  
Hon. Linda Cropp, Chairman, District of Columbia City Council  
Hon. Robert Rigsby, District of Columbia Corporation Counsel

**FROM:** Walter Smith, Executive Director, DC Appleseed Center  
  
L. Elise Dieterich, Esq.  
Swidler Berlin Shereff Friedman, LLP

**DATE:** May 22, 2002

**RE:** **Congress' Authority to Pass Legislation Giving District of Columbia Citizens Voting Representation in Congress**

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We have been asked by the District of Columbia and by the District of Columbia's Delegate to Congress, the Honorable Eleanor Holmes Norton, to address the question of Congress' authority to provide, by legislation, that citizens of the District of Columbia shall have voting representation in the Congress.<sup>1</sup> The legal precedents relevant to this question are familiar to us, because we represented the District (on a *pro bono* basis) in litigation designed to determine whether the Constitution already requires that District citizens be given voting representation. That litigation, known as *Alexander v. Daley*,<sup>2</sup> was ultimately decided in the United States Supreme Court; it determined that the Constitution does not categorically require that D.C. citizens be given voting representation and, therefore, that the Court lacks authority to provide it.

However, as we will explain, the key court opinion in that litigation made clear that Congress does have authority to grant D.C. citizens voting representation and that there are compelling reasons for Congress to do so. As we will also explain, the *Alexander* decision is consistent with the other relevant legal precedents on the question of Congress' authority over this issue. *Alexander* is furthermore consistent with actions that Congress itself has taken in treating citizens of the District as if they were citizens of a State for other limited purposes under the Constitution. For all these reasons, discussed below, we conclude that Congress has the requisite authority under the Constitution to give D.C. citizens what the Supreme Court has called the most precious right of American citizens. In the Court's words:

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

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<sup>1</sup> The District of Columbia has a non-voting delegate in the House of Representatives, but has never had full voting representation in the House or Senate.

<sup>2</sup> 90 F. Supp. 2d 35 (D.D.C. 2000).  
*Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

vote is undermined.

The half million citizens of the District of Columbia, like citizens of the fifty states, bear all of the obligations of American citizenship: they are required to obey the laws passed by Congress; they pay federal taxes; they serve in the military; and, they fight and die in our wars. Yet, they lack the most basic right that should accompany American citizenship – the right to full voting representation in the Congress. The time is now ripe for Congress to exercise its authority to remedy this longstanding inequity.

#### I. Congress' Broad Authority to Legislate for the District of Columbia

The District of Columbia, the seat of the federal government, was established pursuant to Article I, Section 8, Clause 17 (the so-called "District Clause") of the United States Constitution. That Clause provides:

The Congress shall have power . . . To exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States[.]

The courts have repeatedly emphasized the magnitude of Congress' power under this Clause. It has been held, for example, that Congress may "provide for the general welfare of citizens within the District of Columbia by any and every act of legislation which it may deem conducive to that end." Given the breadth of Congress' power under the District Clause, it would appear that Congress has the authority to provide for the "general welfare" of D.C. citizens by providing them the most important right they as citizens should possess – the right to vote. And in fact, the *Alexander v. Daley* decision confirms that is so.

#### II. The *Alexander v. Daley* Decision

In 1998, a group of District citizens and the District of Columbia brought suit seeking a declaratory judgment that the Constitution commands that District citizens be afforded voting representation in Congress. On March 20, 2000, a three-judge federal court in the District of Columbia decided that case, *Alexander v. Daley*. The court held, by a 2-1 vote, that the Constitution does not require that citizens of the District be given voting representation in Congress. The court based its decision on the fact that Article I of the Constitution gives representation only to "people of the several States" and the District is not a State. On October 16, 2000, the U.S. Supreme Court affirmed this decision. *Alexander* is therefore the governing legal authority on the question whether District residents are constitutionally entitled to voting representation in the Congress; under *Alexander* they are not.

But *Alexander* also constitutes the best, most current legal authority on the

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*Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

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

question whether Congress has legislative power to grant D.C. citizens voting representation; under *Alexander*, Congress does have that power.

The *Alexander* court did not hold that the Constitution precludes District residents from having voting representation. Instead, the Court held only that "this court lacks authority to grant" voting representation. The court furthermore made clear that even though it lacked authority to grant relief, that did not mean plaintiffs were without recourse. The court stated that plaintiffs could seek relief "in other venues," including "through the political process." Indeed, the court specifically noted that counsel for the defendant House of Representatives asserted in the litigation that "only congressional legislation or constitutional amendment can remedy plaintiffs' exclusion from the franchise."

The *Alexander* court's interpretation and application of the relevant judicial precedents is consistent with House counsel's position. Two key precedents relied on by the court were Chief Justice John Marshall's 1805 decision in *Hepburn v. Ellzey*, and Justice Robert Jackson's 1949 plurality opinion in *National Mutual Insurance Co. of District of Columbia v. Tidewater Transfer Company*. It is important to describe those two precedents before explaining how the *Alexander* court applied them.

*Hepburn* was the first Supreme Court decision addressing whether the District of Columbia may be treated as a "State" within the meaning of the Constitution. The case concerned the fact that Article III of the Constitution authorizes the federal courts to hear cases "between citizens of different States." The question in *Hepburn* was whether District of Columbia residents are eligible under this Article III provision to bring suit in federal court. Chief Justice Marshall said they are not, relying primarily on the fact that the District is not a State within the meaning of the clauses of Article I of the Constitution granting congressional representation only to States. He believed that just as the District is not a State under Article I, it also is not a State under Article III.

Nevertheless, Chief Justice Marshall closed his *Hepburn* opinion by noting that: (1) citizens of the District are "citizens of the United States"; (2) they are "subject to the jurisdiction of congress"; (3) it is "extraordinary" that they should be denied rights to which "citizens of every state in the union" are entitled; and (4) this inequity is "a subject for legislative, not for judicial consideration."

Nearly 150 years later Congress addressed the inequity by passing a law, under its District Clause power, treating D.C. citizens as if they were citizens of a State for purposes of federal court jurisdiction. In the *Tidewater* case, the Supreme Court was asked to decide whether this law was valid. The Court held that it was, although the

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90 F. Supp. 2d 35, 72 (emphasis supplied).

*Id.*, at 72, 37.

*Id.*, at 40 (emphasis supplied).

6 U.S. 445 (1805).

337 U.S. 582 (1949).

6 U.S. 445, 453.

Justices had different reasons for reaching that conclusion. The important opinion from *Tidewater* is the plurality decision issued by Justice Jackson, because it is the decision relied on by the *Alexander* court.

Justice Jackson said that the clear implication of Chief Justice Marshall's opinion in *Hepburn* was that Congress had the power under the District Clause to treat the District as if it were a State for purposes of federal diversity jurisdiction. As noted, Chief Justice Marshall said in his opinion that it was "extraordinary" that citizens of the District, which is "subject to the jurisdiction of Congress," do not have the same rights as "citizens of every state in the union," but that this is "a subject for legislative, not for judicial consideration." Justice Jackson interpreted this to mean that "Congress had the requisite power under Art. I [the District Clause]" to address the inequity facing District citizens.

It is true, said Justice Jackson, that Chief Justice Marshall's reference to this being a subject for "legislative" consideration is "somewhat ambiguous, because constitutional amendment as well as statutory revision is for legislative, not judicial, consideration." Even so, Justice Jackson concluded, the better reading of Chief Justice Marshall's opinion is that Congress has power under the District Clause to treat the District as if it were a State. And, in any case, Justice Jackson said, "it would be in the teeth of his language to say that it is a denial of such power." Finally, Justice Jackson said, "congress had acted on the belief that it possesses that power" and Congress' determination is entitled to great deference. This is particularly true given that "congressional power over the District, flowing from Art. I, is plenary in every respect." Thus, the Court in *Tidewater* approved Congress' legislative expansion of federal diversity jurisdiction to embrace the District, notwithstanding the use of the word "State" in Article III.

Based in part on *Tidewater* and *Hepburn*, plaintiffs in the *Alexander* case argued that the court should treat the District as if it were a State under the provisions of Article I giving voting representation to States. The dissenting judge in *Alexander* agreed with this argument. The two-judge majority disagreed, but it disagreed in a way that clearly validated Congress' power to treat the District as if it were a State under Article I.

First, the majority said that *Tidewater* "reconfirmed Marshall's conclusion that the District was not a state within the meaning Article III's grant of jurisdiction to the federal courts, holding instead that Congress had lawfully expanded federal jurisdiction beyond the bounds of Article III by using its Article I power to legislate for the District." Then, and more importantly, the *Alexander* majority declared in the closing section of its opinion that "many courts have found a contradiction between the democratic ideals upon which this country was founded and the exclusion of District residents from

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337 U.S. 582, 589.

*Id.*, at 587.

*Id.*, at 589.

*Id.*, at 603.

*Id.*, at 592.

90 F. Supp. 2d 35, 94-96.

*Id.*, at 54-55 (emphasis supplied).

congressional representation." Yet "it is the Constitution and judicial precedent that create the contradiction" and "that precedent is of particularly strong pedigree." That "pedigree," the *Alexander* majority said, was primarily *Hepburn* and *Tidewater*; to support that view, the *Alexander* majority quoted this passage from *Tidewater*:

Among his contemporaries at least, Chief Justice Marshall was not generally censured for undue literalness in interpreting the language of the Constitution to deny federal power and he wrote from close personal knowledge of the Founders and the foundation of our constitutional structure. Nor did he underestimate the equitable claim which his decision denied to residents of the District . . .

The *Alexander* majority then closed by stating:

Like our predecessors, we are not blind to the inequity of the situation plaintiffs seek to change. But longstanding judicial precedent, as well as the Constitution's text and history, persuade us that this court lacks authority to grant plaintiffs the relief they seek. If they are to obtain it, they must plead their cause in other venues.

Taken together, these statements by the *Alexander* court constitute persuasive legal support affirming the legislative authority of Congress to address the voting inequity described by the court, for the reasons that follow.

In *Hepburn*, Chief Justice Marshall concluded that the District is not a State under Article III, but he strongly implied that this inequity (denial of federal court jurisdiction to District citizens) could be remedied by Congress under the District Clause. *Tidewater* later made express what Chief Justice Marshall had implied – that Congress does have the power under the District clause to give D.C. citizens the same rights that citizens of States have under Article III. Indeed, the Judiciary Committee of the House of Representatives recommended the Act of April 20, 1940, which defined the word "States" as used in the diversity jurisdiction statute to include the District of Columbia, as a "reasonable exercise of the constitutional power of Congress to legislate for the District of Columbia."

*Alexander* now makes clear that Congress may use this same District Clause power to remedy the other inequity identified by Chief Justice Marshall – denial of voting representation to District residents. The *Alexander* court gave its guidance on this issue in essentially the same way as had Chief Justice Marshall; *i.e.*, once the court found that the District was not a State for purposes of Article I, it offered a closing statement regarding the best manner to address that inequity – just as Chief Justice Marshall had done.

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*Id.*, at 72.

*Id.*

*Id.*, at 72 (emphasis supplied) (citing *Tidewater*, 337 U.S. at 586-87).

*Id.*

H.R. Rep. No. 1756, 76<sup>th</sup> Cong., 3d Sess., p. 3.

Thus, in *Hepburn*, Chief Justice Marshall expressed his view that it is "extraordinary" that District citizens should be denied rights available to citizens of every state in the union; the *Alexander* court similarly stated that it was inequitable and contrary to our "democratic ideals" that District citizens are denied the voting representation enjoyed by other U.S. citizens. Likewise, Chief Justice Marshall specifically referenced the fact that citizens of the District are subject to the jurisdiction of Congress, referring to Congress' power under the District Clause; the *Alexander* court, in turn, quoted the passage from *Tidewater* noting that Chief Justice Marshall was reluctant to "deny federal power" regarding District residents, given the "equitable claim" they presented. The "federal power" available to address the "equitable claim," as *Tidewater* explained, is plainly Congress' District Clause authority.

Perhaps most important of all, just as Chief Justice Marshall had noted that the inequity presented in *Hepburn* presented a "subject for legislative" consideration, so too the *Alexander* court noted that District citizens could take their claim to "other venues," including the "political process." Indeed, the *Alexander* opinion is even stronger on this point than was Chief Justice Marshall's opinion because the *Alexander* court specifically referenced Congress' own position that the inequity at issue could be addressed through "congressional legislation or constitutional amendment."

For all these reasons, the recent *Alexander* decision, affirmed by the United States Supreme Court in October 2000, has made clear the authority of Congress under the District Clause to pass legislation treating citizens of the District of Columbia as though they are citizens of a State for purposes of voting representation. Furthermore, although *Alexander* only recently made that authority clear, past actions by Congress and other relevant legal precedents confirm that authority.

### III. Other Authority Confirming Congress' District Clause Power

Beyond *Tidewater* and *Alexander*, there are other examples in which the courts have approved the extension by Congress to District residents of a constitutional protection otherwise applicable only to residents of the states. The most important example is found in the cases construing 42 U.S.C. § 1983, the federal statute implementing the protections of the 14<sup>th</sup> Amendment. In *District of Columbia v. Carter*, the Supreme Court held that, because the 14<sup>th</sup> Amendment does not apply to the District of Columbia, Section 1983 did not apply to District residents. "[T]he commands of the 14<sup>th</sup> Amendment are addressed only to the State or to those acting under color of its authority. . . . [S]ince the District of Columbia is not a 'State' within the meaning of the

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90 F. Supp. 2d 35, 37.  
*Id.*, at 40 (emphasis supplied).  
409 U.S. 418 (1973).  
*Id.*, at 423-24.

14<sup>th</sup> Amendment . . . neither the District nor its officers are subject to its restrictions." For this reason, the Court held, "[I]nclusion of the District of Columbia in § 1983 cannot be subsumed under Congress' power to enforce the 14<sup>th</sup> Amendment but, rather, would necessitate a wholly separate exercise of Congress' power to legislate for the District under [the District Clause]." In response, Congress subsequently enacted legislation, pursuant to its power under the District Clause, making Section 1983 expressly applicable to the District. The validity of that legislation has never been challenged, and the courts have since assumed its applicability in many cases brought under its auspices.

The Supreme Court also has upheld instances where Congress has used its power under the District Clause to extend to District citizens certain burdens of citizenship that, under the Constitution, apply to citizens of "states." The most important example is *Loughborough v. Blake*. In that case, the Supreme Court held that Congress, under the District Clause and in conjunction with its Article I, Section 8 power "to lay and collect taxes," could impose a direct tax on the people of the District, notwithstanding that Article I, Section 2 states that "direct taxes shall be apportioned among the several States." Taken together, these cases confirm that Congress has authority under the District Clause to extend the benefits and burdens of U.S. citizenship to District residents, even where the Constitution applies those benefits and burdens only to citizens of the States.

A final confirmation that Congress has power under the District Clause to give D.C. citizens the vote is the fact that Article IV, Section 3 of the Constitution gives Congress the power to grant all the privileges of statehood – including the vote – by simple legislation. Accordingly, there should be no doubt that Congress also has the lesser power to grant a single attribute of statehood – the right to voting representation in Congress – if it deems that appropriate. As Justice Jackson said in *Tidewater*, when Congress treated the District as a State for purposes of Article III of the Constitution, it was "reaching permissible ends by a choice of means which certainly are not expressly forbidden by the Constitution." And Congress did so in circumstances where "no good reason is advanced" for denying Congress that power. All of this applies equally to Congress' power to treat citizens of the District as if they were citizens of a state under Article I solely for voting purposes.

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*Id.*, at 423-24.

*Id.* at 424 n.9.

*See, e.g., Inmates of D.C. Jail v. Jackson*, 158 F.3d 1357 (D.C. Cir. 1998).  
18 U.S. 317 (1820).

337 U.S. 582, 603.

*Id.*

#### IV. The 1978 Proposed Constitutional Amendment

The only remaining question is whether Congress' power under the District Clause is somehow undermined by the proposed constitutional amendment adopted by Congress in 1978. We do not think it is.

As you know, in 1978, a bi-partisan, two-thirds majority in Congress approved a proposed constitutional amendment, which provided: "For purposes of representation in the Congress . . . the District constituting the seat of government of the United States shall be treated as though it were a State." At that time, there appears to have been consensus that an amendment to the Constitution would be the simplest and most durable remedy to the District's disenfranchisement. Several experts consulted by Congress in connection with the 1978 Amendment argued that Congress could, by simple legislation, enfranchise citizens of the District of Columbia, but took the position that a constitutional amendment would be preferable. Others, including the spokeswoman for the administration of then-President Carter and a task force convened to examine the problem, apparently assumed that, to effectuate a legislative solution to the problem, Congress would exercise its authority pursuant to Article IV, Section 3 of the Constitution to confer full statehood on the District, a step perceived by many as problematic.

The House Judiciary Committee in its report ultimately said: "The committee is of the opinion that the District should not be transformed into a State . . ." Indeed, it seems clear from the record that Congress in 1978 was seeking a solution that would permanently enfranchise District citizens without the possibility of a later legislative reversal, while still maintaining the unique status of the District as the national capital, under federal control. Thus, the Committee concluded, that: "If the citizens of the District are to have voting representation in the Congress, a constitutional amendment is essential; statutory action alone will not suffice. This is the case because provisions for elections of Senators and Representatives in the Constitution are stated in terms of the States, and the District of Columbia is not a State."

Despite this definitive-sounding statement, the Committee was not unanimous in

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*See, e.g., Proposed Constitutional Amendments (H.J. Res. 139, 142, 392, 554, and 565) to Provide for Full Congressional Representation for the District of Columbia: Hearings Before the House Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, 95<sup>th</sup> Cong. 86-100 (1977) (testimony of Peter Raven-Hansen, Attorney at Law, and Herbert O. Reid, Professor of Law, Howard University School of Law).*

*See, e.g., Proposed Constitutional Amendments (H.J. Res. 139, 142, 392, 554, and 565) to Provide for Full Congressional Representation for the District of Columbia: Hearings Before the House Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, 95<sup>th</sup> Cong. 125-126 (1977) (testimony of Patricia Wald, Assistant Attorney General, Office of Legislative Affairs).*

H.R. Rep. No. 95-886, at 4 (1978).

*Id.*; H.R. Rep. No. 94-714, at 4 (1975).

believing that a constitutional amendment was necessary. Representatives Thornton, Hungate, Butler, Hyde, and Kindness filed separate views with the House Judiciary Committee Report on an early version of the proposed constitutional amendment, stating: "[I]t would be desirable for the residents of the District of Columbia to have voting representation in Congress . . . [but] we are not convinced that a constitutional amendment is either wise or necessary. More careful consideration should be given to the possibility that statutory provisions could be used to achieve this goal." Representative Holtzman of the Committee also filed supplemental views, stating that: "the Committee [should] explore the possibility, suggested by Rep. Ray Thornton, of providing the District of Columbia with representation through the normal legislative process."

Taking the record as a whole, we conclude that Congress, confronted with conflicting views on whether legislation would suffice, having heard the recommendation of several experts favoring the permanency of a constitutional amendment, and wishing to avoid debate on whether Congress should confer statehood on the District, determined that the proposed constitutional amendment afforded the most straightforward means to the desired end. It also appears from the record that Congress was confident that the proposed amendment would soon be ratified. The Committee on the Judiciary, in the 1975 report on an early version of the constitutional amendment, stated that:

On June 16, 1960, Congress proposed the 23rd amendment to the Constitution. On April 3, 1961 – less than 1 year later – that amendment was ratified. It represented a national consensus that the District of Columbia was entitled on a permanent basis to participate in the election of the President and Vice President of the United States. Based upon the testimony received by the committee we conclude that there is an equally broad consensus that the denial of representation in the Congress for District citizens is wrong and that correction of this injustice is long overdue.

In 1978, the Committee on the Judiciary, considering the final resolution proposing the constitutional amendment, said: "The committee is of the opinion that the District should not be transformed into a State, and it is confident that this proposed constitutional amendment when submitted to the States will be quickly ratified." As it turned out, however, the proposed constitutional amendment failed to gain the approval of three-fourths of the states within the allotted seven year time period, as required, and was not ratified, leaving District citizens disenfranchised, as they still are today.

We believe there are two points from the 1978 Amendment's legislative history

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H.R. Rep. No. 94-714, at 15 (1975).

*Id.*, at 9.

*Id.*, at 3.

H.R. Rep. No. 95-886, at 4 (1978).

that are relevant to Congress' power now. The first is that there were strong differences of opinion in 1978 whether a constitutional amendment was required, and it is clear that many who supported a constitutional amendment did so because they thought one would be quickly passed and would render a permanent solution to the problem. It is also clear that many believed even in 1978 that Congress had the power to address the problem by simple legislation. The *Alexander* decision has now provided persuasive judicial support for that power. Subsequent experience has also shown that those who believed quick ratification would be forthcoming were mistaken; the fact is that even where a proposed constitutional amendment is supported by an overwhelming majority of the people (which polls show is the case with regard to giving D.C. citizens the vote), obtaining ratification by three fourths of the states is very difficult.

The other important lesson to be drawn from the 1978 Amendment is that the majority view in Congress was then, and presumably still remains, that some means should be found to address the inequity facing D.C. citizens. As Senator Strom Thurmond stated in defense of the passage of the proposed amendment:

I think it is a fair thing to do. We are advocating one man, one vote. We are advocating democratic processes in this country. We have more than 700,000 people in the District of Columbia who do not have voting representation. I think it is nothing but right that we allow these people that representation. We are advocating democratic processes all over the world. We are holding ourselves up as the exemplary Nation that others may emulate in ideas of democracy. How can we do that when three-quarters of a million people are not allowed to have voting representation in the capital city of this Nation?

As Senator Dole similarly stated:

The absence of voting representation for the District in Congress is an anomaly which the Senate can no longer sanction. It is an unjustifiable gap in our scheme of representative government -- a gap we can fill this afternoon by passing this resolution.

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It seems clear that the framers of the Constitution did not intend to disenfranchise a significant number of Americans by establishing a Federal District. I believe that the framers would have found the current situation offensive to their notions of fairness and participatory government.

The *Alexander* decision has confirmed the correctness of these statements by Senators Thurmond and Dole. As noted, that decision declared that there is "a contradiction between the democratic ideals upon

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*Metro in Brief*, Wash. Post, April 13, 2000, at B3.

124 Cong. Rec. 27,253 (1978).

124 Cong. Rec. 27,254-55 (1978).

which this country was founded and the exclusion of District residents from Congressional representation." And, most importantly, the *Alexander* decision demonstrates that Congress has authority to correct this contradiction and include District residents in our democracy.

#### Conclusion

The *Alexander* decision, affirmed by the United States Supreme Court, has made clear that Congress has legislative authority to give voting representation to the citizens of the Nation's capital. That court has also confirmed Congress' own stated view that denial of that voting representation is a serious inequity that should be corrected. Now that Congress' authority has been established, it seems appropriate that Congress should act expeditiously to correct the inequity.

State of Illinois  
92nd General Assembly  
Legislation

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92\_HR0390

LRB9209062RRrh

HOUSE RESOLUTION

1  
2 WHEREAS, The Constitution of the United States is the  
3 blue print for the oldest and strongest democratic government  
4 in the world; and

5 WHEREAS, The people of the State of Illinois continue to  
6 uphold the principles of liberty and democracy, and to  
7 support the striving others in pursuit of those ideals; and

8 WHEREAS, The more than one half million citizens of the  
9 District of Columbia are disenfranchised and are unique in  
10 that they lack voting representation in the United States  
11 Congress while proudly and willingly shouldering the full  
12 responsibilities of the United States citizenship; and

13 WHEREAS, This disenfranchisement of the citizens of the  
14 Nation's Capitol is contrary to the spirit of liberty and  
15 democracy and absolutely in violation of the values on which  
16 the United States was founded; and

17 WHEREAS, The State of Illinois and the people of the  
18 State it represents hereby voice their support for the  
19 citizens of the District of Columbia and for the principle  
20 that all American citizens shall elect and be represented by  
21 voting representatives in the national legislature; and

22 WHEREAS, The citizens of the District of Columbia, like  
23 citizens from any state, should have the right to elect  
24 representatives to both houses of the United States Congress;  
25 therefore, be it

26 RESOLVED, BY THE HOUSE OF REPRESENTATIVES OF THE  
27 NINETY-SECOND GENERAL ASSEMBLY OF THE STATE OF ILLINOIS, that  
28 we encourage legislatures throughout this nation to express  
29 support for the people of the District of Columbia in their  
30 campaign to right an historic wrong and realize fully the  
31 promise of American democracy; and be it further

-2- LRB9209062RRrh

1 RESOLVED, That suitable copies of this resolution be  
2 presented to each member of the Illinois congressional  
3 delegation.

[ 3 ]

Resolution

*WHEREAS*, Chicago is the city that works, proclaiming the right of all people to participate in their own government; and

*WHEREAS*, The Constitution of the United States, the blue print for the oldest and strongest democratic government in the world; and

*WHEREAS*, The people of the City of Chicago continue to uphold the principles of liberty and democracy, and to support the striving others in pursuit of those ideals; and

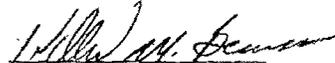
*WHEREAS*, The more than one half million citizens of the District of Columbia are disenfranchised and are unique in that they lack voting representation in the United States Congress, while proudly and willingly shouldering the full responsibilities of the United States citizenship; and

*WHEREAS*, This disenfranchisement of the citizens of the Nations's Capital is contrary to the spirit of liberty and democracy, and absolutely in violation of the values on which the United States was founded; and

*WHEREAS*, The City Council of Chicago, and the people of the city it represents, hereby voice their support for the citizens of the District of Columbia, and for the principle that all American citizens shall elect and be represented by voting representatives in the national legislature; and

*WHEREAS*, the citizens of the District of Columbia, like citizens from any state, should have the right to elect representatives to both houses of the United States Congress; and

*THEREFORE BE IT RESOLVED*, That the City Council of Chicago hereby encourages legislatures through out this Nation to express support for the people of the District of Columbia in their campaign to right an historic wrong and realize fully the promise of American democracy.

  
William M. Beavers  
Alderman-7th Ward



CITY OF PHILADELPHIA  
CITY COUNCIL

RESOLUTION

Supporting the citizens of the District of Columbia in their efforts to gain voting representation in the United States Congress.

WHEREAS, Philadelphia is the cradle of American democracy, from which sprang the Declaration of Independence, proclaiming the right of all people to participate in their own government; and the Constitution of the United States, the blueprint for the oldest and strongest democratic government in the world; and

WHEREAS, The people of the City of Philadelphia continue to uphold the principles of liberty and democracy, and to support the striving of others in pursuit of those ideals; and

WHEREAS, The more than one half million citizens of the District of Columbia are disenfranchised, and are unique in that they lack voting representation in the United States Congress, while proudly and willingly shouldering the full responsibilities of United States citizenship; and

WHEREAS, This disenfranchisement of the citizens of the Nation's Capital is contrary to the spirit of liberty and democracy, and absolutely in violation of the values on which the United States was founded; and

WHEREAS, The Council of the City of Philadelphia, and the people of the city it represents hereby voice their support for the citizens of the District of Columbia, and for the principle that all American citizens shall elect and be represented by voting representatives in the national legislature: now therefore

RESOLVED, BY THE COUNCIL OF THE CITY OF PHILADELPHIA, That the citizens of the District of Columbia, like citizens from any state, should have the right to elect representatives to both houses of the United States Congress.

RESOLVED, That this Council hereby encourages legislatures throughout this Commonwealth and the Nation, express support for the people of the District of Columbia in their campaign to right an historic wrong and realize fully the promise of American democracy.

COUNCILMAN BRIAN J. O'NEILL  
COUNCILWOMAN MARIAN B. TASCIO  
March 1, 2001

CITY OF BALTIMORE  
 COUNCIL BILL 01-0399  
 (Resolution)

Introduced by: President Dixon, Councilmembers Handy, Young, Branch, Garey,  
 Rawlings Blake, Reisinger, Welch, Harris, Cain, Gaddy, Pugh, Holton, Curran, Mitchell,  
 Stukes  
 Introduced and adopted: April 3, 2001

A COUNCIL RESOLUTION CONCERNING

1 In Support of Congressional Representation for Washington, D.C.

2 FOR the purpose of supporting the citizens of the District of Columbia in their efforts to gain  
 3 federal voting representation and respectfully urging the Maryland Delegation to the 107<sup>th</sup>  
 4 United States Congress to actively support this initiative.

5 Recitals

6 The 570,000 residents of the nation's capital have all the burdens of citizenship. They pay  
 7 taxes, must abide by federal laws, and are subject to the military draft. Unlike other American  
 8 citizens, however, they do not have a voting member of the United States Congress to represent  
 9 their interests. D.C. residents elect a delegate to serve in the House of Representatives, but that  
 10 delegate does not have a vote on the House floor.

11 District of Columbia residents have been trying for years to get the voice they are denied.  
 12 Historically, a proposal for statehood has not gained sufficient backing to become a reality. Most  
 13 recently, in October 2000, a special panel of 3 federal judges ruled by a 2 - 1 vote that although  
 14 there may be " a contradiction between the democratic ideals upon which this country was  
 15 founded and the exclusion of the District of Columbia from congressional representation", the  
 16 contradiction originated in the Constitution and falls under the purview of Congress, not the  
 17 courts.

18 A national poll taken last year found that 72% of respondents supported granting D.C. full  
 19 representation in Congress, and the case for statehood can be fairly compelling. The City's  
 20 population is larger than that of Wyoming and is as large as that of Alaska, South Dakota, and  
 21 Vermont. The District is already treated like a state for hundreds of purposes, with the federal  
 22 government and individual states legally recognizing its birth certificates and marriage licenses.  
 23 It has its own flag and a name ready if it should be granted statehood: New Columbia.

24 December 1, 2000, was the 200<sup>th</sup> anniversary of when the District became the seat of the  
 25 federal government. On that date, Congress took control of this jurisdiction, and that is when its  
 26 citizens lost their voting rights in Congress. On February 2, 1801, 204 residents exercised their  
 27 First Amendment right to petition the government for redress of grievances, by signing a petition  
 28 asking Congress for representation and home rule.

29 On March 29, 1961, the 23<sup>rd</sup> Amendment gave Washingtonians the right to vote for president.  
 30 It seems fitting that Congress's bicentennial gift to D.C. residents should be to return in 2001 the  
 31 other votes it took away 200 years ago.

EXPLANATION: Underlines indicates matter added by amendment.  
 Strikethrough indicates matter deleted by amendment.

**Council Bill 01-0399**

1       **NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF BALTIMORE,** That  
2 Baltimore City citizens support the citizens of the District of Columbia in their efforts to gain  
3 federal voting representation and respectfully urge the Maryland Delegation to the 107<sup>th</sup> United  
4 States Congress to actively support this initiative.

5       **AND BE IT FURTHER RESOLVED,** That a copy of this Resolution be sent to the Governor, the  
6 Mayor of Baltimore, the Mayor of Washington, D.C., the members of the District of Columbia  
7 Council, the members of the Maryland Delegation to the 107<sup>th</sup> United States Congress, the  
8 Executive Director of the Mayor's Office of State Relations, and the Mayor's Legislative Liaison  
9 to the City Council.

**MAYOR MARTIN O'MALLEY**  
**DESIGNATING JANUARY 23, 2002**

**AS**

**"DISTRICT OF COLUMBIA DAY"**

**WHEREAS,** the citizens of Baltimore are proud to join with the members of City Council and the citizens of the District of Columbia on the occasion of the resolution of City Council Bill 01-0399 on January 23, 2002; and

**WHEREAS,** the 570,000 residents of the nation's capital have all the burdens of citizenship, they pay taxes, must abide by federal laws and are subject to the military draft, and unlike other American citizens, however, they do not have a voting member of the United States Congress to represent their interests and D.C. residents elect a delegate to serve in the House of Representatives, but the delegate does not have a vote on the House floor; and

**WHEREAS,** December 1, 2000, was the 200<sup>th</sup> Anniversary of when the District became the seat of the federal government and on that date, Congress took control of their jurisdiction, and that is when its citizens lost their voting rights in Congress and on February 2, 1801, 204 residents exercised their First Amendment right to petition the government for redress of grievances, by signing a petition asking Congress for representation and home rule; and

**WHEREAS,** on March 29, 1961, the 23<sup>rd</sup> Amendment gave Washingtonians the right to vote for president, it seems fitting that Congress's bicentennial gift to D.C. residents should be to return in 2001 the other votes it took away 200 years ago; and

**WHEREAS,** it is fitting that the citizens of Baltimore are proud to join with the residents of the District of Columbia on the occasion of their resolution of Council Bill 01-0399.

**NOW, THEREFORE, I, MARTIN O'MALLEY, MAYOR OF THE CITY OF BALTIMORE,** do hereby proclaim January 23, 2002 as "DISTRICT OF COLUMBIA DAY" IN BALTIMORE, and do urge all citizens to join in this celebration.



**IN WITNESS WHEREOF,** I have hereunto set the Great Seal of the City of Baltimore to be affixed this twenty-third day of January, two thousand two.

RESOLUTION

~~Supporting the citizens of the District of Columbia in their efforts to gain voting representation in~~

*WHEREAS*, As Mayor of New Orleans, I have worked to proclaim the rights of all people to participate in government through voting registration, budgetary and legislative autonomy; and

*WHEREAS*, As Mayor of the City of New Orleans, I strive to uphold the principles of the Constitution of the United States, of liberty and democracy, and to support the striving of others in pursuit of those ideals; and

*WHEREAS*, While proudly and willingly shouldering the full responsibilities of the United States citizenship, more than one half million citizens of the District of Columbia are disenfranchised and are unique in that they lack voting representation in the United States Congress; and

*WHEREAS*, This disenfranchisement of the citizens of the Nation's Capital is contrary to the spirit of liberty and democracy, and indisputably in violation of the values on which the United States was founded; and

*WHEREAS*, As Mayor of the City of New Orleans, I hereby voice my support for the citizens of the District of Columbia, and for the principle that all American citizens shall elect and be represented by voting representatives in the national legislature; and

*WHEREAS*, The citizens of the District of Columbia, like citizens from any state, should have the right to elect representatives to the House of Representatives and the United States Congress; and

**THEREFORE BE IT RESOLVED**, As Mayor, I hereby encourage legislatures through out this Nation to express support for the citizens of the District of Columbia in their campaign to right an historic wrong and realize fully the promise of American democracy.



A handwritten signature in cursive script, appearing to read "Marc H. Morial".

Marc H. Morial  
Mayor

**RESOLUTION NO. 743-02** ~~Urging the United States Congress to~~  
 Councilmembers Jackson, recognize the constitutional right of the citizens  
 Conwall, and Jones of the District of Columbia to have full  
 representation in the United States House of  
 Representatives and the U.S. Senate.

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WHEREAS, Washington City, Washington County and Georgetown were merged into Washington, District of Columbia in 1871; and

WHEREAS, the District of Columbia is treated as a state in over 500 federal laws; and

WHEREAS, the 570,000 citizens of the District of Columbia pay approximately \$5 billion annually in local tax revenues, plus \$2.5 billion in federal taxes; and

WHEREAS, Washington D.C.'s local budget is paid for by its own local taxpayers despite the fact that 41% of its land is used by the federal government and cannot be taxed, and services provided to the federal government are not reimbursed except under extraordinary circumstances; and

WHEREAS, the congressional delegate who represents the District of Columbia has the same responsibilities and the same privileges as other members of the United States House of Representatives but cannot vote on the House floor, and further, the District of Columbia does not have any representation in the United States Senate; and

WHEREAS, the United States Congress can override any local ordinance or resolution passed by the District of Columbia City Council; and

WHEREAS, this Council of the City of Cleveland strongly believes that the disenfranchisement of the citizens of this nation's capital is contrary to the spirit of liberty and democracy upon which the United States was founded; and

WHEREAS, this resolution constitutes an emergency measure providing for the immediate preservation of the public safety, welfare and health; now therefore,

BE IT RESOLVED BY THE COUNCIL OF THE CITY OF CLEVELAND:

Section 1. That this Council of the City of Cleveland supports the full rights of citizenship for the residents of the District of Columbia and urges the members of Congress to grant the residents of the District of Columbia the right to elect representatives to both houses of the United States Congress.

Section 2. That the Clerk of Council is hereby requested to transmit a copy of this resolution to President Bush and the members of the Cleveland area congressional delegation.

Section 3. That this resolution is hereby declared to be an emergency measure and, provided it receives the affirmative vote of two-thirds of all the members elected to Council, it shall take effect and be in force immediately upon its adoption and approval by the Mayor; otherwise it shall take effect and be in force from and after the earliest period allowed by law

**IN COMMITTEE**

**RESOLUTION**

**DRAFT**

WHEREAS, any official position of the City of Los Angeles with respect to legislation, rules, regulations or policies pending before a local, state, or federal government body or agency must have first been adopted in the form of a Resolution by the City Council with the concurrence of the Mayor; and

WHEREAS, the United States of America was a signatory on the 1948 United Nations Universal Declaration of Human Rights which includes a commitment to "universal and equal suffrage" in Article 21; and

WHEREAS, the United States of America subsequently adopted the 1966 United Nations International Covenant on Civil and Political Rights which assures that every citizen shall have the right to vote in Article 26; and

WHEREAS, the 23<sup>rd</sup> Amendment to the Constitution was ratified in 1961 recognizing the importance of the representation and participation of residents of the District of Columbia in the election of the President and Vice-President; and

WHEREAS, the District of Columbia contains over 500,000 residents that continue to lack voting representation in the United States Congress while continuing to shoulder the full burdens and responsibilities of fully enfranchised citizens from throughout the fifty states; and

WHEREAS, the historical and political significance of the District of Columbia as the capitol of the nation should not take precedence over the intrinsic rights and values of liberty and democracy that compose the foundation of our nation's structure; and

WHEREAS, there exists an array of options to alleviate the Congressional disenfranchisement of the residents of the District of Columbia including retrocession of the majority of the District to an existing State or the conference of direct statutory enfranchisement.

NOW, THEREFORE, BE IT RESOLVED, that by adoption of this Resolution, with the concurrence of the Mayor, the City of Los Angeles hereby expresses its SUPPORT for the residents of the District of Columbia in their efforts to garner full representation in the United States Congress and requests that the full California Congressional Delegation receive a correspondence indicating this position.

THEREFORE BE IT FURTHER RESOLVED, that by adoption of this Resolution, with the concurrence of the Mayor, the City of Los Angeles hereby urges the United States House of Representatives and Senate to initiate immediate legislative action to achieve an equitable solution to afford full representation for the residents of the District of Columbia.

PRESENTED BY: \_\_\_\_\_  
Mark Ridley-Thomas  
Councilmember, Eighth District

SECONDED BY: \_\_\_\_\_

FILE NO.

RESOLUTION NO.

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Resolution urging the United States Congress to recognize the District of Columbia's constitutional right to basic democracy, through voting representatives, by granting full voting rights to the citizens of the District of Columbia.

WHEREAS, Washington City, Washington County, and Georgetown were merged into Washington, District of Columbia in 1871; and,

WHEREAS, The District of Columbia is responsible for the functions of a city, county, and state including, but not limited to driver licensure, insurance and securities regulation, workers' and unemployment compensation, food and drug inspection, weights and measures, operation of a district police force and a district school system; and,

WHEREAS, The District of Columbia is treated as a state in over 500 federal laws; and

WHEREAS, The 570,000 citizens of the District of Columbia pay approximately \$5 billion annually in local tax revenues, plus \$2.5 billion in federal taxes; and,

WHEREAS, The federal government uses all the District of Columbia's services, but exempts itself, foreign embassies, and others from taxes (41% of the District of Columbia's property), and does not provide payment in lieu of taxes; and,

WHEREAS, The District of Columbia does not have a voting delegate in the House of Representatives or the US Senate; and,

WHEREAS, The United States Congress can override any local ordinance or resolution passed by the District of Columbia City Council; and,

WHEREAS, The per capita federal tax burden for the District of Columbia's residents is second only to Connecticut's; and,

1 WHEREAS, The District of Columbia has a higher Gross State Product (GSP) than 14  
2 states according to the U.S. Department of Commerce Bureau of Economic Analysis, 1997;  
3 and,

4 WHEREAS, The state of Wyoming, despite having a population smaller than that of the  
5 District of Columbia's and paying less per capita in federal income taxes, has one voting  
6 member in the House of Representatives and two voting members in the Senate; and,

7 WHEREAS, Article 25 of the International Covenant on Civil and Political Rights,  
8 ratified by the U.S. Congress and signed by the President, guarantees the right to equal  
9 suffrage and participation in national government through elected representatives; and,

10 RESOLVED, That the San Francisco Board of Supervisors opposes taxation without  
11 representation and urges the United States Congress to recognize the District of Columbia's  
12 constitutional right to basic democracy, through voting representatives, by granting full voting  
13 rights to the citizens of Washington, DC in both the House of Representatives and the US  
14 Senate; and, be it

15 FURTHER RESOLVED, That a copy of this resolution be sent to the District of  
16 Columbia's non-voting Representative Ray Brown at the US House of Representatives.

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IN MEMORIAM

Judge A. Leon Higginbotham, Jr.'s Civil Rights Legacy

*Charles J. Ogletree, Jr.*

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RECENT PUBLICATION

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

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*Jamin B. Raskin\**

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

—Thomas Paine<sup>1</sup>

This District had been a part of the States of Maryland and Virginia. It had been subject to the Constitution, and was a part of the United States. The Constitution had attached to it irrevocably. There are steps which can never be taken backward. . . . The mere cession of the District of Columbia to the Federal government relinquished the authority of the states, but it did not take it out of the United States or from under the aegis of the Constitution.

— Justice Sutherland, *O'Donoghue v. United States*<sup>2</sup>

No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.

— Justice Black, *Wesberry v. Sanders*<sup>3</sup>

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

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

<sup>1</sup> THOMAS PAINE, *THE AMERICAN CRISIS*, NUMBER ONE (R. Carlile 1819).

<sup>2</sup> 289 U.S. 516, 541 (1933) (quoting *Downes v. Bidwell*, 182 U.S. 244, 260–61 (1901)).

<sup>3</sup> 376 U.S. 1, 17–18 (1964).

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

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

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

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

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

<sup>6</sup> 18 U.S. (5 Wheat.) 317, 324 (1820).

<sup>7</sup> See also *Heald v. District of Columbia*, 259 U.S. 114, 124 (1922) (affirming the dis-

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

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

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

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

<sup>9</sup> U.S. CONST. art. I, § 8, cl. 17.

<sup>10</sup> See discussion *infra* Part II.B.

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

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

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

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

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

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

<sup>13</sup> KEELEY, *supra* note 5, at 58.

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

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

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

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

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

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

1. Denial of representation in Congress burdens the equal protection and due process rights of American citizens in the District to be popularly represented in Congress on the basis of one person—one vote without regard to geographic residence, a right established in *Wesberry v. Sanders*<sup>18</sup> and subsequent voting rights jurisprudence, as well as the correlative right to run for Congress;
2. Denial of representation in Congress burdens the right of American citizens living in the District to be represented in their own state legislature, which is Congress itself, on the basis of one person—one vote without regard to geographic residence, a right established in *Reynolds v. Sims*,<sup>19</sup> as well as their correlative right to run for state legislature;
3. Denial of representation in Congress to the sixty-six-percent-majority–African American population in the District not only suggests a

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

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

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

*Id.*

<sup>18</sup> 376 U.S. 1 (1964).

<sup>19</sup> 377 U.S. 533 (1964).

belief in the unfitness of the population to participate equally in national life but creates the kind of “uncomfortable resemblance to political apartheid” that the Supreme Court condemned and invalidated in *Shaw v. Reno*.<sup>20</sup>

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

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

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

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

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

<sup>20</sup> 509 U.S. 630, 647 (1993).

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

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

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

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

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

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

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

*Id.*

<sup>23</sup> *United States v. Cohen*, 733 F.2d 128, 146 (D.C. Cir. 1984) (Mikva, J., concurring).

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

<sup>25</sup> U.S. CONST. art. I, § 8, cl. 17.

<sup>26</sup> 127 U.S. 540 (1888).

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

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

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

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

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

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

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

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

<sup>28</sup> *O’Donoghue v. United States*, 289 U.S. 516, 540 (1933) (finding that, unlike territorial courts, the local courts of the District of Columbia are Article III courts for constitutional purposes).

<sup>29</sup> *Id.* at 541 (quoting *Downes v. Bidwell*, 182 U.S. 244, 260–61 (1901)).

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

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

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

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

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<sup>31</sup> The Fourteenth Amendment provides that “nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV.

<sup>32</sup> 347 U.S. 497 (1954).

<sup>33</sup> 347 U.S. 483 (1954).

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

<sup>35</sup> *Id.* (quoting *Gibson v. Mississippi*, 162 U.S. 565, 591 (1896)).

<sup>36</sup> *See, e.g.,* *Washington v. Davis*, 426 U.S. 229 (1976); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

<sup>37</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

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

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

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

The Reconstruction Amendments brought democratic equality into the heart of the Constitution, replacing the white man's compact of *Dred Scott v. Sandford*<sup>43</sup> with a document that belongs to all the people, at least all the citizens within the definition of the Fourteenth Amendment. This revolution enabled the Warren Court a century later to tear down racial franchise barriers. The idea of a living democratic constitutionalism in service of popular liberty now pervades the philosophy of the Court. Consider Justice O'Connor's stirring words from her opinion in *Planned Parenthood v. Casey*:

Our Constitution is a covenant running from the first generation of Americans to us and then to future generations. It is a coherent succession. Each generation must learn anew that the Constitution's written terms embody ideas and aspirations that must survive more ages than one. We accept our responsibility not to retreat from interpreting the full meaning of the covenant in light of all of our precedents.<sup>44</sup>

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<sup>39</sup> 17 U.S. (4 Wheat.) 316, 404-05 (1819).

<sup>40</sup> The theory of "compact" was advanced by the seceding states during the Civil War. They argued that the nation was nothing more than a confederation of "sovereign states" bound only by a pact from which each could withdraw at will. See generally GARY WILLS, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA (1992).

<sup>41</sup> *Id.* at 145 (quoting Abraham Lincoln's Gettysburg Address).

<sup>42</sup> *Id.*

<sup>43</sup> 60 U.S. (19 How.) 393 (1857).

<sup>44</sup> 505 U.S. 833, 901 (1992).

Because citizenship and its attendant liberties are a birthright under the Constitution,<sup>45</sup> because Congress can make neither slaves nor nobility here,<sup>46</sup> and because “the people” are the sovereign constituting authority, equality of voting rights among citizens is inherent, inalienable and indispensable.

The organizing theme of the following three doctrinal inquiries is that American citizens who live in the District belong to the constitutional community which ratified and, at least hypothetically, continues to renew its consent to our Constitution. Washingtonians have never surrendered their place as members of the constitutional community and must be considered equal members of it. The vast majority of Washingtonians are citizens of the United States,<sup>47</sup> members of the constitutional “people” whose voting rights are not optional but mandatory under the Constitution.<sup>48</sup> In the past, suffrage expansion has occurred following political and military struggle, both through constitutional amendments and as a result of active judicial intervention. Throughout the twentieth century, the Supreme Court has repeatedly removed barriers to enfranchisement, even when these barriers were thought for generations to be perfectly natural or necessary. The Court has invalidated grandfather clauses,<sup>49</sup> exclusionary white primaries,<sup>50</sup> state poll taxes,<sup>51</sup> restrictions on the voting rights of citizens serving in the armed services,<sup>52</sup> unnecessarily long residency requirements,<sup>53</sup> disenfranchisement of citizens living on federal enclaves,<sup>54</sup> prohibitively high candidate filing fees,<sup>55</sup> malapportioned leg-

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<sup>45</sup> See U.S. CONST. amend. XIV.

<sup>46</sup> The Thirteenth Amendment bans “slavery” and “involuntary servitude” in the United States. U.S. CONST. amend. XIII, § 1. Article I prevents both Congress and the states from granting “any title of Nobility.” U.S. CONST. art. I, §§ 9–10.

<sup>47</sup> For a demographic breakdown of the District population, see BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, 1990 CENSUS OF POPULATION, SOCIAL AND ECONOMIC CHARACTERISTICS, DISTRICT OF COLUMBIA (1993).

<sup>48</sup> See U.S. CONST. art. IV, § 4 (the Republican Guaranty Clause); amend. V (protecting life, liberty and property against deprivation without due process); amend. IX (stating that enumeration of certain rights does not deny other rights retained by “the people”); amend. XIV (establishing equal protection for all persons); amend. XV (protecting the rights of “citizens” from racial disenfranchisement); amend. XIX (protecting the rights of “citizens” to vote regardless of sex); amend. XXIII (creating a mechanism for District residents to vote in presidential elections); amend. XXIV (prohibiting denial to “citizens” of the right to vote on grounds of failure to pay a poll tax or any other kind of tax); amend. XXVI (protecting the right of all “citizens,” at least 18 years old, to vote).

<sup>49</sup> See *Guinn v. United States*, 238 U.S. 347 (1915).

<sup>50</sup> See *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927).

<sup>51</sup> See *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966).

<sup>52</sup> See *Carrington v. Rash*, 380 U.S. 89 (1965).

<sup>53</sup> See *Dunn v. Blumstein*, 405 U.S. 330 (1972).

<sup>54</sup> See *Evans v. Corman*, 398 U.S. 419 (1970).

<sup>55</sup> See *Bullock v. Carter*, 405 U.S. 134 (1972).

islative districts,<sup>56</sup> and gerrymandered districts with majority-minority populations.<sup>57</sup>

These cases are not random or scattershot. They reflect a trajectory of progressive political inclusion that has transformed the original republic of "Christian white men of property."<sup>58</sup> Alexis de Tocqueville saw and understood this dynamic of constant progress toward the ideal of one person-one vote and universal adult suffrage. He wrote that "[t]here is no more invariable rule in the history of society: The further electoral rights are extended, the greater is the need for extending them: for after each concession the strength of democracy increases, and its demands increase with its strength."<sup>59</sup>

However natural, fixed, or structurally determined we may think the regime imposed on the District to be, it is completely contrary to this constitutional dynamic. In the words of Kenneth Karst, "[t]he substantive core of the [fourteenth] amendment, and of the equal protection clause in particular, is a principle of equal citizenship, which presumptively guarantees to each individual the right to be treated by the organized society as a respected, responsible, and participating member."<sup>60</sup>

A. *The Denial of Congressional Representatives to the District Burdens its Residents' Right to Be Represented in Congress on the Basis of One Person-One Vote as well as the Right to Run for Congress*

The one person-one vote principle is the heart of modern voting rights jurisprudence. The question is whether it extends to citizens living in the District. The original formulation of the doctrine in *Wesberry v. Sanders* in 1964 was that each citizen must have an equal voice in choosing members of the United States House of Representatives without respect to geographic residence.<sup>61</sup> The Court struck down a Georgia statute that malapportioned House districts to such an extent that certain urban districts had up to three times as many voters within them as rural districts and thus one-third of their rightful influence.<sup>62</sup> The logic of this ruling was that representation in Congress is a right that belongs to the people, not the states, and that government may not use political geogra-

<sup>56</sup> See *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964).

<sup>57</sup> See *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993).

<sup>58</sup> Christopher Collier, *The American People as Christian White Men of Property: Suffrage and Elections in Colonial and Early National America*, in *VOTING AND THE SPIRIT OF AMERICAN DEMOCRACY* 19 (Donald W. Rogers ed., 1992).

<sup>59</sup> 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 10 (Philips Bradley ed. & Henry Reeve trans., Knopf 1946) (1840).

<sup>60</sup> Kenneth L. Karst, *Foreword: Equal Citizenship: Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 4 (1977).

<sup>61</sup> See *Wesberry*, 376 U.S. at 7-8.

<sup>62</sup> See *id.* at 7.

phy or cartography to dilute the representation of the people, much less to rope off an entire community of Americans from the franchise.<sup>63</sup>

The Court rejected Georgia's argument that there were no constitutional problems with imbalanced district populations so long as the state itself maintained the proper level of representation in Congress.<sup>64</sup> It was not Georgia *the state* which had a right to representation in Congress, but the *American citizens* living in Georgia. Justice Black, writing for the Court, found that denying citizens not only a vote but an equally potent vote for their representatives contradicted the principle of popular representation:

To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected "by the People" . . . it was *population* which was to be the basis of the House of Representatives.<sup>65</sup>

To define "population" as the basis of representation in the House "means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."<sup>66</sup> Therefore, the Court made it clear that in territorial districting, the Constitution does not tolerate any discrimination against voting rights based on a citizen's place of residence or geographic location. Describing the Constitutional Convention, Justice Black found that "[o]ne principle was uppermost in the minds of many delegates: that, no matter where he lived, each voter should have a voice equal to that of every other in electing members of Congress."<sup>67</sup>

The principle of popular representation on the basis of one person-one vote requires serious attention to the effect of voting arrangements not only on individuals but on political minorities. As the Court put it in *Gomillion v. Lightfoot*, "[t]he [Fifteenth] Amendment nullifies sophisticated as well as simple modes of discrimination."<sup>68</sup> In *Davis v. Bandemer*, which involved a challenge by Democrats in Indiana to a Republican gerrymander of state legislative districts, the Court found claims of systematic group vote dilution justiciable and held that an equal protection violation exists "where the electoral system substantially disadvantages certain voters in their opportunity to influence the political process

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<sup>63</sup> See *id.* at 13-14.

<sup>64</sup> See *id.* at 14 ("The House of Representatives, the [Constitutional] Convention agreed, was to represent the people as individuals, and on the basis of complete equality for each voter.").

<sup>65</sup> *Id.* at 8-9 (emphasis added).

<sup>66</sup> *Id.* at 7-8.

<sup>67</sup> *Id.* at 10.

<sup>68</sup> 364 U.S. 339, 342 (1960) (quoting *Lane v. Wilson*, 307 U.S. 268, 275 (1939)).

effectively."<sup>69</sup> Such a violation can be shown by evidence of "effective denial to a minority of voters of a fair chance to influence the political process."<sup>70</sup>

The central issue is whether the *Wesberry* principle of political equality, elaborated on behalf of American citizens living in states, should apply to American citizens living in the District. Should District residents be considered part of the sovereign "People of the United States" or "several States" for purposes of representation in the House of Representatives under Article I and, by analogy, in the Senate under the Seventeenth Amendment? Or should District residents be treated like inhabitants of federal territories for Article I purposes? The structure of the American republic, the character of the District and its origins in the states themselves, the radical difference between the District and the territories, and an unbroken line of constitutional authority all argue for treating citizens who live in the District as being rights-bearing members of the same constitutional community as citizens of the fifty states.

### *1. States, Territories, the District, and Other Federal Enclaves*

In the United States, the people, who are the organic source of all constitutional and political power, have designed three kinds of governmental entities through which power is to be exercised: states, territories, and the federal enclaves, such as the District of Columbia.

The states are the basic components of the republic. Article IV, Section 3 gave Congress the power to admit new states "into this Union," and Congress has seen fit since 1787 to admit thirty-seven new states. All of them were former territories or districts of prior states, and all joined the Union on an equal footing with the original thirteen states. Once a former possession becomes a state, it immediately achieves all of the same privileges, rights, and responsibilities that the other states enjoy.<sup>71</sup> The most important dynamic in the structural history of the Union is its constant expansion: the number of states has almost quadrupled since the nation was formed.

In the American system, territories are designed to be the principal states-in-training.<sup>72</sup> In 1784, Thomas Jefferson, the leading figure in map-

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<sup>69</sup> 478 U.S. 109, 133 (1986).

<sup>70</sup> *Id.*

<sup>71</sup> The Supreme Court has found that Congress' power to admit new states is limited by the Equal Footing doctrine such that it cannot attach conditions on statehood admissions that would be unconstitutional as applied against any of the existing states. See *Coyle v. Oklahoma*, 221 U.S. 559 (1911) (invalidating a congressional effort to condition Oklahoma's admission to the Union on its acceptance of the city of Guthrie as its state capital).

<sup>72</sup> Other than Texas, which was an independent republic when it was admitted to the Union in 1846, and Vermont, Kentucky, Maine, and West Virginia, which were formed out of other existing states, every other state to join the Union has been a territory. See BREAK-THROUGH FROM COLONIALISM: AN INTERDISCIPLINARY STUDY OF STATEHOOD 1215-19

ping out the regime governing the territories, developed a "blueprint for a territorial system" that envisioned the Territories "as vast areas of land to be settled by rugged individualists into autonomous political communities with an ingrained democratic tradition."<sup>73</sup> This idea, embodied in the congressional ordinances of 1784, 1785 and 1787, was to encourage settlement, expand the Union, and proliferate the number of states so as to prevent anyone under the flag from being governed permanently as a subject of the national government instead of as an equal citizen:

The Jeffersonians viewed the territorial system as a scheme of colonization that would *temporarily* operate in a given area *only until* it had reached a minimum population and after its inhabitants had experienced a brief tutelage in self-government. During this transitory status, Congress would organize the government through the passage of organic legislation. Once the citizens of that area had learned the ways of democracy, the territory would then be admitted as a full and equal member of the Union.<sup>74</sup>

Under the Jeffersonian conception, the territories are not a kind of imperial real estate acquisition but a national trust held by Congress in the name of the people of the territory who, in matter of course, will either leave the arrangement as the Philippines did or achieve "statehood as a matter of right." Their readiness for admission is to be evidenced by three simple factors: (1) achieving some minimum population threshold (it was set in the Northwest Ordinance of 1787 at 60,000 free male inhabitants); (2) a demonstration of successful experience with democratic self-government; and (3) a showing that a majority of voters in the area earnestly desire statehood.<sup>75</sup>

In the juridical context, the Supreme Court has linked the power to acquire new lands and territories with Congress' power to admit new states.<sup>76</sup> In *Dred Scott*, Chief Justice Taney proclaimed in the strongest of terms the temporary and transitional nature of colonial governments in the territories,<sup>77</sup> emphasizing the Jeffersonian concept of states-in-waiting:

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(1984) [hereinafter BREAKTHROUGH FROM COLONIALISM]. See generally *id.* at 1207-44.

<sup>73</sup> *Id.* at 1111.

<sup>74</sup> *Id.*

<sup>75</sup> See *id.* at 1115-17.

<sup>76</sup> See *American Ins. Co. v. Canter*, 26 U.S. (12 Wheat.) 511 (1828).

<sup>77</sup> *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

There is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure; nor to enlarge its territorial limits in any way, except by the admission of new States.

*Id.* at 446.

The power to expand the territory of the United States by the admission of new States is plainly given; and in the construction of this power by all the departments of the Government, it has been held to authorize the acquisition of territory, not fit for admission at the time, but to be admitted as soon as its population and situation would entitle it to admission. *It is acquired to become a State, and not to be held as a colony and governed by Congress with absolute authority.*<sup>78</sup>

Unlike the territories, which are constitutionally designed as transitory entities, the District is structured as a permanent constitutional feature.<sup>79</sup> The District Clause vests all power in Congress over “[s]uch District (not exceeding ten miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of government of the United States.”<sup>80</sup> The purpose of this District is to guarantee federal police power control over the capital city and to liberate the national government from a potentially crippling dependence on the states.<sup>81</sup>

The Supreme Court has been clear that the District inhabits a different constitutional space than the territories. The Court’s position is that the District is not a territorial student of democracy waiting for eventual graduation to statehood but rather the campus of democracy itself, the residential home of the government which models democratic life for the

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<sup>78</sup> *Id.* at 447 (emphasis added). To be sure, there has been a contrasting and minority view of the territories linked with Alexander Hamilton’s “vision of a permanent American colonial empire.” BREAKTHROUGH FROM COLONIALISM, *supra* note 72. This vision became ascendant during the period of late-nineteenth century imperial expansionism, which “produced a radical departure from the original design of *transient* colonialism geared towards the admission of States to an essentially imperialist scheme based on the then existing European model of permanent colonial administration for the economic benefit of the metropolis.” *Id.* This view denied the inevitability of statehood for possessions. As Senator John C. Spooner of Wisconsin put it: “Never since the foundations of this Government have we in the acquisition of territory paid the slightest attention to the consent of the governed.” *Id.* at 1122. Although this conception, fortunately, remains submerged in law, it did receive a dubious constitutional endorsement in the so-called *Insular Cases*, which devised an explicitly racist dichotomy between “incorporated” and “non-incorporated” territories. See *Dooley v. United States*, 183 U.S. 151 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *De Lima v. Bidwell*, 182 U.S. 1 (1901); see also BREAKTHROUGH FROM COLONIALISM, *supra* note 72, at 1123 n.153 (providing citations to other *Insular Cases*). According to these cases, incorporated territories deserve both the right to statehood and the full force of the Constitution, while the unincorporated territories overseas, inhabited by “alien people,” do not. See BREAKTHROUGH FROM COLONIALISM, *supra*, at 1123–34. “Thus, a half century after the United States proclaimed the inadmissibility of the ownership of persons, it affirmed its acceptance of the contemporaneous European concept of the ownership of peoples.” *Id.* at 1124–25 (quoting Jose A. Cabranes, *Citizenship and the American Empire*, 127 U. PA. L. REV. 391, 487 (1978)).

<sup>79</sup> To say that the District as a constitutional entity is designed to be permanent should not be confused with the argument that the boundaries of the District are fixed and unchangeable. See Raven-Hansen, *D.C. Statehood*, *supra* note 15, at 167–75 (refuting the typical “fixed form” and “fixed function” arguments against statehood).

<sup>80</sup> U.S. CONST. art. I, § 8, cl. 17.

<sup>81</sup> See discussion *infra* Part III.B.1.

nation's citizenry. In finding that Fifth Amendment due process of law applies to District but not territorial residents,<sup>82</sup> Justice Sutherland went to great pains to separate District residents from inhabitants of a territory, which he defined as "an inchoate state"<sup>83</sup> in a condition "of pupilage at best"<sup>84</sup> and a "mere dependent[ ] of the United States."<sup>85</sup>

Justice Sutherland described the differences between territories and the District, stating that "[t]he District is not an 'ephemeral' subdivision of the 'outlying dominion of the United States,' but the capital—the very heart—of the Union itself, to be maintained as the 'permanent' abiding place of all its supreme departments."<sup>86</sup>

Because the seat of government is thus designed as a *permanent* and integral aspect of the constitutional structure, it cannot, in its entirety, become a state even if the three Jeffersonian conditions of population, democratic experience, and popular desire are met.<sup>87</sup>

There are two possible answers. One is negative: District residents are like residents of the territories before statehood and simply have *no way* to vindicate their right to representation short of moving. The other is that District residents are, for all practical and constitutional purposes, more like the residents of the fifty states and simply need Congress to find the appropriate mechanism for their representation.

In fact, District residents share all of the essential characteristics of citizens of the states. Like state residents but unlike territorial residents,

<sup>82</sup> See *O'Donoghue v. United States*, 289 U.S. 516 (1933).

<sup>83</sup> *Id.* at 538 (quoting *Ex parte Morgan*, 20 F. 298, 305 (W.D. Ark. 1883)).

<sup>84</sup> *Id.* (quoting *Nelson v. United States*, 30 F. 112, 115 (C.C.D. Or. 1887)).

<sup>85</sup> *Id.* (quoting *Snow v. United States*, 85 U.S. (18 Wall.) 317, 320 (1873)).

<sup>86</sup> *Id.* at 539.

<sup>87</sup> As statehood advocates argue, Congress could redraw the boundaries of the District and cede the excluded areas to the state of New Columbia. See Jamin B. Raskin, *Domination, Democracy, and the District: The Statehood Position*, 39 CATH. U. L. REV. 417, 423 (1990); Raven-Hansen, *D.C. Statehood*, *supra* note 15. However, the House of Representatives voted such a proposal down by a two to one margin in 1993 and the Senate never even considered it. The structural political obstacles to statehood for New Columbia seem insuperable today. One can imagine the disfavor with which conservative or agrarian states would consider the creation of the most liberal state in the Union—a 100% urban, majority African American state. Meanwhile, larger states would see no reason to dilute their fraction of legislative power any further for a small state; the western states would see nothing in it for them; and so on. In addition, many members of Congress, such as Congresswoman Constance A. Morella of Maryland, take the position that the Constitution effectively forbids creation of a new state out of the District, emphasizing that Washington, D.C., "does not belong to only a few of our residents, but to all of our citizens as the seat of our National Government." 139 CONG. REC. H10,568 (daily ed. Nov. 21, 1993) (statement of Rep. Morella). More to the point, even on a shrunken basis, the District would still have some people living within it, a point pressed hard for other reasons by statehood opponents like Adam Kurland. See Adam H. Kurland, *Partisan Rhetoric, Constitutional Reality, and Political Responsibility: The Troubling Constitutional Consequences of Achieving D.C. Statehood by Simple Legislation*, 60 GEO. WASH. L. REV. 475 (1992). Whether or not that fact refutes the argument for statehood, it still leaves the problem of disenfranchisement of District residents as a constitutional puzzle that needs to be solved on its own terms.

they pay federal taxes, indeed more per capita than most states.<sup>88</sup> Like state residents but unlike territorial residents, they vote for president and vice-president.<sup>89</sup> District residents are counted in the national census.<sup>90</sup> They are governed by the laws of the United States and were part of the original thirteen states. They fight wars, are drafted into the military, and have lost many men and women in foreign battles.<sup>91</sup> They are treated like residents of the states for federal diversity jurisdiction purposes.<sup>92</sup> The principle of one person—one vote applies within the District to the reapportionment of the District's Council.<sup>93</sup>

No right is more fundamental than the right to vote, which is the right "preservative of all rights"<sup>94</sup> and the right that establishes people as first-class citizens deserving of public respect and equal membership.<sup>95</sup> But intertwined with the right to vote is the right to run for office as a candidate and, at least theoretically, to serve as a representative. Indeed, the right to vote and the right to run imply one another since the "fundamental principle of our representative democracy" embodied in the Constitution is that "the people should choose whom they please to govern them."<sup>96</sup> A law that gave women or racial minorities the right to vote but denied them the right to run for office would violate both their right to participate fully and the right of the voters to choose them as representatives.

The citizens of the District cannot be confined to the role of consenting spectators in other people's political and governmental process. They have the right to become active agents in shaping national public

<sup>88</sup> "Today, District residents pay over \$3 billion annually in Federal taxes at the fourth highest per capita rate in the Nation without full democratic representation." 139 CONG. REC. H10,569 (daily ed. Nov. 21, 1993) (statement of Rep. Vento).

<sup>89</sup> See U.S. CONST. amend. XXIII.

<sup>90</sup> See 13 U.S.C. § 191 (1994).

<sup>91</sup> "The District of Columbia sustained more casualties during the Vietnam War than 10 States and more killed in action per capita than 47 States . . . more District residents per capita fought in the Persian Gulf War than 46 other States." 139 CONG. REC. H10,569 (daily ed. Nov. 21, 1993) (statement of Rep. Vento).

<sup>92</sup> See *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1948) (upholding federal court jurisdiction between citizens of states and citizens of the District of Columbia under the District Clause Federal Statute).

<sup>93</sup> See D.C. CODE ANN. § 1-1308(c) (1981).

<sup>94</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) ("[Voting] is regarded as a fundamental political right, because [it is] preservative of all rights.").

<sup>95</sup> Justice Blackmun observed:

[T]he right to vote is accorded extraordinary treatment because it is in equal protection terms, an extraordinary right: a citizen cannot hope to achieve any meaningful degree of individual political equality if granted an inferior right of participation in the political process. Those denied the vote are relegated, by state fiat, in a most basic way to second-class status.

*Plyer v. Doe*, 457 U.S. 202, 233 (1981) (Blackmun, J., concurring).

<sup>96</sup> *Powell v. McCormack*, 395 U.S. 486, 547 (1969) (quoting Alexander Hamilton, in 2 ELLIOT'S DEBATES, *supra* note 38, at 257).

discourse and debate, a right that includes the possibility of running for Congress and serving. Yet District residents have no meaningful role in Congress' constitutional functions, such as approving budgets, regulating interstate commerce, ratifying presidential impeachment, and passing on Supreme Court and other judicial nominations. They are, for all practical purposes, not actors in influencing the course of national legislation and public policy.

*U.S. Term Limits v. Thornton*<sup>97</sup> underscores the constitutional importance of the people's untrammelled right to run for public office. In *U.S. Term Limits*, the Court struck down Arkansas' effort to limit its House delegation to three terms in office and its U.S. senators to two terms in office by denying affected incumbents a place on the ballot. The Court held that this rule violated the Qualifications Clause, which requires only that House members must be at least twenty-five years old, a U.S. citizen for seven years, and an inhabitant of the state, and that senators be at least thirty years old, a U.S. citizen for nine years, and an inhabitant of the state.<sup>98</sup>

The Court reasoned that Arkansas had placed an extra qualification on congressional candidacy, falsely restricting the field of candidates. The Court invoked against this restriction "an egalitarian ideal—that election to the National Legislature should be open to all people of merit" and found that this ideal "provided a critical foundation for the Constitutional structure."<sup>99</sup> The Court further found that state-imposed term limits violate the sovereign "right of the people to vote for whom they wish," a right that "belongs not to the States, but to the people."<sup>100</sup> In language strikingly relevant to the situation of the District, the Court upheld "the direct link that the Framers found so critical between the National Government and the people of the United States."<sup>101</sup>

Thus, District residents are part of "the People" who seek, among other things, to "form a more perfect Union, establish Justice" and "secure the Blessings of Liberty to ourselves and our Posterity."<sup>102</sup> Yet the question remains whether they should be treated functionally as part of "the People of the several States" referred to in Article I. Symmetry of approach would argue for just such an interpretation, but there is a further, more fundamental reason. The provisions of the Constitution must be read together, and all of the relevant provisions and case precedents since the Equal Protection Clause entered the Constitution harmonize on one theme: District residents must be treated with equal respect by government and must enjoy the same federal rights as citizens living in

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<sup>97</sup> 514 U.S. 779 (1995).

<sup>98</sup> *See id.* at 779.

<sup>99</sup> *Id.* at 819.

<sup>100</sup> *Id.* at 820, 821.

<sup>101</sup> *Id.* at 822.

<sup>102</sup> U.S. CONST. preamble.

states. Thus, just as it would be unconstitutional for states to strip citizens of their right to vote in congressional elections, it is unconstitutional for Congress to disenfranchise the citizens of Washington.

Because the guarantee of the Equal Protection Clause applies to citizens living in the District, they must receive equal benefit from “the principle solemnly embodied in the Great Compromise—equal representation in the House for equal numbers of people.”<sup>103</sup> If the House is the people’s body, constituted on the basis of population without regard to geographic residence, the population of American citizens living in the District must be included in its constituency. If it is true, as Justice Black wrote, that the principle “uppermost in the minds” of the Framers was that “no matter where he lived, each voter should have a voice equal to that of every other in electing members of Congress,” then the current regime in the District plainly violates the one person—one vote right to “fair representation.”<sup>104</sup>

Hundreds of thousands of American citizens have lost their right to be represented because of the place they live. This arrangement cannot be reconciled with *Wesberry*’s articulation of a general right of popular representation in national government. Justice Black wrote:

No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. *Our Constitution leaves no room for classification of people in a way that unnecessarily abridges that right.*<sup>105</sup>

## 2. Popular Representation in the Senate

The principle of democratic participation also requires representation of District residents in the U.S. Senate, even though that chamber was originally designed, as part of the Great Compromise, to be the body of the representatives of the *states* rather than the *people*.

Yet, this original sharp dichotomy between the people’s chamber and the states’ chamber has been muted, if not completely wiped away, by the

<sup>103</sup> *Wesberry v. Sanders*, 376 U.S. 1, 14 (1964).

<sup>104</sup> *Id.* at 10.

<sup>105</sup> *Id.* at 17–18 (emphasis added). Justice Black went on to quote James Madison:

Who are to be the electors of the [F]ederal Representatives? Not the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States.

*Id.* at 18 (quoting THE FEDERALIST NO. 57 (James Madison)).

Seventeenth Amendment. Ratified in 1913, this amendment shifted the mode of selection of senators from designation by the state legislatures, the original method specified by Article I, Section 3, to election *by the people* of the states.<sup>106</sup> The purpose of this change was to remove the selection of senators from corrupt state legislatures and place it instead in the hands of the citizenry. The Seventeenth Amendment was directly patterned after the mode of popular election of House members provided for in Article I, Section 2. Thus, although senators are still selected statewide, the basis of selection has shifted to the people. As the Supreme Court put it in *U.S. Term Limits*:

[f]ollowing the adoption of the 17th Amendment in 1913, this ideal [of popular government] was extended to elections for the Senate. The Congress of the United States, therefore, is not a confederation of nations in which separate sovereigns are represented by appointed delegates, but is instead a body composed of the representatives of the people.<sup>107</sup>

The constitutional move to popular election of Senators brings “the people” of the District again within the appropriate electoral community by placing constitutional emphasis on equal participation in national government by all citizens. This point is reinforced by the dual nature of congressional power over the District.<sup>108</sup>

### *3. The Unlawfulness of Denying Representation to Citizens Because the District Is Directly Under a Federal Jurisdiction*

One might argue that, even if the Equal Protection Clause generally applies to the District, the right to vote does not extend to citizens who have freely chosen to live on a federally governed jurisdiction like the District of Columbia because a citizen’s right to vote in state and federal legislative elections depends on his or her choosing to reside on the actual land of a *state*. But this argument, as a categorical proposition, has already been squarely rejected by the Supreme Court, and the residents or potential residents of literally thousands of federal enclaves, all except for the District, have won the constitutional right to participate in federal elections.<sup>109</sup>

<sup>106</sup> See U.S. CONST. amend. XVII.

<sup>107</sup> 514 U.S. 779, 821 (1995).

<sup>108</sup> See discussion *infra* Part II.B.

<sup>109</sup> See Carl Strass, Note, *Federal Enclaves—Through the Looking Glass—Darkly*, 15 SYRACUSE L. REV. 754, 755 (1964) (“Under [the federal enclave] provision, the federal government has acquired more than 5,000 parcels over which it exercises exclusive jurisdiction. Over forty are bigger than Washington, D.C. Others are only as big as a single building . . .”).

In the watershed case of *Evans v. Cornman*,<sup>110</sup> the Supreme Court struck down Maryland's disenfranchisement of American citizens living on the grounds of the National Institutes of Health ("NIH"), a federal enclave in Montgomery County, which borders the District of Columbia. The NIH campus was built on land donated to Congress by Maryland in 1953.<sup>111</sup> Citizens living on the NIH grounds continued to vote "apparently without question, for another 15 years"<sup>112</sup> in Maryland, just as residents of the seat of government continued to vote after Maryland and Virginia's gift of land in 1790. What ended the practice was a decision holding that a resident of a federal enclave was not a "resident of the state" within the meaning of the state constitution.<sup>113</sup> That state case set the stage for NIH residents to make an equal protection challenge to the removal of their names from the voter rolls.<sup>114</sup>

In *Evans*, the Supreme Court considered Article I, Section 8, Clause 17, the provision that enabled Maryland to transfer to Congress both the land used for NIH and the land used for the District of Columbia. Just as this Clause gives Congress power to exercise legislation over the District, it grants "like Authority over all Places purchased by the consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings . . ."<sup>115</sup> The Court agreed with Maryland that the NIH federal enclave, like the District of Columbia itself, "is one of the places subject to . . . congressional power."<sup>116</sup>

However, the Court did not agree that the federal character of the NIH enclave obviated Maryland's obligation to grant citizens living there the constitutional right to vote and be represented. On the contrary, by disenfranchising people living on NIH grounds, Maryland was breaking "the citizen's link to his laws and government," the connection that "is protective of all fundamental rights and privileges."<sup>117</sup> The Court thus applied strict scrutiny to determine whether the suffrage denial could be sustained.<sup>118</sup>

Maryland asserted that its compelling interest was "to insure that only those citizens . . . interested in or affected by electoral decisions have a voice in making them,"<sup>119</sup> a potentially valid interest. It argued that NIH

<sup>110</sup> 398 U.S. 419 (1970).

<sup>111</sup> *See id.* at 421.

<sup>112</sup> *Id.*

<sup>113</sup> *See Royer v. Board of Election Supervisors*, 191 A.2d 446 (Md. 1963).

<sup>114</sup> In October 1968, the Permanent Board of Registry of Montgomery County announced publicly that persons living on NIH grounds failed to meet the state constitutional residency requirement and would be removed from the county's voter rolls. *See Evans*, 398 U.S. at 419-20.

<sup>115</sup> U.S. CONST. art. I, § 8, cl. 17.

<sup>116</sup> *Evans*, 398 U.S. at 420.

<sup>117</sup> *Id.* at 422.

<sup>118</sup> *See id.*

<sup>119</sup> *Id.*

residents were “substantially less interested in Maryland affairs than other residents of the State because the Constitution vests ‘exclusive Legislation in all Cases whatsoever’ over federal enclaves to Congress.”<sup>120</sup> It cited several state supreme court cases that denied suffrage to federal enclave residents on the grounds of the preemptive priority of the “exclusive Legislation” Clause from Article I.<sup>121</sup> But the Supreme Court was not satisfied with this blanket textual appeal to the fact of federal control over the enclave because both the law of voting and the character of federal enclaves had changed over time. It found that “[w]hile it is true that federal enclaves are still subject to exclusive federal jurisdiction . . . , whether [NIH residents] are sufficiently disinterested in electoral decisions that they may be denied the vote depends on their actual interest today . . . .”<sup>122</sup>

The Court then canvassed the “numerous and vital ways in which NIH residents are affected by electoral decisions,” including government policy concerning criminal justice, spending and tax decisions, state unemployment and workers’ compensation laws, auto registration, family and probate matters, and public education.<sup>123</sup>

Meanwhile, for differences between NIH residents and state residents, Maryland could point only to the fact that NIH residents did not pay real property taxes that made up a large part of Maryland public school financing, would not have paid county personal taxes if there were any, were exempt from service in the state militia, and were exempt from the state’s compulsory education law.<sup>124</sup> The Court considered these differences “far more theoretical than real,”<sup>125</sup> and found that they “do not come close to establishing that degree of disinterest in electoral decisions that might justify a total exclusion from the franchise.”<sup>126</sup>

In summary, the Court emphasized that the federal enclave residents had the same interests in voting that they had before the land was transferred from Maryland to Congress:

In their day-to-day affairs, residents of the NIH grounds are just as interested in and connected with electoral decisions as they were prior to 1953 when the area came under federal jurisdiction and as are their neighbors who live off the enclave . . . .

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<sup>120</sup> *Id.* at 423.

<sup>121</sup> *See id.*

<sup>122</sup> *Id.* at 423–24.

<sup>123</sup> *See id.* at 424.

<sup>124</sup> *See id.* at 424–25, 425 n.5.

<sup>125</sup> *Id.* at 425.

<sup>126</sup> *Id.* at 426.

They are entitled under the Fourteenth Amendment to protect that stake by exercising the equal right to vote.<sup>127</sup>

With this democratic logic rooted in the "equal stake" of federal enclave residents in public decision making, the Supreme Court invalidated every state law in the country disenfranchising residents of federal enclaves.

*Evans* obviously has untapped importance for bringing the right to vote to the District. It establishes as a textual and structural matter that Congress' "exclusive Legislation" authority over federal enclave residents does not presumptively destroy the constitutional imperative of voting rights for all citizens. On the contrary, enclave residents presumptively maintain their right to vote in both federal and state elections.

Under *Evans*, government denial of an enclave resident's voting rights triggers strict scrutiny under the Equal Protection Clause and can only be sustained if there is a compelling interest effectuated by narrowly drawn means. If the government proposes as a compelling interest the necessity of assuring that voters have a real interest in government policy and federal enclave residents categorically lack such an interest, the test of the validity of this proposition is the grounded and fine-grained inquiry into whether the enclave residents have an "actual interest today" in "electoral decisions."<sup>128</sup>

This is a clarifying framework for analysis. Even though they live in a large federal district, D.C. residents are American citizens who have a general interest in every significant national decision made by Congress and a specific interest in congressional legislation regarding the District. Indeed, because Congress is both their federal and state legislature, they have *more* of an interest in its deliberations than the people of any of the states.<sup>129</sup>

Any argument that District residents lack sufficient interest in their "state" or national affairs to be represented in Congress must fail. Indeed, as a much larger population with far more serious challenges, the com-

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 424.

<sup>129</sup> District residents, who have experienced both crime waves and unparalleled levels of incarceration, have a profound interest in congressional passage of both federal and state criminal laws. The District of Columbia has the highest incarceration rate in the country, four times the national average. The sentences are the longest in the country—three times the national average. See Vincent Schiraldi, *This Moral Code Should be Inviolable*, WASH. POST, Sept. 14, 1997, at C8. Given that District residents pay more than \$2 billion a year in taxes and that both their federal and state budgets are passed by Congress, there is a deep interest in congressional spending and taxing decisions. Because Congress is the state legislature, and does not hesitate to legislate for the District, the people have a powerful interest in being represented when it comes to legislation that affects state unemployment and workers' compensation laws, auto registration, family and probate matters, and public education. Moreover, District residents have all of the federal interests that other American citizens have in congressional representation: interests in economic policy, social legislation, matters of war and peace, and urban policy.

munity of District residents has a *stronger* argument for regaining the right to vote than the nearby residents of NIH did in 1970. The fact that District residents live not within the political boundaries of a state but within the political boundaries of a federal district is immaterial. The whole trajectory of the one person—one vote cases is to insist that substantive political rights must trump the administrative consequences of governmental line-drawing and classification.

*B. Denial of Representation in Congress Burdens the Right of American Citizens to be Represented in Their Own State Legislature*

Congress is both a national and a state legislature. Under Article I, it governs the United States as a nation and the District of Columbia as a state. Thus, Congress' banishment of voting representatives from the District effects not only federal disenfranchisement of citizens living in the District but disenfranchisement from their own state legislature.

Congress plainly acts as a state legislature when it governs the District. Courts have always described the relationship in those terms. In 1932, for example, the Court in *Atlantic Cleaners & Dyers v. United States*<sup>130</sup> wrote that Congress possesses over the District "all the powers of legislation which may be exercised by a state in dealing with its affairs, so long as other provisions of the Constitution are not infringed."<sup>131</sup>

As the state legislature governing the District, Congress must respect, as best as it can, the principle of one person—one vote in the constitution of its membership. In a sense, the whole people of the United States are the sovereign community which forms this state government, yet all parts of the sovereign community are represented in it *except* the people of the District. It is as if the representatives of forty-nine states and the District were the state legislature for Delaware but the people of Delaware had no representatives in their own state legislature.

As a general matter, to have the people of the fifty states sending representatives to a fifty-first state's legislature is undoubtedly odd, but this is the inescapable cost of having the federal legislature act also as the state legislature for the District. This anomaly makes it all the more ur-

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<sup>130</sup> 286 U.S. 427 (1932).

<sup>131</sup> *Id.* at 435; *see also* *Capital Traction v. Hof*, 174 U.S. 1, 5 (1899) ("[Congress] may exercise within the District all legislative powers that the legislature of a state might exercise within the state . . ."); *Metropolitan R.R. v. District of Columbia*, 132 U.S. 1 (1889).

It is undoubtedly true that the District of Columbia is a separate political community in a certain sense, and in that sense may be called a state; but the sovereign power of this qualified state is not lodged in the corporation of the District of Columbia, but in the government of the United States. Its supreme legislative body is Congress.

*Id.* at 4.

gent that Congress admit the District's representatives. It is unsuitable to have every American citizen represented in the District's state legislature except American citizens who live there.<sup>132</sup>

State legislatures are subject to the principle of one person—one vote popular representation. Just a few months after its holding in *Wesberry*, the Court in *Reynolds v. Sims* struck down malapportioned state legislative districts in Alabama.<sup>133</sup> Chief Justice Warren reaffirmed the principle that citizens may not be deprived of their voting rights based on residency: "Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable."<sup>134</sup> He elaborated in terms that seem tailor-made for the purpose of breaking the constitutional impasse over the District's voting rights:

[T]he weight of a citizen's vote cannot be made to depend on where he lives . . . . This is the clear and strong command of our Constitution's Equal Protection Clause . . . . This is at the heart of Lincoln's vision of "government of the people, by the people, (and) for the people." The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as all races.<sup>135</sup>

Chief Justice Warren stated:

"The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications . . . . The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote."<sup>136</sup>

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<sup>132</sup> The situation is antithetical to the spirit, if not the letter, of the Republican Guaranty Clause, which provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government . . . ." U.S. CONST. art. IV, § 4. Although this Clause has never been applied directly to the District, every other Article IV provision is deemed applicable to the District, including Section 1 (the Full Faith and Credit Clause) and Section 2 (Privileges and Immunities Clause and Extradition Clause). However, this point is not raised to argue that this is a justiciable claim, because the Court, since *Luther v. Borden*, 48 U.S. (7 How.) 1, 45 (1849), has ruled that the question of republicanism is a political question for Congress to decide. Nonetheless, the Republican Guaranty Clause is a source of critical democratic norms that inform other constitutional voting principles.

<sup>133</sup> 377 U.S. 533 (1964).

<sup>134</sup> *Id.* at 563.

<sup>135</sup> *Id.* at 567–68.

<sup>136</sup> *Id.* at 558 (quoting *Gray v. Sanders*, 372 U.S. 368, 379–81 (1963)).

The project of constitutional interpretation is to take words and ideas worked out in the past and to translate them to new contexts in ways that keep faith with the original and evolving meaning of the concepts.<sup>137</sup> Both *Wesberry* and *Reynolds* established principles of popular representation in federal and state government on the basis of one person—one vote regardless of a citizen's geographic residence. The rule of geographic non-discrimination in voting renders congressional disenfranchisement of the District deeply suspect. The current regime works a double representational harm against a community of more than a half-million American citizens, leaving the people without effective representation in their national and state legislative bodies. Moreover, the right to run for, and serve in, one's state legislature is abolished under the current regime, leaving the residents of the District as the only citizens or subjects of the United States, including not just the states but the territories as well, unrepresented in their own state-level legislature.<sup>138</sup>

*C. Denial of Representation to District Residents Bears an Unconstitutional Resemblance to Political Apartheid*

In *Shaw v. Reno*, the Supreme Court recognized a new Equal Protection cause of action in the political process against congressional reapportionment plans that “bear[ ] an uncomfortable resemblance to political apartheid.”<sup>139</sup> In *Shaw*, the Court cast doubt on, and ultimately invalidated, a North Carolina districting plan that “resemble[d] the most egregious racial gerrymanders of the past.”<sup>140</sup> The voting age population of the offending districts in North Carolina were 53.4% African American and 45.5% white, and 53.3% African American and 45.2% white.<sup>141</sup> The eight congressional districts found unconstitutional by the Court in the line of cases after *Shaw* had thin African American majorities like North Carolina's. Justice Thomas, for example, described the conscious creation of such districts as “an enterprise of segregating the races into political homelands that amounts, in truth, to nothing short of a system of ‘political apartheid.’”<sup>142</sup>

Which resembles “political apartheid” and “racial segregation”<sup>143</sup> more: an oddly drawn majority–African American congressional district

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<sup>137</sup> See generally Lawrence Lessig, *Fidelity as Translation*, 65 *FORDHAM L. REV.* 1365 (1997).

<sup>138</sup> The people of all 50 states, of course, have their own legislatures and the people of the four territories have territorial legislatures. The District population alone is without representation in its state-level legislature, Congress itself.

<sup>139</sup> 509 U.S. 630, 647 (1993).

<sup>140</sup> *Id.* at 641.

<sup>141</sup> See Brief for State Appellee, *Shaw v. Reno*, 509 U.S. 630 (1993), available in 1993 WL476425, at \*23a.

<sup>142</sup> *Holder v. Hall*, 512 U.S. 874, 905 (1994) (Thomas, J., concurring).

<sup>143</sup> See *Shaw*, 509 U.S. at 630 (referring to redistricting legislation that is so extremely

where *everyone* has the right to vote and run for office or an oddly drawn majority-African American district where *no one* has the right to vote or run for office?

*Shaw* and its progeny have established a new kind of constitutional claim whenever voting rights are subjected to wrongful configurations of political and racial geography.<sup>144</sup> In the *Shaw* cases, the white plaintiff-voters have never alleged that they were denied the right to vote for House candidates or to run as candidates, or that they were denied the opportunity to support or oppose a particular candidate, or that they were the victims of racial vote dilution, or that they were harmed in any concrete or tangible way. Nor were there any findings in any of the cases that such injuries actually occurred; they did not. Rather, the constitutional injury and violation in these cases reside simply in the images and messages of "apartheid" communicated by the racial and political geography of a particular voting regime. As Justice O'Connor put it famously, "reapportionment is one area in which appearances do matter."<sup>145</sup>

*Shaw* validates expressive harms as constitutionally cognizable.<sup>146</sup> O'Connor's opinion

is laden with references to the social perceptions, the messages, and the governmental reinforcement of values that the Court believes North Carolina's districting scheme conveys. There is simply no way to make sense of these references, which give the opinion its character and are central to its holding, without rec-

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irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting).

<sup>144</sup> This Article is not the place to evaluate the merits of the *Shaw* line of authority; I have registered my elaborate objections elsewhere. See Jamin B. Raskin, *The Supreme Court's Racial Double Standard in Redistricting: Bizarre Jurisprudence, Bizarre Scholarship*, 14 U. VA. J.L. & POL. (1998); Jamin B. Raskin, *Supreme Court's Double Standard: Gerrymander Hypocrisy*, NATION, Feb. 6, 1995, at 167. For trenchant criticism of the *Shaw* doctrine, see James U. Blacksher, *Dred Scott's Unwon Freedom: The Redistricting Cases As Badges of Slavery*, 39 HOW. L.J. 633, 660-84 (1996); Frank R. Parker, *The Constitutionality of Racial Redistricting: A Critique of Shaw v. Reno*, 3 D.C. L. REV. 1 (1995).

<sup>145</sup> *Shaw*, 509 U.S. at 647.

<sup>146</sup> The leading academic expositors and supporters of the *Shaw* doctrine, Richard H. Pildes and Richard G. Niemi, have done an excellent job of elaborating *Shaw*'s sometimes inscrutable theory of "expressive harms" in the political process. They write:

One can only understand *Shaw* . . . in terms of a view that what we call *expressive* harms are constitutionally cognizable. An expressive harm is one that results from the ideas or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about. On this view, the *meaning* of a governmental action is just as important as what the action *does*.

Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 506-07 (1993).

ognizing that the decision is grounded in concern for expressive harms.<sup>147</sup>

The anti-apartheid doctrine of “expressive harms” elaborated in *Shaw* provides a devastating angle of attack on disenfranchisement in the District, which is a system of far more thorough and ongoing symbolic and material injury than anything experienced by voters in the states where majority-minority districts have been struck down by the Court.<sup>148</sup>

Like the plans invalidated by the *Shaw* line of cases, the District’s disenfranchisement bears an uncomfortable resemblance to political apartheid. The District population is more racially lopsided than any of the districts so far invalidated by the Court. According to the 1990 Census, the District population is 65.8% African American, 27.4% white, and 2.2% Hispanic.<sup>149</sup> Unlike citizens in majority-minority congressional districts in the states, all of whom enjoy the right to vote for representatives and senators and state and local officials, the District’s population is categorically denied the right to vote for members of the U.S. House and Senate as well as their main local governing bodies.

The District’s similarity to “political apartheid” in South Africa goes beyond the similarity exhibited by majority-minority districts in the other states. Actual disenfranchisement of the black majority was the central feature of “political apartheid” in pre-liberation South Africa, where 85% of the population was denied the right to vote for representatives to Parliament and the National Government. Like the twenty-one million blacks in South Africa previously denied representation in Parliament and on Provincial Councils, the majority-black population in the District of Columbia is without a vote in its national and “state” legislatures.<sup>150</sup>

The congruence with apartheid becomes even more disturbing when one looks at the District’s disenfranchisement in national and local con-

<sup>147</sup> *Id.* at 508–09.

<sup>148</sup> See *Abrams v. Johnson*, 521 U.S. 74 (1997) (holding that the Georgia legislature acted within its discretion in deciding that the creation of two majority black districts would be an impermissible racial gerrymander); *Bush v. Vera*, 517 U.S. 952 (1996) (holding that strict scrutiny was triggered in a Texas redistricting plan where the plan was “so extremely irregular on its face that it rationally can be viewed only as an effort to segregate races for the purposes of voting, without regard for traditional districting principles”); *Johnson v. De Grandy*, 512 U.S. 997 (1994) (finding no violation of the Voting Rights Act even though the Florida redistricting plan diluted Hispanic and black voting strength); *Shaw*, 509 U.S. 630 (casting doubt on North Carolina’s redistricting plan as segregation for the purposes of voting).

<sup>149</sup> See BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, 1990 CENSUS OF POPULATION AND HOUSING, POPULATION AND HOUSING UNIT COUNTS (1990).

<sup>150</sup> See A. Leon Higginbotham et al., *Shaw v. Reno: A Mirage of Good Intentions With Devastating Racial Consequences*, 62 *FORDHAM L. REV.* 1593, 1622 (1994) (“The twenty-one million black people enjoy no representation in the central Parliament. Nor are they represented in the Provincial Councils which have limited legislative powers over the provinces.” (quoting JOHN DUGARD, *HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER* 6 (1978))).

texts. In a nation of fifty majority-white states, the majority-African American population of the District is the only community not represented in federal, state, and most recently, local government. In a familiar historical pattern, the majority-black District's affairs are controlled at almost every significant turn by representatives of majority-white districts from neighboring and other southern states.<sup>151</sup>

The background conditions of life in the District only reinforce the impression of apartheid-style political arrangements. The dilapidated and dysfunctional District of Columbia public school system is ninety-six percent minority and only four percent white.<sup>152</sup> Only eighteen of 155 public schools have even twenty-five white students.<sup>153</sup> On any given day, an astounding *half* of the District's young African American men ages eighteen to thirty-five are in jail or prison, on probation or parole, awaiting trial, or being sought on warrant.<sup>154</sup> The District has a higher rate of criminal incarceration than any state in the union.<sup>155</sup>

It is not necessary to claim that Congress has any official purpose or motivation to discriminate against the African American population in the District through disenfranchisement (or any other policy). *Shaw* did away with the purpose requirement that applies to other kinds of equal

<sup>151</sup> The District is sandwiched oddly between Maryland and Virginia, the former 69.6% white and the latter 76% white. White representatives from those two states are—and almost always have been—critical actors in congressional rule over the District. The current chair of the House District Subcommittee of the Government Reform and Oversight Committee is Congressman Tom Davis, who represents the neighboring 11th district in Northern Virginia. The vice-chair is Congresswoman Constance A. Morella, who represents the neighboring 8th district of Maryland.

<sup>152</sup> See NINA SHOKRAH ET AL., HERITAGE FOUND. REPORTS, A COMPARISON OF PUBLIC AND PRIVATE EDUCATION IN THE DISTRICT OF COLUMBIA (1997) (stating that the District's public school student population is 88% African American, 4% white, 7% Hispanic, and 1% Asian).

<sup>153</sup> See Lisa Greenman, *Turning Back the Clock: Why Close A School Where the Races Mix?*, WASH. POST, Apr. 13, 1997, at C1. By contrast, before school desegregation took place as a result of *Bolling v. Sharpe*, 347 U.S. 497 (1954), white students constituted about 50% of the public schools. See Joseph M. Sellers et al., *Public Education Legal Service Project: A Private Sector Initiative in the Area of Public Education*, 27 HOW. L.J. 1471, 1473 (1984) (describing the racial demographics of the school system when *Bolling* was decided).

<sup>154</sup> See NATIONAL CTR. ON INSTS. & ALTERNATIVES, *HOBBLING A GENERATION: YOUNG AFRICAN AMERICAN MALES IN WASHINGTON, D.C.'S CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER* 3 (1997) [hereinafter *HOBBLING A GENERATION*]; see also *id.* at 4 ("The number of African Americans in custody in D.C. is 36 times greater than the number of whites, relative to their population. Nationwide the disparity is 7 to 1.")

<sup>155</sup> See Jamin B. Raskin, *Imprisoning 'the Last, the Least, and the Lost,'* LEGAL TIMES, Nov. 28, 1994, at 27. Of every 100,000 persons, the United States imprisons 426 people, Louisiana imprisons 478, and the District imprisons an astounding 1651. Apartheid South Africa incarcerated 333 per 100,000. As part of the recent legislation reclaiming power from the home rule government, Congress passed criminal justice provisions that are expected to substantially *lengthen* criminal sentences in the District. See *HOBBLING A GENERATION*, *supra* note 154, at 8 (discussing recent congressional creation of a federal "Truth-in-Sentencing" Commission whose mandate is to see to it that felons serve at least 85% of their sentences). Prisoners in D.C. in 1994 served 67% of their sentences, which is already higher than the national average of 46% for violent offenders. See *id.*

protection claims.<sup>156</sup> It would be similarly irrelevant to allege that disenfranchisement in the District disproportionately harms African Americans (although such an allegation would be easy to make given the demographics of the District).

All that matters from the standpoint of *Shaw* is that Congress, which possesses exclusive legislative power over the District and its forms of government, has arranged the District's voting system in such a way as to produce striking images and symbols of apartheid and segregation. To people who have spent their lives in the District, the racial subtext of political powerlessness in the city is so plain as to not even require elaborate explanation.

Demonstration of a discriminatory purpose *would* be required to sustain a cause of action under the Fifteenth Amendment.<sup>157</sup> Although it would not be impossible to make this showing, it would probably take a meticulous and as yet-unwritten history of race relations in America and the District to make such a claim convincing.

The conceptual problem is that, except for the first ten years of congressional control, the District has been disenfranchised whether its population is majority-white or majority-black. But during periods of total disenfranchisement, such as the century between the 1870s and the 1970s, the historical record of denial of the ballot in local affairs is replete with expressions of explicit racism. The fact that whites were disenfranchised as well simply reflects the fact that whites in the District have often preferred to be disenfranchised rather than give African Americans the right to vote. In December of 1865, after the Civil War ended, for example, blacks in the District and Republicans in Congress tried to gather support for giving blacks the right to vote in local elections. They were opposed by local whites who prevailed upon the Mayor to call a public referendum on the issue.<sup>158</sup> "The result was 35 votes for suffrage, and 6591 votes against it in Washington."<sup>159</sup> Amazingly, many whites "made representations to Congress that the voters would prefer to [disenfranchise] themselves, and allow the District's affairs to be administered by a Commission, of three or five members, appointed by the President, than agree to 'equal suffrage.'"<sup>160</sup>

The fact that whites are disenfranchised along with African Americans does not categorically preclude a finding of a Fifteenth Amendment

<sup>156</sup> See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976) (requiring black plaintiffs challenging a police candidate testing system as violative of the Equal Protection Clause to prove a discriminatory purpose).

<sup>157</sup> See, e.g., *Mobile v. Bolden*, 446 U.S. 55, 65 (1980) (stating that the Fifteenth Amendment "prohibits only purposefully discriminatory denial or abridgement by government of the freedom to vote 'on account of race, color, or previous condition of servitude'" (quoting U.S. CONST. amend. XIV)).

<sup>158</sup> See KEELEY, *supra* note 5, at 121.

<sup>159</sup> *Id.* at 121-22.

<sup>160</sup> *Id.* at 123.

violation. In *Hunter v. Underwood*, for example, the Supreme Court invalidated a provision of the Alabama Constitution designed to disenfranchise blacks even though it stripped some whites of the franchise as well.<sup>161</sup> Because the provision, disenfranchising persons convicted of crimes involving moral turpitude, was clearly targeted at African Americans, Justice Rehnquist found that "an additional purpose to discriminate against poor whites would not render nugatory the purpose to discriminate against all blacks . . . ."<sup>162</sup>

Ultimately, the question of whether the unique disenfranchisement of the District population from congressional representation is racially motivated remains inscrutable. This is why the various incidents that support the idea of deliberate racial disenfranchisement should simply be mobilized to bolster the conclusion that the current regime at the very least creates the *appearance* of "political apartheid." The same holds true for the theory that disenfranchisement is precisely the kind of "badge[ ] and incident[ ]"<sup>163</sup> of slavery that Section 2 of the Thirteenth Amendment gives Congress the power to abolish.<sup>164</sup>

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<sup>161</sup> See 471 U.S. 222 (1985).

<sup>162</sup> *Id.* at 232.

<sup>163</sup> *E.g.*, The Civil Rights Cases, 109 U.S. 3 (1883).

<sup>164</sup> In addition to these Equal Protection arguments, the effective disenfranchisement of the District is vulnerable to at least two other challenges. First, penalizing residents of the District by denying voting rights burdens the right to travel within the United States. In *Shapiro v. Thompson*, the Supreme Court struck down a class of public welfare statutes that denied assistance to anyone who had not resided within the relevant jurisdiction for at least one year because the statutes effectively penalized Americans for moving. See 394 U.S. 618, 634 (1969) (emphasizing that "in moving from State to State or to the District . . . appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional"). Moreover, the Court has already invoked the right to travel against a governmental restriction on voting *less* severe than the one in place in the District. See *Dunn v. Blumstein*, 405 U.S. 330, 339 (striking down a requirement that "force[s] a person who wishes to travel and change residences to choose between travel and the basic right to vote"). United States citizens who move abroad have the right to vote in federal elections through the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. § 1973ff-6 (1994), while those who move to the District do not. Second, denying citizens who move to the District the right to vote violates *Romer v. Evans*, 517 U.S. 620, 631 (1996). In *Romer*, the Supreme Court struck down a Colorado state constitutional amendment that denied municipalities the right to pass civil rights legislation protecting gays and lesbians as a class because it imposed a "special disability" on one group, leaving them vulnerable in the political process by requiring them to amend the state constitution to obtain protection against discrimination. See *Romer*, 517 U.S. at 631. Like the provision condemned in Colorado, the discriminatory treatment of the District residents offends the central "principle that government and each of its parts remain open on impartial terms to all who seek its assistance. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." See *Romer*, 517 U.S. at 633 (citations omitted).

### III. Strict Scrutiny

The Court must apply "strict review of statutes distributing the franchise" because they "constitute the foundation of our representative society."<sup>165</sup> Thus, the question raised by the equal protection claims is whether Congress possesses a compelling interest in disenfranchising the District population. Three general categories of interest present themselves: (1) interests that relate to some characteristics of the District population that are allegedly disqualifying; (2) an interest in complying with the structural provisions of the Constitution that allegedly require disenfranchisement and do not permit Congress to extend the vote in congressional elections to District residents; (3) an interest in maintaining federal control over the seat of government and vindicating specific federal interests in the capital city. In this section, I conclude that the first kind of interest is categorically impermissible; that the second is specious; and that the third is real and arguably compelling with respect to voting in local elections if narrowly tailored, but wholly unconvincing as a reason for disenfranchisement from Congress.

#### A. *Is there a Valid Interest in Disenfranchising the District Population?*

The first type of interest offered to justify disenfranchisement in the District relates to some allegedly disqualifying characteristic of the population. The offending characteristic may be dressed up in sophisticated terms, but in 1970, Senator Edward Kennedy plainly observed that "opposition to congressional representation for the District [is] based on the conviction that it is 'too liberal, too urban, too black, or too Democratic.'"<sup>166</sup> Of course, the first and fourth adjectives represent nakedly political and ideologically biased efforts to "fenc[e] out" a "sector of the population because of the way they may vote," a kind of political discrimination condemned by the Supreme Court.<sup>167</sup> The "too urban" argument has no justification in the Constitution and seems to cut directly against the Court's statement that "[l]egislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests."<sup>168</sup> The idea that the District population is "too black" to be represented is the very antithesis of everything the Fourteenth and Fifteenth Amendments are designed to accomplish.

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<sup>165</sup> *Dunn v. Blumstein*, 405 U.S. 330, 337 (1972) (quoting *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627 (1969)).

<sup>166</sup> Kurland, *supra* note 87, at 476 n.2 (citing Arlen J. Large, *Full Representation for D.C.?*, WALL ST. J., Aug. 30, 1978, at 14 (quoting Sen. Edward Kennedy)). Senator Kennedy repeated those opposition arguments in 1991. *See id.*

<sup>167</sup> *Carrington v. Rash*, 380 U.S. 89, 94 (1965) (striking down Texas' disenfranchisement of members of the armed forces).

<sup>168</sup> *Reynolds v. Simms*, 377 U.S. 533, 562 (1964).

There are, however, slightly elevated forms of this kind of argument. It has been suggested that the District population is too politically and economically dependent on the federal government,<sup>169</sup> or that it lacks sufficient political diversity. It is worth briefly parsing these arguments.

The association of some substantial part of the District's citizenry and economy with the federal government cannot be legitimate grounds for disenfranchising the District's citizens. This rationale is both radically underinclusive and radically overinclusive. It leaves out the millions of federal government employees who live and work in *other* states; indeed, the vast majority of federal government employees do not live in the District.<sup>170</sup> Why should certain federal government employees be disenfranchised but not others? Is it really worse to work at and live near the Department of Justice in the District than to work at and live near the Pentagon in Virginia or the National Institutes of Health in Maryland? And why not disenfranchise state and local government employees? Obviously, a statute that simply disenfranchised all employees of the government would be flagrantly unconstitutional. Government employees retain their essential political and free speech rights, and cannot be disenfranchised even if their domicile in a state is based only on assignment to a military base.<sup>171</sup>

This rationale is also fatally overinclusive because hundreds of thousands of Washingtonians—an outright majority—do not work for the federal government and do not depend on it for their livelihoods. They become voting rights victims by virtue of a congressionally imposed form of guilt by association.

Finally, the suggestion that the District, which is overwhelmingly Democratic in voter registration,<sup>172</sup> is not of sufficient political diversity to merit voting rights suffers from the same flaws. Many jurisdictions are as similarly lopsided as the District. For example, Idaho's entire congressional delegation is Republican,<sup>173</sup> and Massachusetts' is entirely Demo-

<sup>169</sup> See JUDITH BEST, NATIONAL REPRESENTATION FOR THE DISTRICT OF COLUMBIA 3-4 (1984), cited in Neuman, *supra* note 21, at n.133 ("The District is ineligible for statehood because its populace is too closely associated with the interests of the federal government.").

<sup>170</sup> As of December 31, 1994, approximately 2,903,000 civilian federal employees lived and worked in the United States, but only 204,000, or roughly seven percent, worked in the District. See BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1997, at 350 tbl. 539 (1997).

<sup>171</sup> See, e.g., *Pickering v. Board of Educ.*, 391 U.S. 563 (1968) (finding that public employees do not generally relinquish First Amendment rights simply by accepting public employment); *Carrington*, 380 U.S. 89 (striking down state law forbidding voting by military personnel stationed in Texas).

<sup>172</sup> In the District's 1994 general election, 79.1% of registered voters were Democratic, 7.1% Republican, 12.6% Independent, and 1.2% Statehood Party. See Rene Sanchez, *Voter Sign-Up Makes Ward 8 a Match for 3; Gains East of Anacostia Push Registration to All-Time High*, WASH. POST, Oct. 28, 1994, at D1.

<sup>173</sup> See BARONE & UHFUSA, *supra* note 5, at 450-62.

cratic.<sup>174</sup> The complaint that the District lacks sufficient political diversity is a camouflaged reformulation of the impermissibly viewpoint-specific complaint that it is too Democratic or too liberal.

*B. Does the Constitution Actually Compel Congress to Disenfranchise the District?*

The assumption that the Constitution compels congressional disenfranchisement of District residents has long permeated legal and popular consciousness.<sup>175</sup> Even many proponents of statehood and greater home rule accept on face value the ubiquitous claim that the non-voting regime flows necessarily from the architecture of the Constitution. But the relevant structural provisions of the Constitution—Article I, Section 8, Clause 17; Article I, Section 2, Clause 1; the Seventeenth Amendment; and the Twenty-third Amendment—contain nothing explicitly or implicitly compelling disenfranchisement.

*1. The District Clause Fallacy*

Article I vests in Congress the power to “exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may . . . become the Seat of the Government of the United States.”<sup>176</sup> It is often argued that this Clause requires disenfranchisement of the population of the District in congressional elections. According to this conception, because Congress is the governmental authority for the District, residents cannot constitutionally be given the right to vote for members of Congress who share in actual Article I powers. However, this interpretation is not supported by the text, structure, history, or purposes of the District Clause, much less the conception of political sovereignty that underlies the Constitution as a whole.

Nothing in the text of the District Clause explicitly requires Congress to disenfranchise Washingtonians. Indeed, the language of the District Clause makes clear that its purpose is *administrative* in nature, and

<sup>174</sup> See *id.* at 684–720.

<sup>175</sup> As long ago as 1803, St. George Tucker wrote of the disenfranchisement: “An amendment of the constitution seems to be the only means of remedying this oversight.” ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES 1: App. D 278 (1803). Modern observers speak in the same voice. See Peter Franchino, *The Constitutionality of Home Rule and National Representation for the District of Columbia*, 46 GEO. L.J. 377, 407 (1958) (“It would appear that constitutional amendment is the sole method of providing national franchise for District citizens . . .”). In an important article more than two decades ago, however, Peter Raven-Hansen argued that the Constitution allows, although it does not compel, Congress to grant District residents representation in Congress by treating the District as a “state” within the meaning of Article I. See Peter Raven-Hansen, *Congressional Representation for the District of Columbia: Constitutional Analysis*, 12 HARV. J. ON LEGIS. 167 (1975) [hereinafter Raven-Hansen, *Congressional Representation*].

<sup>176</sup> U.S. CONST. art. I, § 8, cl. 17.

that Congress' authority over the District is "for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings . . ." <sup>177</sup>

If in a self-executing way the Clause independently forces District residents to forfeit the right to vote, it must be because it causes them to lose *all* of the constitutional rights that citizens of the fifty states enjoy. On this theory, the District Clause establishes unrestrained congressional power over everything that happens within its jurisdiction, unbounded by the Bill of Rights and other constitutional principles.

But this reading is terribly strained. In fact, the Clause gives Congress the same kind of exclusive legislative power that states enjoy over the populace within their geographic domains. The Supreme Court has always understood the District Clause to create a structural analogy between the powers of Congress over the residents of the District and the powers of the states over their residents. <sup>178</sup>

Thus, Congress has the powers over citizens within its jurisdiction that states have over theirs. But these powers are in no sense unconstrained. It is the premise of our Constitution that governmental power must coexist with citizens' constitutional rights without infringing upon them. <sup>179</sup>

Interpreting the District Clause, Justice Sutherland asserted that District residents may not be treated as second-class citizens. <sup>180</sup> He emphasized that the District Clause and the creation of the District out of Maryland and Virginia land had not subtracted constitutional rights from people who already had them as citizens of states. <sup>181</sup> Neither the text, structure, nor interpretive history of the District Clause compels Congress to disenfranchise citizens living in the District of Columbia.

Specific inquiry into the intent behind the District Clause reveals that its original purpose was not to render American citizens voteless, but to assure Congress complete police power over the seat of government. Congress wanted to guarantee that it could maintain military control and physical security over the Capitol, the other federal buildings, and the capital city. <sup>182</sup>

<sup>177</sup> *Id.*

<sup>178</sup> See discussion *supra* Part II.B.

<sup>179</sup> The "very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

<sup>180</sup> See *supra* note 28 and accompanying text, discussing *O'Donoghue v. United States*, 289 U.S. 516 (1933).

<sup>181</sup> See *supra* note 29 and accompanying text, discussing *O'Donoghue*, 289 U.S. at 541 (quoting *Downes v. Bidwell*, 182 U.S. 244, 260-61 (1901)).

<sup>182</sup> As a lesser concern, the Framers also thought that carving out a separate jurisdiction for the national government would dampen the intense sectional rivalries that had been unleashed by the peripatetic Congress' search for a permanent home in the 18th century. See 3 ELLIOT'S DEBATES, *supra* note 38, at 432-33. For expressions of this sectionalism, see *id.* at 430-31, 433 (statement of Mr. Grayson) and see *id.* at 440 (statement of Mr. Pendleton). This additional motivation, however, in no way conflicts with the constitutional imperative of voting by capital residents.

A major reason the Framers consistently argued for giving members of Congress control over the city in which they met was "to preserve the police of the place and their own personal independence, that they may not be overawed or insulted, and of course to preserve them in opposition to any attempt by the state where it shall be."<sup>183</sup> The critical event giving impetus to this pervasive rationale was a rowdy public demonstration at the Pennsylvania State House building in Philadelphia on June 21, 1783, while the United States Congress was meeting there.<sup>184</sup> According to historian Kenneth Bowling, thirty former Revolutionary War soldiers, mostly from Pennsylvania, prepared to mount an assault on the building.<sup>185</sup> The target of their wrath was not Congress, which had recessed over the weekend, but Pennsylvania's Executive Council, which was in session on the second floor of the building. The soldiers had come to the State House to demand their overdue pay from the Executive Council.<sup>186</sup>

As the demonstration grew larger and rowdier, the congressmen appealed to the Executive Council to summon the Pennsylvania militia.<sup>187</sup> The Council refused, arguing that absent an authentic emergency the militia would never take up arms against the men who had fought for American independence.<sup>188</sup> The Executive Council finally agreed to accept the soldiers' petition and meet with a group of officers, but not before the soldiers and gathered crowd had insulted and intimidated the congressmen in the building.<sup>189</sup>

According to Bowling, Alexander Hamilton and his Federalist allies exploited the flare-up over wages precisely to win support in their effort to constitutionalize their vision of a magnificent federal capital directly under congressional control. In addition, Bowling suggests that "Hamilton and his centralist allies deemed it inappropriate that continental soldiers be allowed to settle their claims against Congress with a state government."<sup>190</sup> In an emergency session held the night of the demonstration, Congress passed several secret resolutions, mainly written by Hamilton, protesting the insult experienced by members of Congress, authorizing Hamilton to seek assurances from Pennsylvania that it would in the future ensure the "dignity of the federal government," and ordering George Washington to march a group of loyal federal soldiers to Philadelphia to

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<sup>183</sup> *Id.* at 439–40 (statements of Mr. Pendleton); *cf. id.* at 89 (statement of Mr. Madison) (warning that a state with legislative power over the seat of government could threaten and control Congress).

<sup>184</sup> See KENNETH R. BOWLING, *THE CREATION OF WASHINGTON, D.C.: THE IDEA AND LOCATION OF THE AMERICAN CAPITAL* 30–34 (1991) (providing an authoritative and detailed account of these events and their political meanings).

<sup>185</sup> *See id.* at 30.

<sup>186</sup> *See id.*

<sup>187</sup> *See id.* at 32.

<sup>188</sup> *See id.*

<sup>189</sup> *See id.* at 32–33.

<sup>190</sup> *Id.* at 31. Centralists sought stability for the new country, and most wanted the federal government to be supreme over the states. *See id.* at 24.

quell the gathering insurrection.<sup>191</sup> Congress also passed, and soon acted upon, a clandestine measure authorizing the President of Congress to reconvene Congress in New Jersey “in order that further and more effectual measures may be taken for suppressing the present revolt, and maintaining the dignity and authority of the United States.”<sup>192</sup>

Whether these events reflected Congress’ authentic anxiety about its physical security or an elaborate political ruse, the Philadelphia controversy clearly “led for the first time to public proposals that Congress should exercise exclusive jurisdiction over the place where it met.”<sup>193</sup> During the debates a few years later over the content and then ratification of the Constitution, “the Philadelphia incident became a key exhibit in support of the need for exclusive federal jurisdiction over . . . the seat of the federal government.”<sup>194</sup>

In a review of the controversy over the District Clause in state ratification debates, Professor Peter Raven-Hansen noted that “the memory of the mutiny scare and the need for full federal authority at the national capital motivated the drafting and acceptance of the ‘exclusive legislation’ Clause.”<sup>195</sup> Indeed, it was taken for granted at the Virginia ratifying convention, even among skeptical delegates, that what “originated the idea of the exclusive legislation was, some insurrection in Pennsylvania, whereby Congress was insulted—on account of which, it is supposed, they left the state.”<sup>196</sup>

Madison referred to the “disgraceful” affront to federal authority that took place in Philadelphia, arguing that “[i]f any state had the power of legislation over the place where Congress should fix the general government, this would impair the dignity, and hazard the safety, of Congress . . . . Gentlemen cannot have forgotten the disgraceful insult which Congress received some years ago.”<sup>197</sup> Madison then made the classic argument that the federal government could not be guarded “from the undue influence of particular states, or from insults, without such exclusive power.”<sup>198</sup> “If this commonwealth depended, for the freedom of deliberation, on the laws of any state where it might be necessary to sit,” he asked, “would it not be liable to attacks of that nature (and with more indignity) which have already been offered to Congress?”<sup>199</sup>

Other state ratification debates reveal the same conception of the purposes behind “exclusive legislation.” In the North Carolina Conven-

<sup>191</sup> *Id.* at 33.

<sup>192</sup> *Id.* at 33–34.

<sup>193</sup> *Id.* at 34.

<sup>194</sup> Whit Cobb, *Democracy in Search of Utopia: The History, Law, and Politics of Relocating the National Capital*, 99 DICK. L. REV. 527, 530–31 (1995).

<sup>195</sup> Raven-Hansen, *Congressional Representation*, *supra* note 175, at 171.

<sup>196</sup> 3 ELLIOTT’S DEBATES, *supra* note 38, at 434 (statements of Mr. Grayson).

<sup>197</sup> *Id.* at 89.

<sup>198</sup> *Id.* at 433.

<sup>199</sup> *Id.*

tion, Delegate Iredell asked about the “consequence” of locating the capital “in the power of any one particular state . . . .”<sup>200</sup> “Would not this be most unsafe and humiliating? Do we not all remember that, in the year 1783, a band of soldiers went and insulted Congress?”<sup>201</sup>

Thus, the historical record is plain that the overriding purpose of the District Clause was to guarantee that Congress would not be forced to depend on a state government that could compromise or obstruct its actions for parochial reasons. Congress did not intend to disenfranchise citizens within the capital city. The importance of this understanding is that vindicating Congress’ control over the capital does not conflict with the equally compelling constitutional imperative of extending suffrage rights to citizens of the capital. Congress *can* govern the capital city exclusively and in zealous pursuit of its own interests *without disenfranchising the local population in federal elections*. Congress feared a threat to its power and dignity from a sovereign state government controlling the police and legislative power in the capital city. If the District were given direct representation in the Senate and House, the District Clause would not be offended so long as Congress continued to act as the supreme legislative power over District affairs. Even if the District’s two senators and representative were to seek some legislative result incompatible with a valid federal interest as perceived by other members of Congress, they could be outvoted 100-2 and 435-1.

There is not a shred of historical evidence that it was the purpose or design of any of the Framers or ratifiers of the District Clause to disenfranchise American citizens. It is true that a few early republican skeptics of the District Clause seemed to anticipate that without a Bill of Rights to restrain them, members of Congress would end up disenfranchising residents.<sup>202</sup> But there is no evidence that any Framers believed that communal disenfranchisement at the seat of government was necessary to maintain congressional police power jurisdiction over the area. In fact, as District of Columbia Court of Appeals Judge Gladys Mack has forcefully argued:

An examination of the circumstances surrounding the adoption of Clause 17 [the District Clause] demonstrates that the Framers

<sup>200</sup> 4 ELLIOT’S DEBATES, *supra* note 38, at 219.

<sup>201</sup> *Id.* at 219–20.

<sup>202</sup> For example, Thomas Tredwell, a delegate to the New York ratifying convention, argued that “subjecting the inhabitants of that district to the exclusive legislation of Congress . . . is laying a foundation on which may be erected as complete a tyranny as can be found in the Eastern world.” 2 ELLIOT’S DEBATES, *supra* note 38, at 402. Still, it is hard to infer from such statements that the purpose of the District Clause was disenfranchisement. First, Tredwell was speaking about a District Clause without any accompanying Bill of Rights to inform it. Second, as a critic of central power, Tredwell was making a prediction about what Congress would actually do with respect to local voting rights rather than what it *had* to do as a matter of constitutional law.

never contemplated that Congress would be permitted to use cession to strip away the rights accorded to all *state* citizens by the Constitution, rights that "attached to [District residents] irrevocably" when the District was a part of the ceding states. [citation omitted] . . . . As state citizens prior to cession, D.C. residents were entitled to participate in the election of the President via the electoral college under Article II, § 1 . . . [and] to elect representatives to the House of Representatives, Article I § 2 cl.1.<sup>203</sup>

In fact, during the period of constitutional formation, there was precious little discussion of voting in the capital city. The Supreme Court has observed the failure of the Founders to deal cleanly with the problem of how to treat District residents for the purposes of federal diversity jurisdiction: "There is no evidence that the Founders, pressed by more general and immediate anxieties, thought of the special problems of the District of Columbia . . . . This is not strange, for the District was then only a contemplated entity."<sup>204</sup>

Raven-Hansen has attributed the Framers' inattention to the voting issue to several factors.<sup>205</sup> First, because the Framers' focus was on assuring federal independence from states and control over its local meeting place, the problem of suffrage was not on anyone's mind. The geographic site for the District had not yet been located, and thus the Framers were dealing with a complete future abstraction. It was perfectly conceivable that the District would be located on virtually empty land, and indeed when it was sited on the Potomac and the federal government finally opened up shop in 1800, it had fewer than 15,000 year-round residents, much less than the target population of 50,000 that Congress had set for the admission of new states in the Northwest Ordinance of 1787.<sup>206</sup> Second, "it was widely assumed that the land-donating states would make appropriate provision in their acts of cession to protect the residents of the ceded land."<sup>207</sup> On this theory, voting was not a matter of

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<sup>203</sup> Gary v. United States, 499 A.2d 815, 855 (D.C. 1985) (Mack, J., dissenting in part and concurring in part) (quoting *Downes v. Bidwell*, 182 U.S. 244 (1901)). In this luminous opinion invalidating the one-house veto provision in the D.C. Home Rule charter, Judge Mack notes that: "As state citizens prior to cession, D.C. residents were entitled to participate in the election of the President via the electoral college under Article II, § 1 . . . [and] to elect representatives to the House of Representatives, Article I § 2 cl. 1." *Id.* at 855. She states that: "The right to a national voice in Congress, which was never voluntarily relinquished, in my view should be speedily restored." *Id.* at 855-56. "There is nothing inherent in the Constitution that prevents District residents from electing national representatives." *Id.* n.10 at 856.

<sup>204</sup> *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 587 (1949).

<sup>205</sup> See Raven-Hansen, *Congressional Representation*, *supra* note 175.

<sup>206</sup> See *id.* at 177.

<sup>207</sup> *Id.* at 172 (citing 3 ELLIOTT'S DEBATES, *supra* note 38, at 433 (statements of James Madison)).

constitutional concern—recall that at the time there was *no* federal constitutional protection of the right to vote—because the ceding states would work the matter out politically with Congress during cession negotiations. Delegate Iredell in the North Carolina ratification debate pointed out that a ceding state “may stipulate the conditions of the cession. Will not such state take care of the liberties of its own people?”<sup>208</sup>

Finally, Raven-Hansen argued that representation of District residents was not an issue because “it was assumed that the residents of the District would have acquiesced in the cession to federal authority.”<sup>209</sup> The most explicit statement by one of the Framers on this point was Madison’s observation that:

the [ceding] State will no doubt provide in the compact for the rights, and the consent of the citizens inhabiting it . . . as they will have had their voice in the election of the government which is to exercise authority over them; as a municipal legislature for local purposes, derived from their own suffrages, will of course be allowed them . . .<sup>210</sup>

Madison’s statement that District residents “will have had their voice” in the election of Congress is, of course, studiously ambiguous. It might simply mean, as Raven-Hansen seems to believe, that Madison recognized that District residents, as former residents of states, will have had their chance at some point in the past to cast votes for representatives to Congress, now their exclusive legislator. Alternatively, it might mean that Madison anticipated the arrangement that actually prevailed for the first decade after cession by Maryland and Virginia in which District residents continued to vote for members of Congress from their states of former domicile. At any rate, it is hard to read Madison’s language as manifesting anything like an intention to permanently disenfranchise the capital population. On the contrary, his words evince a most democratic spirit, antithetical to the idea of constitutionally engineered disenfranchisement, and a specific commitment to a “municipal legislature . . . derived from their own suffrages.”<sup>211</sup>

<sup>208</sup> 4 ELLIOTT’S DEBATES, *supra* note 38, at 219.

<sup>209</sup> Raven-Hansen, *Congressional Representation*, *supra* note 175, at 172.

<sup>210</sup> THE FEDERALIST NO. 43, at 280 (James Madison) (Earle ed. 1937). However, Raven-Hansen considered Madison’s words “doubtful authority” for the proposition that Madison anticipated direct District representation in Congress. He especially objected to a misreading of Madison’s statement by proponents of District representation in which the future perfect tense is altered to read “they will have their voice in the election of the government.” See Raven-Hansen, *supra* note 175, at 172–73 n.24. (citing *Hearings on H.J. Res. 396 Before the House Comm. on the Judiciary*, 90th Cong. 43 (1967) (statement of Citizens’ Joint Committee on National Representation)).

<sup>211</sup> THE FEDERALIST NO. 43, *supra* note 210, at 280.

## 2. The "People of the States" Fallacy

The argument that the Constitution itself disenfranchises the District also relies on language describing senators as "chosen . . . by the People of the several States"<sup>212</sup> and as coming "from each State."<sup>213</sup> The theory is that the constitutional vernacular of "states" reflects an intention to exclude District residents categorically from representation in Congress. This claim is not simply that the District community, as a distinct political entity, is barred from sending representatives directly to the House and Senate, but that District residents themselves are constitutionally *forbidden* to vote for representatives to Congress, even if from other states.

This overly literal reading does not do justice to the historical context or the case law. When Article I was written, of course, *no one* lived in the seat of government because it had not yet been designated, much less populated. Thus, when the Framers described representation as relating to "the People of the several States," they were not at the time excluding the citizens who lived in the parts of Maryland and Virginia area that would later become Washington, D.C., but rather *including* them in the constitutional community of voting citizens.

The history bears out this interpretation in the most vivid way. During the first Congress, it was clearly understood that the Constitution did *not* disenfranchise citizens living in the District. When Congress took possession from Maryland and Virginia in 1790, residents of the land ceded to Congress continued to vote in federal elections in Maryland and Virginia for the first decade after cession. Although the local population was brought under the "Exclusive Legislation" of Congress "in all cases whatsoever" in 1790, Congress set the first Monday in December of 1800 as the official day for removing the federal government to the District, and so provided that District residents could continue to vote in Maryland and Virginia for members of Congress and that Maryland and Virginia law would continue to operate within the District until further notice.<sup>214</sup> There is no recorded challenge to this practice, and indeed the first

<sup>212</sup> U.S. CONST. art. I, § 2.

<sup>213</sup> U.S. CONST. amend. XVII.

<sup>214</sup> Raven-Hansen seems to embrace the idea that exclusive legislative authority vested in Congress in 1800. See Raven-Hansen, *Congressional Representation*, *supra* note 175, at 174 (citing *United States v. Hammond*, 26 F. Cas. 96 (C.C.D.C. 1801) (No. 15,293)). But I would argue that the event of constitutional dimension took place in 1791 when Congress accepted the lands from Maryland and Virginia. The Constitution requires Congress to "exercise exclusive Legislation in all Cases whatsoever over such *District* . . . as may, by cession of particular States, and the Acceptance of Congress, become the Seat of Government of the United States . . ." U.S. CONST. art. I, § 8, cl. 17 (emphasis added). Thus, the cession, the acceptance, and the creation of the District all took place in 1791 despite the fact that Congress chose not to occupy the District or govern it directly until 1800. Congress' decision to continue Maryland and Virginia jurisdiction during the interval period was wholly within its discretion, and it could just as well have appointed commissioners or

Congress itself must have thought it perfectly unobjectionable, a fact pregnant with constitutional meaning.<sup>215</sup>

Moreover, when Congress in 1800 debated a bill providing that it would control District law in the future, the issue of voting came up in an illuminating way. The bill's proponents understood that the exercise of direct control by Congress would cause District residents to "cease to be the subject of State taxation, [and that] it could not be expected that the States would permit them, without being taxed, to be represented."<sup>216</sup>

The opponents of the bill argued for keeping the status quo: District residents would be governed by the evolving state laws of Maryland and Virginia and could keep voting in the states, despite the fact of exclusive legislative authority by Congress. As Raven-Hansen puts it, "[t]he premise underlying their opposition to the bill—a premise never challenged in the congressional debates which ensued—was that . . . the lodging of exclusive legislative authority over the District in Congress [was] consistent with continued representation of District residents in Congress."<sup>217</sup>

Even more striking, there were members of the House of Representatives from both Maryland and Virginia whose residences were within the boundaries of the District, both before and after 1800. Daniel Carroll served in both the Continental Congress and the first United States Congress from March 4, 1789, to March 3, 1791, as a Representative from Maryland, yet lived in Rock Creek Park.<sup>218</sup> After 1800, John Love, a resident of Alexandria, which was then part of the District, served as a Representative from Virginia.<sup>219</sup>

The foundational experience of District residents voting for, and serving as, congressional representatives is not an isolated event in American history. Through at least the middle of the twentieth century, many states allowed District residents who had gone to work in the federal government to vote back home. Indeed, the practical vision of a capital city as a transient home to citizens who retain their basic political loyalties to their states continues to mark life in the District. Hundreds, if not thousands, of permanent year-round District residents are registered and vote in other states, even if this peculiar arrangement is nowhere em-

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allowed some other states to supervise the District.

<sup>215</sup> The constitutional understandings of the first Congress are given special weight because many of the members of the first Congress, including Madison himself, were also Framers of the Constitution. See *Marsh v. Chambers*, 463 U.S. 783, 790 (1983) ("An act 'passed by the first Congress assembled under the Constitution, many of whose members had taken part in the framing of that instrument . . . is contemporaneous and weighty evidence of its true meaning.'" (quoting *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888))).

<sup>216</sup> Raven-Hansen, *supra* note 175, at 175 (quoting 10 ANNALS OF CONG. 869 (1800) (statements of Rep. Nicholas)).

<sup>217</sup> *Id.* at 176.

<sup>218</sup> See WASHINGTON PAST AND PRESENT: A HISTORY (John Clagett Proctor ed., 1930).

<sup>219</sup> See BIOGRAPHICAL DIRECTORY OF THE AMERICAN CONGRESS 1774-1927, H.R. DOC. No. 81-607, at 92 (1950).

bodied in law. To take the most prominent example, President and Mrs. Clinton are full-time residents of the District of Columbia (in public housing no less!) but continue to vote in Arkansas. The same holds true for a large portion of the 535 members of Congress, and their spouses and families, who maintain voter registration in their home states but live on Capitol Hill, or in Georgetown, Cleveland Park, or the Watergate apartments. These VIP Washingtonians and their families take it for granted that the constitutional structure is not a political straitjacket that requires them to be unrepresented in Congress simply because they live in the District. There is no constitutional law to contradict their practice or to invalidate their votes.

If it is an accepted practice for high-level Washingtonians to escape nonrepresentation by voting in the states, then surely it must be permissible for Congress to enfranchise *all* Washingtonians in the same way (if not some other, more direct method). To be sure, one might say that the right of elected legislative and executive branch officials living in the seat of government to vote in their home states is implied by the various provisions of Article I, but that would not explain why the spouses and children and staff members of the President and members of Congress should be able to live permanently in the District but vote in the states. Finally, two significant extant practices confirm that Article I does not disenfranchise citizens who are domiciled in the District. The first practice is the decision by Congress to grant the District a delegate in the House of Representatives. At first blush, the conventional understanding of the “non-voting” delegate position might seem to bolster the proposition that Washingtonians may not have voting representation in Congress. However, closer examination reveals that the delegate already exercises some actual fraction of the overall constitutionally created legislative power.

Article I of the Constitution vests all legislative powers in the “Congress of the United States.”<sup>220</sup> Thus, as the D.C. Circuit has emphasized, “[n]o one congressman or senator exercises Article I ‘legislative power.’”<sup>221</sup> Rather, the “legislative power” rests with the bicameral legislature itself. As a matter of political reality and constitutional understanding, however, each of the 535 members of the two bodies exercises some fraction of the overall constitutional essence we call “legislative power.” Some of them, chairs of major committees with great seniority, for example, end up exercising more of that power than others, such as freshman members of the minority party in the House. But it also seems clear that each of the five delegates—from the District of Columbia and the four territories—exercises a real, if tiny, fraction of the national legislative power. The delegates have regular office space in the House office buildings. They have the right to speak on the floor of the House as well as in standing

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<sup>220</sup> U.S. CONST., art. I, § 1.

<sup>221</sup> *Michel v. Anderson*, 14 F.3d 623, 630 (D.C. Cir. 1994).

committees. Most significantly, however, delegates enjoy the right to vote in committee and in subcommittee,<sup>222</sup> and for a brief period even voted in the Committee of the Whole on the floor of the House.<sup>223</sup>

There is no doubt that real legislative power generated by the Constitution attends to the delegate position. A delegate's vote can make the difference in whether a bill or an amendment passes a committee or subcommittee vote and is sent to the floor. Although a discharge petition procedure is always available to prevent a delegate's vote from ultimately controlling a piece of legislation, as a matter of political reality, a vote in committee is a precious piece of the overall legislative power. Indeed, as part of the normal process of legislative logrolling, a delegate can trade his or her vote in committee or subcommittee on a bill for a member's vote on the floor on another bill. Moreover, the right to speak in committee and on the floor of the House implies the power to persuade and convince other Members of one's position, an opportunity that other American citizens who are not members of the House obviously do not enjoy.

Indeed, if we assume, as I think we safely can, that Congress would have no authority to enact a statute that turned prominent private citizens or mayors of large cities (to use the *Michel* court's example) into delegates to the House, then we have explicitly recognized both the District and the territories as distinctive and legitimate legislative actors within the constitutional regime. That these entities are awarded a fragment of the overall legislative power again refutes the claim that Article I denies the District population the right to vote for representatives in Congress.

A second practice suggesting that the *statelessness* of District residents does not compel them to be perpetually unrepresented is Congress' decision to enfranchise citizens who have moved abroad temporarily or permanently. Through the Uniformed and Overseas Citizens Absentee Voting Act, first enacted in 1986, Congress requires that each state "permit absent uniformed services voters and overseas voters to use absentee registration procedures and to vote by absentee ballot in general, special, primary, and runoff elections for Federal office."<sup>224</sup> With this Act, Con-

<sup>222</sup> The Rules of the House of Representatives provide that the delegates shall "serve on standing committees in the same manner as Members of the House and shall possess in such committees the same powers and privileges as the other Members." ROBIN H. CARLE, U.S. HOUSE OF REPRESENTATIVES, RULES OF THE HOUSE OF REPRESENTATIVES 18 rule XII (1998).

<sup>223</sup> This was the subject of the litigation in *Michel v. Anderson*. On January 5, 1993, the House gave the five delegates the right to vote in deliberations of the Committee of the Whole. The entire Republican membership of the House brought suit alleging that this practice violated Article I's command that the House "shall be composed of Members chosen every second year by the People of the several States." Because the court thought that the "ancient practice of delegates serving on standing committees of the House" was beyond challenge, it found that the enlargement of the Delegates' voting privileges had no "constitutional significance." See *Michel*, 14 F.3d at 632.

<sup>224</sup> 42 U.S.C. § 1973ff-1 (1994).

gress also compels the states to accept and process, with respect to any Federal election, any *otherwise valid* voter registration application from an absent uniformed services voter or overseas voter, if the application is received not less than thirty days before the election.<sup>225</sup>

With this provision Congress essentially forces the states to accept voter registration by citizens who otherwise would not be qualified to register for lack of proper residence or domicile in the state. Indeed, there appears to be no requirement that the voters have even lived in the state in which they register. Congress has thus successfully used its enforcement powers under Section 5 of the Fourteenth Amendment to secure the right of Americans living abroad to vote in federal elections by making their enfranchisement a kind of collective responsibility on the part of the states. The District population is in an analogous situation to Americans living abroad: unless Congress acts to vindicate their right to be represented in federal elections, District residents will continue to go without this most fundamental right of citizenship.

### 3. *The Twenty-Third Amendment Fallacy*

Another part of the argument that the Constitution must disenfranchise citizens living in the District in congressional elections may be based on the Twenty-third Amendment, which provides the District with electoral college votes in presidential elections.<sup>226</sup> The Amendment seems to reinforce the distinction between the District and the states and arguably constitutionalizes a principle of political inequality between them by limiting the District's voting power in the electoral college to that of the least populous State.<sup>227</sup> Moreover, the Amendment says nothing about congressional representation, leaving the negative inference that District residents are, and must remain, disenfranchised in Congress.

There are many problems with this line of attack on the application of one person-one vote to the District. First, it seems deeply ironic to use a constitutional amendment that was enacted in order to *vindicate* voting rights in presidential elections as the reason to *negate* voting rights in congressional elections. Given the constitutional preference for representation, the Twenty-third Amendment ought to be viewed as rejecting any implication that District residents are unfit for participation in federal elections. Indeed, if the adoption of the Twenty-third Amendment in 1961 foreclosed all substantive enfranchisement of the District population in Congress, it would have been unconstitutional for Congress to

<sup>225</sup> *See id.*

<sup>226</sup> *See* U.S. CONST. amend. XXIII, § 1 (stating that the District "shall appoint . . . electors of President and Vice President . . . in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State . . .").

<sup>227</sup> *See id.*

create the office of delegate from the District of Columbia a decade later.<sup>228</sup>

Reading the Twenty-third Amendment to preclude a constitutional claim for voting representation in Congress offends the dynamic of democratic enlargement that defines the Constitution. Consider for example the Twenty-fourth Amendment, added to the Constitution in 1964 to ban all poll taxes in federal elections. During the enactment and ratification debates, there was much discussion about whether the Amendment should extend to poll taxes in state elections as well,<sup>229</sup> and a deliberate decision was made to limit the Amendment's scope. Just two years later, in *Harper v. Virginia Board of Elections*, the Supreme Court found that Virginia's state election poll tax violated the Equal Protection Clause,<sup>230</sup> although such a claim had been regarded as ridiculous by those who understood the Twenty-fourth Amendment's silence on the subject to imply that state poll taxes remained valid. This holding prompted angry dissenting opinions from Justices Black and Harlan, who argued that the Court was betraying "the original meaning of the Constitution,"<sup>231</sup> and ignoring the fact that poll taxes "have been a traditional part of our political structure."<sup>232</sup> The majority determined, however, that "[n]otions of what constitutes equal treatment for the purposes of the Equal Protection Clause *do* change."<sup>233</sup> These words seem custom-made for the situation of the District of Columbia.

Those who argue that the Twenty-third Amendment and the subsequent failure of the D.C. Voting Rights Amendment freeze the political rights of District citizens also ignore the ways in which equal protection doctrine has often done the work intended by failed constitutional amendments. For example, the failure to pass the Equal Rights Amendment did not foreclose the evolution of equal protection principles to vindicate the equal rights of women under heightened scrutiny. It would have been possible to argue that the Nineteenth Amendment, ratified in 1920 and conferring on women the right to vote, impliedly foreclosed the use of Equal Protection to protect against gender discrimination, for if the Equal Protection Clause applied, why would the Nineteenth Amendment have been necessary? Nonetheless, the Court has forcefully brought women under the umbrella of equal protection jurisprudence, a process

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<sup>228</sup> See 2 U.S.C. § 25(a) (1994).

<sup>229</sup> See, e.g., 108 CONG. REC. 17,660 (1962) (statement of Rep. Lindsay of New York) ("Mr. Speaker, if we are going to amend the Constitution, the amendment ought to be meaningful . . . such an amendment should abolish impediments to voting in local elections as well as state elections. It should not be confined to Members of Congress.").

<sup>230</sup> 383 U.S. 663 (1966).

<sup>231</sup> *Id.* at 677 (Black, J., dissenting).

<sup>232</sup> *Id.* at 684 (Harlan, J., dissenting).

<sup>233</sup> *Id.* at 669 (emphasis in original).

that culminated in the Court's landmark decision in *United States v. Virginia*.<sup>234</sup>

*C. Does Congress Have a Compelling Interest in Maintaining its Control over the Federal District?*

The above analysis of the District Clause makes it clear that Congress has a compelling interest in maintaining control over the seat of government and assuring effective operation of the federal government. Thus, if it could be shown that giving Washingtonians representation in Congress actually interfered with this interest, then it might be a sufficiently compelling reason for disenfranchisement.

This proof cannot be made. The vast majority of issues dealt with by Congress do not relate specially or uniquely to the District but rather to the nation as a whole. Moreover, if District representatives' views of proper policy governing the District under the District Clause clashed with those of all other members of Congress, they could be easily outvoted. Let us assume, for example, that the representatives and the people of Washington wanted to keep Pennsylvania Avenue open for public traffic, but everyone else in Congress, along with the President, believed that for security reasons it should be closed.<sup>235</sup> If it came to a vote, the District's representatives would lose in the House by a vote of 435 to 2, with similar margins in the Senate. The point is that there is very little chance that representation for District residents will impede Congress' rightful role over the seat of government.

IV. The Justiciability of the District's Disenfranchisement

However compelling, this argument will have nowhere to go if the various causes of action are ruled non-justiciable. Article III of the Constitution confines the federal judicial role to the adjudication of actual "cases" and "controversies."<sup>236</sup> As the Court observed in *Allen v. Wright*,

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<sup>234</sup> 518 U.S. 515 (1996) (holding that Virginia violated equal protection in maintaining a male-only admissions policy at the Virginia Military Institute); *see also* J.E.B. v. Alabama, 511 U.S. 127 (1994) (forbidding preemptory challenges to potential jurors based on gender); *Kirchberg v. Feenstra*, 450 U.S. 455 (1981) (declaring that a Louisiana law which allowed a husband to dispose of property held jointly with his wife without her consent violated equal protection); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980) (holding that gender-based distinctions in Missouri's workers' compensation law violated equal protection); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (holding that disparate treatment of servicemen and servicewomen in allocating benefits was a violation of the Equal Protection Clause).

<sup>235</sup> *See Closed Streets, Open Issue*, WASH. POST, May 24, 1995, at A24; Stephen C. Fehr & Hamil R. Harris, *U.S. Says It Will Pay for Closing the Avenue; Officials Irked D.C. Was Not Consulted Before Action*, WASH. POST, May 24, 1995, at D5.

<sup>236</sup> U.S. CONST. art. III, § 2.

“several doctrines” have grown up “to elaborate that requirement;”<sup>237</sup> two of them are crucial in testing the justiciability of the claims outlined above: the political question doctrine and standing. This Part argues first that a federal suit addressing the representational rights of District residents would present no “political question” outside the competence of the judiciary. The District’s disenfranchisement is a perfectly redressable violation of voting rights like the ones dealt with in one person–one vote or majority-minority district cases. Second, several hundred thousand people who are concretely and palpably injured by this regime have standing to challenge their disenfranchisement.

#### A. *Is This a Political Question?*

These claims will confront, before anything else, the assertion that they raise a non-justiciable political question. A political question is one “where there is ‘a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.’”<sup>238</sup> These are the two principal factors for analysis.

First, the question of voting rights in the District is not textually committed to the political arena. The text of the Constitution mentions neither congressional representation of District residents nor the specific nature of their voting rights. The District Clause provides that Congress shall “exercise exclusive Legislation” over the District,<sup>239</sup> but this is the same kind of power that states exercise over cities and towns, a kind of power that does not include authority to disenfranchise citizens in federal elections.

The general grant of power in the District Clause relates to the congressional interest in maintaining police power over the federal district, and has never prevented courts from examining the constitutionality of congressional treatment of the District. On the contrary, the Bill of Rights applies with full force in the District, and just as Congress may not establish a church or shut down the *Washington Post*, it may not violate the voting and representational rights of District residents. Congress could not, for example, create a local city council in the District with malapportioned or racially gerrymandered districts; nor could it (any longer) create a school board with fixed seats for members of different races. Thus, it is wrong to believe that the District Clause makes congressional regulation of voting rights in the District non-reviewable.

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<sup>237</sup> 468 U.S. 737, 750 (1984).

<sup>238</sup> *Nixon v. United States*, 506 U.S. 224, 224 (1993) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

<sup>239</sup> U.S. CONST. art. I, § 8, cl. 17.

It might be plausible to argue that Article I, Section 5 reflects a “textually demonstrable commitment of the issue” of District voting rights to Congress. That Section states that “[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . .”<sup>240</sup> In *Powell v. McCormack*,<sup>241</sup> however, the Supreme Court held that this provision was *not* a textual commitment of unreviewable authority to Congress, since the Qualifications Clause specifies the requirements for membership in the House.<sup>242</sup> The Court held that the House could not simply add to these qualifications by excluding a duly elected member, Harlem Congressman Adam Clayton Powell, on the grounds that he was facing criminal charges.<sup>243</sup> Invoking Article I, Section 5 here fails for the same reason: the Qualifications Clause cannot be made to require that a candidate live outside the District of Columbia.<sup>244</sup> Again, there have been Congressmen from Maryland and Virginia who lived exclusively within the geographic boundaries of the District, and a great many U.S. House and Senate candidates today—almost all of them incumbents—*do* live in the District of Columbia.<sup>245</sup>

Second, the Court is competent to adjudicate cases respecting voting rights in congressional elections. The Supreme Court since *Baker v. Carr*<sup>246</sup> has rejected all claims that voting rights cases raise intractable or unmanageable political questions. In *Baker*, the Court differentiated “political questions” from “political cases,” noting that courts “cannot reject as ‘no law suit’ a bona fide controversy as to whether some action denominated ‘political’ exceeds constitutional authority.”<sup>247</sup>

The Court has accordingly found justiciable attacks on practices that are alleged to dilute or cancel out votes, such as malapportioned legislative districts<sup>248</sup> and gerrymandered districts with majority-minority populations.<sup>249</sup> The fact that the Supreme Court, ultimately, would be reviewing actions of Congress rather than the states does not change the analysis. In *Powell v. McCormack*,<sup>250</sup> the Court found justiciable the seating of a

<sup>240</sup> U.S. CONST. art. I, § 5.

<sup>241</sup> 395 U.S. 486 (1969).

<sup>242</sup> See U.S. CONST. art. I, § 2.

<sup>243</sup> See *Powell v. McCormack*, 395 U.S. 486 (1969).

<sup>244</sup> It might be said that the Qualifications Clause itself implies disenfranchisement of the District since a District resident cannot be an inhabitant of a state. But District residents can be, and frequently are, treated as residents of states for both constitutional and statutory purposes.

<sup>245</sup> Congress has passed a statute requiring that Members of Congress who live year-round in the District of Columbia be treated like inhabitants of states for the constitutional and statutory purposes of taxation. By implicit analogy, this treatment must extend to voting and candidacy. See 4 U.S.C. § 113 (1994); 26 U.S.C. § 162 (1994).

<sup>246</sup> 369 U.S. 186 (1962).

<sup>247</sup> *Id.* at 217.

<sup>248</sup> See *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1963).

<sup>249</sup> See *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993).

<sup>250</sup> 395 U.S. 486 (1969).

Congressman allegedly denied his rightful seat in the House. In *United States Department of Commerce v. Montana*,<sup>251</sup> a case closely analogous to the District's, the Court considered the question of whether Congress' preferred method of apportioning House districts among the states (the so-called "method of equal proportions") violated the principle of one person—one vote developed in *Wesberry v. Sanders*.<sup>252</sup> The Court rejected the United States' argument that the case presented a nonjusticiable political question.

Acknowledging that the one person—one vote challenge to federal reapportionment "raises an issue of great importance to the political branches,"<sup>253</sup> the *Montana* Court nonetheless found that the "controversy . . . turns on the proper interpretation of the relevant constitutional provisions. As our previous rejection of the political question doctrine in this context should make clear, the interpretation of the apportionment provisions of the Constitution is well within the competence of the Judiciary."<sup>254</sup>

It did not bother the Court that it was reviewing the actions of Congress directly because although respect for Congress raises special concerns, "those concerns relate to the merits of the controversy rather than to our power to resolve it. As the issue is properly raised in a case otherwise unquestionably within our jurisdiction, we must determine whether Congress exercised its apportionment authority within the limits dictated by the Constitution."<sup>255</sup> Thus, it would not be a political question to review whether Congress' present reapportionment method unconstitutionally excludes American citizens living in the District from being counted for the purposes of apportioning members of the House.

Additionally, the 1994 *Michel v. Anderson* decision found that a Republican Article I challenge to a House of Representatives' rule, which allowed the delegate from the District of Columbia and the four territorial delegates to vote in the Committee of the Whole, presented no political question.<sup>256</sup> The court's theory was that the alleged practice of bestowing voting privileges on non-members of the House would indeed violate the constitutional provision that members of the House be "chosen by the People of the Several States" and therefore both voters and members of the House would have the right to challenge it.

By the same token, there must be justiciability when voters in the District and their non-voting House delegate allege that they are being wrongfully denied their voting and representational rights as citizens and as a representative under Article I. Of course, the claims would still have

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<sup>251</sup> 503 U.S. 442 (1992).

<sup>252</sup> *Id.* at 446.

<sup>253</sup> *Id.* at 458.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 459.

<sup>256</sup> 14 F.3d 623 (D.C. Cir. 1994) (upholding the voting policy).

to prevail on the merits, but as a threshold matter, the allegation that Congress is denying fundamental voting rights must be heard.

The political question doctrine cannot block judicial review of a basic disconnect in the framework of representative democracy. Indeed, judicial review is at its zenith of legitimacy when it is applied to the voting rights of people who have no other effective way in the political process to satisfy their claims. As John Hart Ely has written, "unblocking stoppages in the democratic process is what judicial review ought pre-eminently to be about, and denial of the vote seems the quintessential stoppage."<sup>257</sup>

### B. *Is There Standing?*

To prove standing, a plaintiff must allege: (1) a personal injury that, (2) is fairly traceable to the defendant's allegedly unlawful conduct, and (3) is likely to be redressed by the plaintiff's requested relief.<sup>258</sup>

Before analyzing these three dimensions of standing, it is important to observe that traditional standing doctrine may no longer apply to all complaints about unconstitutional arrangements in the electoral system. In *Shaw v. Reno*<sup>259</sup> and *Miller v. Johnson*,<sup>260</sup> the Court took up and affirmed challenges to certain majority-minority districts despite the fact that the plaintiffs never alleged that they had been personally, directly or concretely harmed in any way by virtue of living in the districts. If the Court simply assumed that the intersection of race and voting rights claims triggered a kind of threshold super-strict scrutiny that allowed plaintiffs to waive showing of injury, then plaintiffs claiming that systematic disenfranchisement of a majority-minority jurisdiction creates the unlawful impression of "political apartheid" would also be permitted to proceed directly to the merits.

Even following the three standard elements of *Allen v. Wright*, however, standing clearly exists to bring these claims. First, Supreme Court jurisprudence demands a "distinct and palpable" constitutional injury.<sup>261</sup> All of the Court's voting rights precedents make or assume the basic point that denial of voting rights is just such an injury. In a democratic society, there are few per se injuries of a grosser nature than stripping a citizen of his or her right to vote.

Furthermore, when congressional representation is denied, other injuries follow, such as the inability to obtain equal services and a fair share of federal resources. This is surely empirically provable, but it is sufficient that District residents, by virtue of their lack of political repre-

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<sup>257</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST* 117 (1980).

<sup>258</sup> See *Allen v. Wright*, 468 U.S. 737, 751 (1984).

<sup>259</sup> 509 U.S. 630 (1993).

<sup>260</sup> 515 U.S. 900 (1995).

<sup>261</sup> *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

sentation, have a lesser *opportunity to compete* for federal resources in Congress. We know this point from *Regents of the University of California v. Bakke*<sup>262</sup> and *Associated General Contractors of America v. Jacksonville*,<sup>263</sup> in which standing to challenge affirmative action policies did not require proof that the challengers would have received the benefits had the policies not been in place. It was sufficient to allege as injury that applicants were denied a fair chance to compete.<sup>264</sup>

Second, the disenfranchisement of District residents is “fairly traceable”<sup>265</sup> to congressional action and inaction. Congress has the constitutional responsibility to enfranchise American citizens on a one person—one vote basis,<sup>266</sup> but it has failed to live up to this responsibility, granting District residents only a non-voting delegate in the House of Representatives and no representation in the Senate. Congress is the only government entity that can bring the vote to Washington and it has refused to do so.

One might object that the Constitution itself causes the harm, but Part III has shown that this is not the case. The constitutional “exclusive legislator” for the District is Congress, and so it is the body with dirty hands.

The fact that the District’s disenfranchisement may be characterized as a result of congressional inaction rather than an affirmative, explicit statute does not destroy standing. In the years leading to *Bolling v. Sharpe*,<sup>267</sup> Congress had never passed a statute explicitly dictating “that dual, segregated schools should be maintained; but the progression of school legislation enacted during those years did very clearly rest on a congressional *assumption* that segregation would continue.”<sup>268</sup> The *Bolling* Court assumed that Congress was at fault because it was structurally responsible for the District.

Finally, the injury to voting rights is likely to be redressable by judicial relief. Indeed, judicial relief is the *only* way that this matter will be resolved, for the proposed D.C. Voting Rights amendment has failed, statehood has been rejected, and Congress refuses to explore seriously other alternatives. Change will arrive only when a court declares the current regime unconstitutional and orders Congress to reapportion itself

<sup>262</sup> 438 U.S. 265 (1978).

<sup>263</sup> 508 U.S. 656 (1993).

<sup>264</sup> See *Bakke*, 438 U.S. at 280 n.14; *Associated*, 508 U.S. at 666 (“The ‘injury in fact’ in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of [a barrier that makes it more difficult for members of a group to obtain a benefit], not the ultimate inability to obtain the benefit.”).

<sup>265</sup> *Allen v. Wright*, 468 U.S. 737, 751 (1984) (citing *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41 (1975)).

<sup>266</sup> See discussion *supra* Part II.

<sup>267</sup> 347 U.S. 497 (1954).

<sup>268</sup> *Hobson v. Hansen*, 269 F. Supp. 401, 408 n.1 (D.D.C. 1967) (emphasis added) (citing *Carr v. Corning*, 182 F.2d 14, 17–19 (D.C. Cir. 1950)).

according to the principle of one person—one vote and respect the other constitutional rights currently being abridged.

But what might Congress do? What range of remedies could the Court even suggest that Congress might choose from? Among the major possibilities available to Congress are two that would not involve structural changes in Congress' relationship to the District.

### 1. Direct Statutory Enfranchisement

Congress could pass a statute treating the District as though it were a state and directly confer senators and proportionate House representation on it by statute.<sup>269</sup> The constitutional basis of Congress' power to act in this way would be its awesome delegated powers under the District Clause to "exercise exclusive Legislation in all Cases whatsoever" and the implied federal corollary to Section 5 of the Fourteenth Amendment. If the District Clause is as all-encompassing as opponents of District voting rights say it is, and if the Supreme Court's recent decision in *City of Boerne v. Flores*<sup>270</sup> is to be credited, then Congress must have the power to redress centuries of political discrimination and exclusion by granting full voting rights to the District's residents right now.

To be sure, this solution requires a structural and functional reading of Article I, which refers to representatives of the "states." But there is ample precedent from other contexts for Congress to use its powers under the District Clause to treat the District as though it were a state for both statutory and constitutional purposes. Hundreds of statutes provide that "[f]or the purposes of this legislation, the term 'State' shall include the District of Columbia."<sup>271</sup> If Congress does not have the constitutional

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<sup>269</sup> District residents could be enfranchised in Congress by way of a Constitutional amendment embodying the same provisions. But such an amendment was actually proposed by Congress and failed to win ratification in the states, when only 16 of the requisite 38 states ratified it. See MARKMAN, *supra* note 22, at 3 n.1 (1988). Moreover, Article V does not allow for court-ordered constitutional amendments and, of course, the states would be implicated by this mechanism as well.

<sup>270</sup> 117 S. Ct. 2157, 2163 (1997) (restating the authority of Congress to act affirmatively to secure voting rights under its Equal Protection powers to remedy and prevent discrimination and voting rights violations).

<sup>271</sup> There are 537 federal statutes that treat the District of Columbia as though it were a State for programmatic, governmental and constitutional purposes. See, e.g., 2 U.S.C. § 431 (1994) (Federal Election Campaign Act); 15 U.S.C. § 1692a (1994) (Fair Debt Collection Act of 1977); 17 U.S.C. § 101 (1994) (subject matter and scope of copyright); 18 U.S.C. § 1961 (1994) (Racketeer Influenced and Corrupt Organizations); 23 U.S.C. § 101 (1994) (federal-aid highways); 42 U.S.C. § 1973ee-6 (1994) (voting accessibility for the elderly and handicapped); 42 U.S.C. § 1973ff-6 (1994) (Uniformed and Overseas Citizens Absentee Voting Act of 1986); 42 U.S.C. § 1973gg-1 (1994) (National Voter Registration Act of 1993). See also *D.C. Representation in Congress: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 95th Cong. 7-12 (1978) (testimony of Senator Edward M. Kennedy).

power from the District Clause to treat the District as though it were a state, then these laws must be unconstitutional.

Moreover, as Peter Raven-Hansen has argued, the Court has been willing to see—and to allow Congress to treat—the District as though it were a state for numerous *constitutional* purposes as well.<sup>272</sup> Raven-Hansen identified three cases where the Court had specifically upheld legislation treating the District like “states” within the meaning of the Constitution. In *Loughborough v. Blake*,<sup>273</sup> Chief Justice Marshall found that Congress could impose a direct tax on residents of the District despite the fact that Article I, Section 2 specifically provides that direct taxes need to be apportioned “among the several states which may be included within this union.”<sup>274</sup> He reasoned that this phraseology established a “standard” for apportionment in the laying of direct taxes that could be applied to the District. But if *Loughborough* “does not treat the District as a state, for what purposes is the ‘standard’ applicable?”<sup>275</sup>

Second, in its somewhat convoluted holding in *National Mutual Insurance Co. v. Tidewater Transfer Co.*,<sup>276</sup> the Court affirmed the constitutionality of a federal statute that gave federal courts diversity jurisdiction over lawsuits between District and state residents despite the fact that Article III, Section 2, creates diversity jurisdiction in federal court only between citizens of different states.<sup>277</sup>

Third, the Court in *District of Columbia v. Carter*<sup>278</sup> more generally “recognized nominal statehood as a commonplace of constitutional construction.”<sup>279</sup> Justice Brennan wrote for the Court: “Whether the District of Columbia constitutes a ‘State or Territory’ within the meaning of any particular statutory or constitutional provision depends upon the character and aim of the special provision involved.”<sup>280</sup>

Because there are few constitutional purposes more important in a democracy than equal citizenship and participation, both the District Clause and the Equal Protection Clause should be read to empower Congress to enfranchise the District. As Raven-Hansen argued, enactment of

<sup>272</sup> See Raven-Hansen, *Congressional Representation*, *supra* note 175, at 179–84. Raven-Hansen here introduces and elaborates the “theory of nominal statehood” which he argues can and should be used to make political representation available to District residents.

<sup>273</sup> 18 U.S. (5 Wheat.) 317 (1820).

<sup>274</sup> *Id.* at 319.

<sup>275</sup> Raven-Hansen, *Congressional Representation*, *supra* note 175, at 179–81.

<sup>276</sup> 337 U.S. 582 (1949).

<sup>277</sup> See Raven-Hansen, *Congressional Representation*, *supra* note 175, at 183. This holding, however, can be only one element of an argument for the treatment of the District as a state. As Raven-Hansen noted, “*Tidewater* effectively recognized the District’s nominal statehood only for purposes of construing the federal judicial power, and not for the purposes of representation.” *Id.*

<sup>278</sup> 409 U.S. 418 (1973).

<sup>279</sup> Raven-Hansen, *Congressional Representation*, *supra* note 175, at 184.

<sup>280</sup> *Carter*, 409 U.S. at 420.

such a statute "would correct the historical accident by which D.C. residents lost the shelter of state representation without gaining separate participation in the national legislature."<sup>281</sup>

This proposition raises issues of further constitutional complexity that have been addressed by Raven-Hansen and Lawrence M. Frankel in extraordinary and exhaustive detail.<sup>282</sup> Both have concluded that the theory of "nominal statehood" would justify direct congressional enfranchisement of the District population.<sup>283</sup>

### 2. *Treating District Residents Like Citizens Living Abroad*

Congress could also use its powers under Section 5 of the Fourteenth Amendment and the District Clause to pass a statute giving residents the right to vote and run for office in their states of former domicile or, if they are native Washingtonians, in Maryland or, perhaps, the state of their choice. This statutory solution is parallel to the approach Congress crafted in the Uniformed and Overseas Citizens Absentee Voting Act.<sup>284</sup> It is also roughly similar to the District's original voting regime. This system could be implemented immediately by way of a simple statute but is far less preferable from a democratic perspective because it breaks up the political coherence of the community of citizens living in the District. It is even possible that such an electoral diaspora would run afoul of *Shaw v. Reno* and the other cases disfavoring bizarre and disjointed political geography. Nothing would be stranger in our political and constitutional experience than having citizens from one geographic community vote in fifty different states, so this solution is both theoretically and constitutionally disfavored.

### 3. *A Structural Revision: Statehood*

Congress could change course and decide to pass a statehood bill that reduces the size of the federal district, cedes the residential lands to the state of New Columbia, approves New Columbia's petition for admission, and then admits the fifty-first state to the Union. Of course, this disposition could not be ordered and is in no sense a constitutional requirement: under Article IV, Section 3, Congress has essentially unreviewable powers to admit new states. But it is one way that Congress

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<sup>281</sup> Raven-Hansen, *Congressional Representation*, *supra* note 175, at 185.

<sup>282</sup> See Lawrence M. Frankel, *National Representation for the District of Columbia: A Legislative Solution*, 139 U. PA. L. REV. 1659 (1991) (updating and, in certain constitutional respects, expanding on Raven-Hansen's original argument).

<sup>283</sup> See, e.g., Raven-Hansen, *Congressional Representation*, *supra* note 169, at 179-84.

<sup>284</sup> 42 U.S.C. § 1973ff-6 (1994).

could live up to the command of equal protection for citizens now caught in the undemocratic arrangements in the District.<sup>285</sup>

#### 4. Another Structural Revision: Reunion with Maryland

Just as Congress returned Alexandria and Arlington to Virginia in 1846, it could return most of the present District to Maryland, thus giving Washingtonians their political rights presently being denied. Maryland would have to consent to this retrocession of its former lands since Article IV, Section 3 provides that "no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress."<sup>286</sup> It does not presently appear that the political will exists in Maryland or in Congress to make this happen, but it remains a theoretical possibility.

Surely it was more difficult for Congress to attempt to build a system of integrated public schools in the District after two centuries of exclusion and segregation than it would be for Congress simply to find a way to give District residents the right to vote. It would not require constant supervision and intervention by the federal district court for Congress to accomplish this goal. In sum, the District's citizenry has standing to pursue its rights because it can show a concrete and severe injury caused by Congress that is redressable by the courts.

### V. Conclusion

It is an unremarked but powerful fact of American history that the District of Columbia has been a crucial pivot point in the development of the processes and values of constitutional democracy. Perhaps the most famous Supreme Court case in history, *Marbury v. Madison*, which proclaimed the doctrine of judicial review, was a District case dealing with a dispute over the presidential appointment of a Georgetown businessman to the local bench as a justice of the peace.<sup>287</sup> In 1862, the District became the first place where Congress abolished slavery, a full year before the Emancipation Proclamation; after the Civil War, Congress gave black men in the District the right to vote as a dress rehearsal for the Fifteenth Amendment.<sup>288</sup> The right of equal protection against invasion by the federal government (as opposed to the states) and the right to travel were both established by court cases that originated in the District.<sup>289</sup> Now the

<sup>285</sup> See Raskin, *supra* note 87, at 423; Raven-Hansen, *D.C. Statehood*, *supra* note 15.

<sup>286</sup> U.S. CONST. art. IV, § 3.

<sup>287</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>288</sup> See ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877*, at 6, 272 (1988).

<sup>289</sup> See *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Bolling v. Sharpe*, 347 U.S. 497

time has come for another case; this one to test whether equal protection for District citizens extends to the right to vote and to be represented in Congress.

A resilient truth about equal protection jurisprudence is that historical practice is no guarantee of present-day constitutionality, for "[n]otions of what constitutes equal treatment for the purposes of the Equal Protection Clause *do* change."<sup>290</sup> Radical reversals of obsolescent arrangements are to be expected because "the Equal Protection Clause is not shackled to the political theory of a particular era."<sup>291</sup> The equal protection principle will destabilize every settled form of political inequality and force the managers of exclusionary regimes to justify themselves.

Congress has a great deal of explaining to do when it comes to the District population, which it has treated for centuries like an unwanted step-child or, shifting metaphors, like the unseen inhabitants of a piece of real estate picked up accidentally in a foreign war.

The Supreme Court has generally done better by the District. Although it has systematically rejected attempts to escape taxation by frustrated non-voters in the District, it has also made clear that the Bill of Rights is still operative for District residents. Despite its "exclusive legislation" powers, Congress under current doctrine cannot establish an official church in the District, shut down the newspapers, deprive residents of a right to jury trial, force defendants to testify against themselves, or take the property of residents without just compensation.

Separately, the Court has also found that the "right to vote" is a fundamental right of the highest importance which it has repeatedly enforced over structural objections like separation of powers, federalism and the political question doctrine.

The Court must connect the general idea that American citizens in the District are members of the constitutional polity protected by the Bill of Rights with the specific idea that American citizens have to be represented in their federal, state and local governments and must have the right to vote for representatives.

It is true that even overwhelming authority in the voting rights field could not overcome a textual ban in the Constitution on voting by residents of the District. Yet no such ban exists. Nothing in the language of the District Clause disenfranchises Washingtonians, and there is no evidence that its original intent or meaning was to effect disenfranchisement. In the final analysis, the Court will again have to address the question of whether the Constitution is simply a contract among the states or a national popular covenant according to which the people have committed themselves to the ideals of equality and liberty proclaimed in the

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(1954).

<sup>290</sup> *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 669 (1966).

<sup>291</sup> *Id.*

Declaration of Independence and now embodied in the Fifth, Thirteenth, Fourteenth and Fifteenth Amendments.

This question was settled as long ago as *McCullough v. Maryland*, in which Chief Justice John Marshall declared that “[t]he Government of the Union . . . is emphatically and truly, a government of the people. In form and substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.”<sup>292</sup> The Constitution begins by making the source of political power clear: “We the people . . .”

The idea that Congress may constitutionally disenfranchise the District reflects the most conservative and statist constitutionalism. It is conservative because it works to conserve traditional political, social and racial arrangements. It is statist because it promotes a vision of the Constitution that privileges governmental power over political freedom. It is also statist, in an equally resonant sense, because it imagines the Constitution to be a social compact among *the states* rather than a social contract or covenant among *the people*.

The right of Washingtonians to be represented in Congress follows inexorably from the logic of all of our constitutional understandings. It is now time for the Courts and for Congress to take this appreciation from the level of insight to the level of action.

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<sup>292</sup> 17 U.S. (4 Wheat.) 316, 404–05 (1819).

**Written Testimony of the Committee for the Capital City**  
**To the Senate Committee on Governmental Affairs**  
**“Voting Representation in Congress for Citizens of the District of Columbia”**  
 May 23, 2002  
**Betty Ann Kane, spokesperson**  
**Board of Directors**

Senator Lieberman and members of the Senate Committee on Government Affairs, my name is Betty Ann Kane. I am pleased to present this written testimony on behalf of the Board of Directors of the Committee for the Capital City concerning options for restoring voting rights for residents of the District of Columbia. I have been a resident of the District of Columbia for 34 years and was honored to serve for 16 years as an elected official on the Board of Education and the D.C. Council.

The Committee for the Capital City is a non-profit, non-partisan educational organization formed in 1995 by a group of civic-minded residents of the District, Maryland and Virginia who are united by a common desire to preserve and protect the unique character of the nation's capital city while achieving full democratic rights for its citizens. We are devoted to researching and increasing public awareness of a just and practical solution to the injustice daily faced by District residents: that in the capital city of the world's greatest democratic nation, its residents lack fundamental voting rights, including the right to participate fully in their own governance. The Committee believes that any solution to this injustice that still leaves citizens of the city of Washington with fewer political rights than other Americans cannot be accepted. Whatever form of government is established, we must have full political rights, including the right to a local elected government with real municipal power, the right to voting representation in a state government that has sovereign taxing authority, and the right to voting representatives in both houses of Congress.

After examining four types of governmental structures that could meet the criteria of fiscal stability and full political rights, including stand alone statehood, creation of an expanded state, and annexation by another state, the Committee believes that the most just solution is reunion of the District of Columbia with its original territory, the State of Maryland, and the establishment of Washington as a home rule jurisdiction within the State of Maryland system. Our testimony will focus on that option, and in particular will address some of the misunderstandings of reunion.

We believe that reunion of most of the territory of the District of Columbia with the State of Maryland is the most just and practical solution for full democracy for District residents for several reasons. First, history is on our side. As you know, the District was originally created with land ceded for that purpose from the states of Maryland and Virginia. The portion ceded by Virginia was returned to that state in 1846. The reason given for that retrocession was that it “was not needed” by the national government. It is difficult to see in the year 2001 how any continuing national interest is served by Congress retaining ultimate sovereignty over anything other than a small federal enclave in the remaining portion of the District.

Second, while we do not underestimate the political challenges, the process of reunion would be relatively simple. As was the case with the Virginia portion, no Constitutional amendment would be required, and no prolonged process of ratification by multiple state legislatures. The Constitution requires only that there be a District “not exceeding ten miles square” as the seat of the federal government. As long as there remained a small federal enclave, the change in legal status could be brought about by a simple act of Congress returning the Maryland portion to that state, and by a simple act of the Maryland legislature accepting the return of the territory. Although not required, at the time of the Virginia reunion a referendum was held among the citizens of Alexandria to determine that they wished to be reunited with Virginia, and such a referendum would undoubtedly be desirable to the current District citizens.

As a matter of fact, legislation to achieve reunion is currently pending in Congress. For the seventh consecutive year, on March 1 of this year, a senior Republican Congressman, Ralph Regula, representing the 16<sup>th</sup> District in Ohio since 1972 and a member of the House Appropriations Committee and its Commerce, Justice, State and Judiciary Subcommittee, introduced H.R. 810, the District of Columbia Retrocession Act. The bill has five co-sponsors. One co-sponsor, Congressman Stephen Horn (R-CA), noted on the House floor that since 1961, “there

have been endless and fruitless talks about either statehood for the district or some other means to provide full and permanent representation in the House and with the Senate. The legislation we are offering today would cut through this logjam by retrocession of a part of the current District [retaining] as a Federal enclave containing the White House, Congress, the Supreme Court and most of the executive agencies. The rest of the current District would be returned to the State of Maryland." He closed by referring to his great-grandfather, an immigrant from Ireland to the District of Columbia, who "for about 3 years," this being the brief period in the 1870's when District residents could vote, "marched down there with top hat and tails because he was so proud to have the franchise." The Congressman concluded: "We do not have that franchise and we need to do it for the people that live within the District of Columbia."

HR 810 has been referred to both the House Judiciary Committee and the House Government Reform Committee. A copy of the bill is attached. Similar in concept to legislation introduced in prior years by Congressman Regula, the current bill is more detailed in that it includes a detailed description of the National Capital Service Area that would remain under Congressional control, makes Maryland legislation accepting the District a requirement, and provides that until the next reapportionment, Maryland would receive one more seat in the House and "the individual serving as the Delegate to the House of Representatives from the District of Columbia shall serve as a member of the House of Representatives from the State of Maryland" with full voting privileges. As Maryland matches Congressional districts with urban jurisdictions, the District would retain its own Representative after the 2010 census.

Third, the Committee believes that District residents never actually lost the right to vote in Maryland. In our amici brief filed in the case of *Adams v. Clinton*, 90 F. Supp. 2d 35 (2000),

*(continued next page)*

affirmed, U.S. Supreme Court by Summary Disposition (October 16, 2000), we argued that no law or Constitutional amendment has ever revoked our right to vote in Maryland's Congressional elections. While the court did not grant the remedy we suggested-- ordering that District residents be allowed to vote for Representatives and Senators in Maryland elections-- we continue to believe that the legal arguments are valid. Citizens who live on other federal territory such as military bases and in national parks retain full voting rights in the state the territory was created from, and so do we.

Fourth, reunion with Maryland would not only provide full voting representation in Congress. It would also restore full political rights on every other level. By becoming part of Maryland, we would gain our own four elected state senators and 12 elected delegates to the Maryland legislature. This would double the number of elected positions for Washington residents and make the District an important force in the Maryland state government. Full democratic rights would also be restored by removing Congress from authority over District laws, the District budget, District taxing authority, and all other District policy. Some have objected that reunion with Maryland would dilute District authority. I strongly disagree: it would greatly increase our democratic rights. I would much rather have Maryland be my state than have a Congress we have no vote in constantly interfering and imposing its un-elected will on our local officials and residents.

In that vein, let me conclude by addressing some of the common misunderstandings of the reunion option.

It is thought by some that by becoming part of Maryland, the District would lose political identity. This is not true. Politically, the District would be a home-rule county under the Maryland Constitution, the same as Montgomery County, Prince George's County, Baltimore City and three other urban counties in Maryland. As a home rule jurisdiction, we would retain our current system of locally elected City Council and Mayor. Or we could alter it if our voters - I say, our voters, not the Maryland legislature - so chose. Like other Maryland home rule counties, local matters would come under our exclusive control. This includes police, fire protection, land use and zoning, community development, economic development, and the regulation of taxis. In Maryland welfare services are administered by the state, but both the state and the local government have a mutual veto over the selection of the local social services director. The same situation would prevail for public health services.

In education, the District's current structure of a mixed elected and appointed local board of education would also remain. Oversight and total budget control by the Mayor and the City Council would remain. Supervision by the Maryland State Board of Education is rather light. They administer state-wide testing, and student's rights, and can intervene in cases of failed schools, but that's about it.

The State of Maryland would assume certain functions now performed by the District that are normal state responsibilities. These would include supervision of banking, insurance, the professions, and driver's licenses. It would include the prison system, other than the DC jail for pre-trial and short-term incarcerations. In addition, state functions taken over by the federal government for fiscal reasons could be restored to the control of persons elected by District residents-- another win for full democracy.

The fiscal picture is more complex. There would certainly be efficiencies created by combing duplicative state functions. Revenue options would increase, including the authority to tax income by all persons working in the District. The tax burden on District residents would probably decrease slightly. Fiscal stability would be increased for the District and, if the facts are looked at objectively, the District could be a valued net gain for Maryland.

Would our city lose any identity in the public eye by reunion with Maryland? Is New York City any less identifiable because it is part of New York State? Or Boston? Or Baltimore? Washington would remain the nation's capital and the world will continue to view us that way.

Mr. Chairman, you have styled the topic of this hearing options for restoring voting rights for District residents. Like other options, restoring full democratic rights through reunification with Maryland will take a serious educational as well as political strategy. We look forward to working with you and other members of Congress as you study ways to solve this problem.

# Implicit statehood

## Give the District a new constitutional status

By **Timothy D. Cooper,**  
**Charles Wesley Harris,**  
**Mark David Richards**

**T**he most compelling and strategically effective remedy for ending the enduring disfranchisement of D.C. residents may be neither statehood nor retrocession of the District to the state of Maryland, but rather the elevation of the District to a new constitutional status, one enjoyed by all other federal districts in the world, and which were, ironically, originally modeled after America's own — the District of Columbia.

The political leaders of the federal republics of Australia, India, Venezuela, Mexico and Brazil appear to be light-years ahead of the United States in coming to grips with the systemic disfranchisement of the residents of their own federal districts. While the residents of Canberra, New Delhi, Caracas, Mexico City and Brasilia — once denied equal voting rights in their national legislatures — are guaranteed full political participation today, only the residents of the District of Columbia, despite 200 years of protest, remain wholly disfranchised. The United States — long an ardent champion of democracy and human rights — may have something elementary to learn about full political participation and fundamental rights from its democratic neighbors around the globe.

Consider the example of Brazil. The original constitution of the Federal Republic of Brazil, which was adopted in 1889, provided no representation in the national legislature for the residents of its original federal district — Rio de Janeiro — the country's capital. (In a delicious twist of irony, the U.S. government actually pressured Brazilian President Getulio Vargas to grant full voting representation to the citizens of Rio de Janeiro in 1945.) In 1988, however — after the capital was moved to Brasilia in 1960 — Brazil recognized the injustice and amended its constitution, granting the residents of its new capital the right to equal representation in both chambers of the national legislature, and treating them like the citizens of the 26 Brazilian states. The new constitution not only granted the residents of the

federal district the same legislative powers as the states and municipalities, but also endowed them with the same taxation and revenue powers (and limitations) as the state. Moreover, the federal district was granted budgetary autonomy, and received special payments by virtue of it being the federal seat of government.

If the passage of a constitutional amendment, which granted full political and economic rights to the citizens of Brasilia, successfully remedied an identical historical injustice in Brazil, why wouldn't it succeed for the citizens of Washington? Why not, in fact, campaign for a 28th Amendment to the U.S. Constitution that would effectively treat D.C. citizens as residents of a state for all constitutional intents and purposes?

In 1997, the District's leadership transferred key state func-

Council member Kevin Chavous, which also is limited to voting rights. We oppose any constitutional amendment that fails to provide D.C. residents with equal rights.

Significantly, an Equal Constitutional Rights Amendment could be accomplished without the District bearing the high financial burdens of full statehood. And while the federal government could continue to pay for the District's prison system, courts and its Medicaid obligations as it does today, thus ensuring the city's continued fiscal solvency, it would also satisfy the principle imperatives of statehood advocates who rightfully demand legislative and budgetary autonomy — as well as full representation in the national legislature, including two U.S. senators and a representative in the House of Representatives based on the size of the population.

In the case of Brasilia, with the national constitution providing for the federal district to be treated as a state, the federal district is strong in both local autonomy and representation in the national congress. Under similar constitutional language, D.C. residents would enjoy implicit, or de facto, statehood under the 28th Amendment.

Moreover, according to recent national polls, 72 percent of Americans believe that District residents should enjoy equal constitutional rights, and of those in favor of equal rights for D.C., 82 percent supported an amendment for equal constitutional rights over either retrocession to Maryland or D.C. statehood.

The beauty of an Equal Constitutional Rights Amendment is that it would remedy the gross injustice of the District's troubling disfranchisement as well as its lack of self-government, while simultaneously — and perhaps most importantly — respecting the spirit and substance of the District's longstanding commitment to obtaining rights equal for all American citizens.

*Timothy D. Cooper is executive director of Democracy First. Charles Wesley Harris is a professor of political science at Howard University and a fellow at the Woodrow Wilson International Center for Scholars. Mark David Richards is a Washington sociologist.*

### DISTRICT FORUM

tions to the federal government, as required under then-President Clinton's economic and revitalization plan. Therefore, an application for D.C. statehood by a non-voting delegate would violate the so-called "equal footing" doctrine that requires all states to be admitted to the Union on an equal footing with every other state. An amendment for equal constitutional rights for D.C. residents, however, would violate no such doctrine. The people of the District are free to pursue a constitutional amendment remedy today.

Our amendment, known as an Equal Constitutional Rights Amendment, would guarantee D.C. residents not only full congressional voting rights, but also those same rights, powers, privileges and protections provided to all other U.S. citizens living in the 50 states. In this respect, the amendment would be altogether different from the 1978 Voting Rights Amendment, which failed to win ratification in 1985 and was limited to strictly congressional voting rights. Likewise, it would be distinctly different than the proposal presented recently by American University Professor Jamin Raskin and D.C.

CONGRESSMAN RALPH REGULA  
TESTIMONY FOR THE SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS  
MAY 23, 2002

Mr. Chairman, I would like to start by thanking the committee for inviting me to testify on the issue of voting rights for District of Columbia residents. I testified before this committee eight years ago on precisely this same issue and I hope we can work to make some progress in the future. It truly confounds me that the residents of our nation's capital continue to lack one of the fundamental rights of a democratic society- the right to have a voting Member of Congress representing their interests.

I have a lengthy background and interest in the affairs of our capital city. From 1987 to 1993 I served on the House District of Columbia appropriations subcommittee. Since leaving that panel, I have continued to take a strong interest in the issues facing this city.

I am here today because I care about the people who live in this city and I believe our system of government should embrace them in the same way it does every other U.S. citizen. More specifically, I am here to discuss my own proposal for restoring effective democratic representation and ending the current inequity that exists.

My proposal, one that I have pursued legislatively for over a decade, is retrocession. Under this proposal, all of the District of Columbia, minus a small federal enclave, would be returned to the state of Maryland. I believe this is the most practical method for providing the citizens of Washington D.C. with full voting representation.

Why? Past attempts to restore voting representation by other methods have failed and hold little hope for future success. In 1978 both the House and Senate approved a constitutional amendment to provide D.C. with two voting Senators and one voting Representative but it never managed to spark the interest of the state legislatures. Only 16 had ratified the amendment when time expired in 1985.

Then in 1994 the House considered a bill to grant D.C. statehood, which was overwhelmingly defeated (by a vote of 153 to 277). These results clearly show us that retrocession remains as our most viable option for restoring voting representation for D.C. residents.

There is a clear precedent for retrocession. Some may forget that D.C. once extended west of the Potomac River and included parts of Northern Virginia. In 1846 this portion of the old District was returned to the Commonwealth of Virginia.

Retrocession would immediately end the voting rights issue for D.C. residents, as they would gain not only a voting representative in the House of Representatives, but also two U.S. Senators. Further, they would also gain new representation on the state level.

Beyond the voting rights issue, D.C. residents stand to gain much more from reunion with Maryland. Currently, the District of Columbia is a city but must act as a state because of its unique status. As a result, it has had to create a service and institutional infrastructure to fulfill its state-like functions, requiring a substantial number of employees on the public payroll.

If reunited with Maryland, the District would enjoy access to Maryland's own state infrastructure, institutions, and assistance programs and thus not need to duplicate many of these responsibilities. D.C. residents would also benefit from increased funding for these programs and services, especially for education and public works.

After retrocession, Washington, as a city in Maryland, would have a greater ability to improve funding for education. Maryland school boards can levy taxes specifically for education. In contrast, the D.C. board must go to the city's general fund in order to get more funding.

Under my proposal, Washington, D.C. would have the best of both worlds: removal of its state-like bureaucratic responsibility and the new ability to govern its own affairs without interference from Congress. In effect, it could finally act like a city.

Conversely, Maryland also stands to gain much from retrocession. By gaining the District's nearly 600,000 residents, Maryland would gain an additional seat in the House and extend its influence in Congress.

Contrary to what some may believe, there are clear economic benefits for Maryland as well. With the nation's 2nd highest per capita income, District residents would enhance Maryland's tax base and help create the 4<sup>th</sup> largest regional market in the country.

Canada offers a model of how this proposal could and does work. Ottawa, like Washington, D.C., is situated on the border of two larger political entities. The bulk of Ottawa lies in Ontario, however a sizeable population resides across the Ottawa River in Hull, Quebec. The solution Ottawa has come up with is sending representatives to the Provincial Parliament in Toronto and to the Federal Parliament as part of the Ontario delegation.

Let me conclude by saying that voting rights for the citizens of D.C. has been an issue ever since these rights were lost in 1800. Over two hundred years have passed and we are still trying to figure out how to extend constitutional rights to citizens who are living in the shadow of the Capitol.

Over the years I have seen this debate evolve from constitutional amendment, to statehood, to simple voting representation, to retrocession. Each cause is inspired by the desire to help the people of the District of Columbia. Yet we appear no closer to a solution. As an advocate of retrocession I believe this plan offers the best course of action. I implore my fellow colleagues to take action on restoring the rights and privileges to the people of the District of Columbia.

STATEMENT OF SENATOR PAUL STRAUSS  
SHADOW UNITED STATES SENATOR ELECTED BY VOTERS  
OF THE DISTRICT OF COLUMBIA

**Introduction**

Chairman Lieberman and distinguished Committee Members, I want to thank you for the opportunity to present this testimony for the record. My name is Paul Strauss and as you know, I am the Junior United States Senator representing the District of Columbia, as defined by D.C. law 8-135. My role as the District's elected U.S. Senator is to be an advocate on issues of importance to the citizens of the District of Columbia that are before the Senate. It is in this role that I provide testimony in support of voting representation in Congress for the District.

I am pleased to have the opportunity to voice my stance on this issue, because it is an issue I, as well as my constituents, feel extremely passionate about. As Senator of the District of Columbia I am the embodiment of the aspirations of District residents for representation in the U.S. Senate. By electing Shadow U.S. Senators, D.C. residents continue to renew their aspirations.

I would like to take the opportunity to apprise you of the issues I face concerning this topic on behalf of my constituents. Senate representation for D.C. involves issues of fairness, equality, democracy, and civil rights, all of which have been guaranteed to all citizens of this nation, under the Constitution. However at this time, the citizens of D.C. are denied the same basic rights as citizens of all other states in the U.S. I find it incredibly ironic that the citizens of our nation's Capitol are deprived of their basic constitutional rights of representation while the nation touts itself as the most democratic nation in the world.

On a daily basis, my office receives correspondence from the residents of the District asking for assistance on a gamut of issues concerning them. Any other state's residents can contact their Senator in the possible expectation that their concerns may be heard and acted upon.

In my case, I can simply listen and empathize with their frustrations, since their voices will not be heard in the Senate. The restrictions placed on my office tie my hands in offering the assistance my constituents need, deserve, and are unconstitutionally denied. I encourage my citizens to empower themselves to crusade for this cause and find alternate methods to express their thoughts and concerns in the public arena. For example, one way D.C. citizens and activists expressed their thoughts and concerns, was through lobbying to all 100 senators on D.C. Lobby Day on May 15<sup>th</sup> 2002. This lobbying opportunity was made available by organizations such as D.C. Votes, Stand Up for Democracy, Leadership Conference on Civil Rights and People for the American Way, which are also organizations that we work closely with to meet our goal of D.C. Senate Representation. This successful lobbying effort resulted in 12 co-sponsors of the bill S.603. Furthermore, these organizations have been relentlessly making follow up calls, to persuade the other senators to support this bill.

A more recent event, that illustrates D.C. citizen and activist support for voting representation, was the plaque for the Rhodes Tavern, in commemoration for the 200-year anniversary of the first election held in D.C. for Washington's City Council. It was interesting to note that, 2 of the D.C.'s 5 polling places that day was the U.S. Capitol Building and the White House. Today, most D.C. residents view these buildings as a symbol of federal disenfranchisement, not inclusive democracy. At that event, a letter written by a West Point Cadet touched me. It makes an eloquent point, simply stated, and I enclose it as an attachment and ask that you print it in the record.

Throughout our fight to receive voting representation for D.C. citizens, many options have been discussed to meet this goal. I want to discuss these options further, to better access the most efficient way to meet the voting needs of D.C. citizens.

**Viable Options**

Some of these options include: statehood, passing a constitutional amendment, passing a voting rights statute, and even retrocession, with the State of Maryland or another state, has been deliberated as options to allow for voting representation for the citizens of the District of Columbia.

**Statehood**

The question of Statehood is the only option that has been expressly endorsed by DC residents. It remains the preferred means to grant D.C. full federal voting rights. Even though there are other options to grant D.C. voting rights, Statehood is the only one that grants the District of Columbia full self-determination and the other amenities that every other American citizen should enjoy. Without Statehood, even if Congress grants full federal representation, problems would still exist. D.C.'s elected officials still would not have plenary power over all aspects of local governance such as, control of the budget, control of the prosecution and the adjudication of, as well the imprisonment for, crimes, have the power to deny the city a commuter tax, and to be able to pass laws in contravention of the will of D.C. citizens. Congress should not ignore these major differences. Full Statehood is more than just voting representation for D.C. citizens and elected officials, it becomes more of a question of democracy, fairness and economic survival.

The framers implicitly state that these are basic, fundamental rights that should be deemed to every citizen. To have an issue that is the denial of basic voting rights is utterly demeaning. It undermines the constitutional rights granted to every U.S. citizen, and as a result, is insulting to the integrity of our people.

#### **Fairness**

Many leaders have proclaimed of the profound injustice of this issue, yet a resolution has still not been attained. For example, President Bill Clinton has stated that "It is fundamentally unfair that the residents of the District are denied full representation and participation in our national life. It is equally unfair that they are denied the self-government enjoyed by the 50 states and 4 territories." The District of Columbia, as the nation's capitol, is supposed to epitomize the great freedoms that are country has to offer, yet it's very own residents are deprived of those very freedoms. We are the only nation, of 115 nations, that have elected legislatures that deny the people in our capitol basic voting rights. Even Australia and Mexico, who also treat their capitals as separate entities, still acknowledge that their citizens deserve voting representation. Most states allow convicted felons greater voting rights than the law-abiding citizens of the District. For example, in Texas, convicted felons are allowed to vote for Congressional Representatives after they have completed their sentences. Furthermore, in the past we have pressured other countries to grant full voting rights representation to the citizens of their respective capital cities. For example, in 1945, while Rio de Janeiro was still the capital of Brazil, the U.S. government actually pressured President Getulio Vargas to give full representation to the citizens that lived there. How can we have pressured other governments to grant voting representation to their capital cities, but deny it to their own citizens?

**Economic Survival/ Structural Imbalance**

Despite the obstacles of governing a city with such unique characteristics and stipulations, the leaders of the District have surmounted their challenges and proved that they are worthy of full budget autonomy. We have to function with 56% of their land being non-taxable and we are expected to provide services, such as transportation and emergency rescue, to those who merely commute to the District (whose income is not taxable). Denying statehood to DC residents deprives them of revenues and development that other states flourish in having. The revenue losses are estimated at some two billion a year. This "lost" money could have been re-invested in the District, in order to secure its social and economic future, and more importantly it will allow us to some Federal interest by giving D.C. the economic base to pay for the State functions that the Federal government must now pay for

When Congress has the power to use discretion over issues such as: how local tax dollars are spent and how the children within the district are educated, they are removed from the realities that confront DC constituents. Even such mundane matters as street names, trash collecting schedules, and taxi cab fares, D.C. elected officials must still resort to the discretion of those in Congress to get approval. As U.S. Representative David Bonior once professed, " If they want to pass a new law, they have to come to us. If they want to set new hours for garbage collection, they have to check with us first...Just because we pay rent- and a very skimpy rent- for the land does not give us the right to act like the feudal overlord!"....

The District's elected officials are capable and have exemplified their superb discretion and ability to prevail when confronted with depleted resources and deprived circumstances. It is not only just, but it is necessary, that D.C. citizens be represented by officials who understand the

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intrinsic nature of the conditions and the people that exist within their respective society. It seems only just that the people whom reside within the nation's capital are deemed not only representation but also, the other resources that come along with the functioning's of a state.

#### **The Question of a Voting Rights Amendment or a Federal Statute**

Other options that have been discussed, in order to permit voting representation for the citizens of D.C., are passing an amendment or statute. For example, Adam H. Kurland, Professor of Law at Howard University School Of Law, is a vehement supporter of making this voting rights act an amendment to the constitution. He states in his testimony that since D.C. was not considered a state, a statute was not conceivable. Moreover, he states that a statute could be easily overturned, and is considered more of a short-term solution to this apparent lack of voting rights. I believe that Kurland's arguments have been effectively rebutted by Jamin Raskin, who states that passing a statute is a more viable answer to the D.C. voting rights dilemma. For instance, Jamin Raskin, Professor at Washington College of Law at The American University, proclaims in his testimony that an amendment is not the required path to achieve D.C. voting rights, rather, having the congress pass a statute to rectify this injustice is the more appealing way to go. He disagrees with Professor Kurland and accesses in his testimony that a statute would not be unconstitutional. For example, Professor Raskin analysis of the District Clause contained in Article I, Section 8, Clause 17, makes clear there is ample authority permitting a statute for D.C. voting rights. In this clause, Congress is granted power to "exercise exclusive Legislation in all Cases whatsoever, over such District as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States."<sup>2</sup> This in short, grants Congress power to give citizens in the District of Columbia voting

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<sup>2</sup> U.S. Const. Art. I, §. 8, cl. 17

rights among other things, if it wishes to do so. Even though D.C. is not a state Congress treats the District explicitly as though it were a state for just about every purpose but the most democratically significant. For example, the injustices of this voting rights quandary is embodied in the fact that the residents of the District of Columbia are treated like any other citizen residing in their respective state. For example, they pay the second highest per capita income tax in the nation. For instance, D.C. citizens pay more total income taxes than the residents of 7 states, and more per person than the residents of all but 4 states. Moreover, the District comprises a larger population than some other recognized states, such as Wyoming, which as the result of the incumbent Vice president, actually has 3 people in the U.S. Senate. Moreover, D.C. citizens have consistently served in the military and have fought in wars. Rather, they, like every other state, have sacrificed many citizen lives to fight for the very freedoms that they have been deprived of. Throughout the world, our nation has been the supreme champion of democracy. While we conduct diplomacy with the mission to spread democracy in such far away nations, as, Afghanistan, we still deny the fundamental liberties of democracy to the citizens in the seat of our nation's capitol.

There are many essential reasons why passing an amendment is not an imperative option when dealing with D.C. voting rights. Even though it may be more stable, since it is harder to repeal an amendment than a statute, it still can be altered to fit the needs of the states. For example, this amendment will go straight to state legislatures if passed, and they can view the amendment in partisan, sectional or racial terms, rather than a basic democratic constitutional right. Moreover, the fact that it would need to be ratified by three-fourths of states, and two-thirds in vote by both houses of Congress, may cause many unnecessary obstacles in the battle to grant D.C. citizens their legitimate voting rights. Another obstacle could be that the Supreme

Courts majority would have to accept the D.C. Voting Rights Bill as constitutional or not. Do we have faith that if the D.C. Voting Rights bill chose the path to become an amendment, that it would pass all of these stipulations? Would we be willing to risk this, and gamble with the voting rights of D.C. citizens, when the odds are against us? In the past we have tried to pass an amendment for D.C. Voting Rights numerous times, but we have failed numerous times. We need to realize if the D.C. Voting Rights bill became a statute, a justifiable alternative to becoming an amendment, it would swiftly and deservedly grant D.C. citizens their constitutional voting rights.

**Retrocession**

The issue of the retrocession of the District of Columbia with the state of Maryland has been proposed to permit voting rights for D.C. citizens. Betty Ann Kane, spokesperson for the Committee for the Capital City Board of Directors, declared in her testimony that this is the most "just and practical solution for full democracy for District residents."<sup>3</sup> Unfortunately, her reasons for her argument are flawed. For example, she fails to recognize that the District of Columbia is unique in many ways, especially in its role as the nation's capitol, and that these distinctions should not be overlooked by lumping this area into other states' jurisdictions in a effort to solve this problem superficially. Likewise, a similar argument declares that citizens of the District of Columbia may register to vote on national issues in neighboring states is preposterous, since no other citizen of a recognized state would stand for another jurisdiction to make decisions on their behalf.

**“Taxation without Representation”**

I thank you Senator Lieberman, and the other co-sponsors, for your support on this imperative issue. Although, this hearing was on the broad topic of D.C. Voting representation and not on a specific bill, let me take a moment to briefly discuss the Senate Bill S.603, “Taxation without Representation.” This bill discusses the “either or” notion that either D.C. citizens should be granted voting rights, or they should be exempted from federal taxes. This provision we hope will steer the Congress to the heart of this core issue: that there are tax paying citizens in the United States who are being denied their constitutional rights. The citizens do not have a problem with paying taxes; they have problem with the denial of voting representation.

Having achieved its symbolic purpose, and secure in the knowledge that our point has been now made, the time may be here to simply eliminate this alternative “no taxation” position and allow the bill to move forward on the exclusive issue on voting representation. Initially I was supportive of the “no taxation” clause in Bill S.603, but ultimately I am becoming concerned that this language might be a distraction that might impede our success in attaining D.C. voting representation. Even though most Senators have recognized that this no taxation proposal is mere rhetoric, one or two other Senators have expressed their confusion and skepticism for co-sponsoring this bill because of the declarative statement “residents of the District of Columbia shall be exempt from Federal income taxation, until such full voting representation takes effect.”<sup>4</sup>

The taxation clause in bill S.603 must be reviewed in entirety to assess its influence on granting voting representation for D.C. citizens. Since the goal of this that this bill is to help grant D.C. citizens representation, it is a fair question as to why is this “taxation” clause such an imperative addition to this bill? In reality, it has no real bearing on the D.C. voting rights issue,

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<sup>3</sup> Kane, Betty Ann D.C. Voting Rights Testimony, May 23<sup>rd</sup> 2002

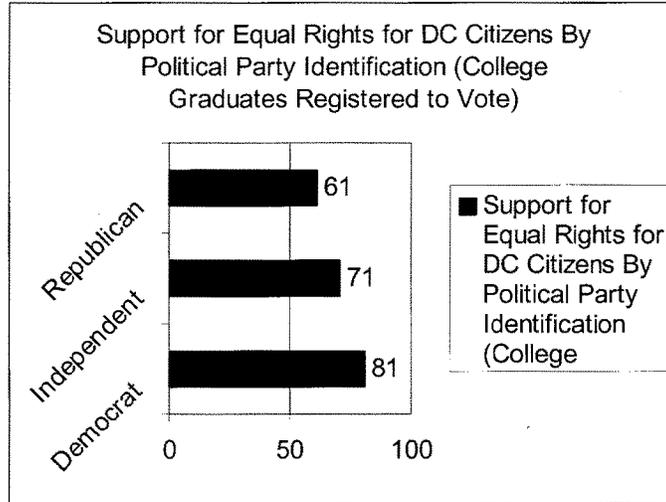
then is why not just take it out? Moreover, if presented as the civil rights issue that it is, instead of a financial one, more congressional members would be willing to co-sponsor. In the past, the issue of D.C. Voting Rights has been viewed as bipartisan (the 1978 attempt to grant D.C. Voting Rights was vehemently supported by both Republicans and Democrats). For example, in 1978, Senator Bob Dole (R-Kansas) stated that "The Republican Party supported D.C. voting representation, because it was just, and injustice we could do nothing else." So why not repeat history and remove this bill from its dissuasive element, the taxation clause, and give the fair chance and bipartisan support it deserves?

### **Conclusion**

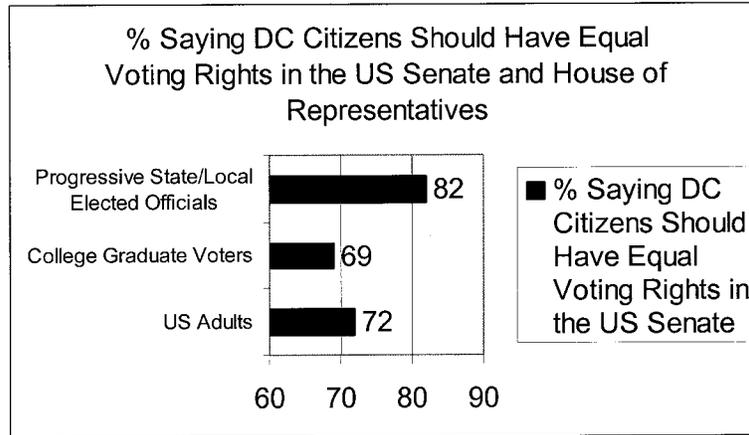
I would like to thank Senator Lieberman and other supporters for bringing attention to this pertinent issue. I would like to further state that permitting D.C. voting rights is imperative, and needs to be accessed in order to give full representation for D.C. citizens. We can not tolerate this injustice to go on, D.C. citizens deserve a voice in Congress, and should not be denied the liberties that this country has been founded on. So, please, I implore you to direct your attention to this matter, and immediately rectify these injustices, and deem D.C. citizens their constitutional rights. In closing let me thank two members of my legislative staff Stacey Butner and Pragati Nayak, for all their valuable assistance in preparing this testimony. I would be happy to respond to any questions that the Committee would like to submit.

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<sup>4</sup> [www.senate.gov](http://www.senate.gov), Bill S.603



Source: Mark David Richards, Sociologist, Senior Associate, Bisconti Research, Inc., mark@bisconti.com



Source: Mark David Richards, Sociologist, Senior Associate, Bisconti Research, Inc., mark@bisconti.com

P.O. Box 3819  
West Point, NY 10997-3819  
April 2, 2002

Hon. George W. Bush  
The White House  
Washington, D.C. 20500

Dear Mr. President,

As a native-born resident of District of Columbia, you know, of course, that I have no voting representation in Congress. This situation has persisted for 200 years. District residents first bought this to the attention of congress in 1801. Today, we are the only citizens of the United States, excluding felons, who pay federal taxes and serve in the Armed Forces, but are denied representation in Congress.

Two years ago, when I reached my 18<sup>th</sup> birthday, I registered as a Republican and voted in the 2000 presidential election as provided in the 23<sup>rd</sup> Amendment to the Constitution. Now I am a Cadet at the United States Military Academy, and appeal to you to uphold the longstanding tradition of our party to advocate representation in congress for the residents of the District of Columbia.

Sir, I wish that one day soon I might have the opportunity to meet you, salute you as my Commander-in chief, and thank you personally for addressing this grievance.

Sincerely,  
James n. Rimensnyder  
Cadet PFC USCC

## RHODES TAVERN – D.C. HERITAGE SOCIETY



Joseph N. Grano, President  
 3881 Newark St., NW # A-475  
 Washington, D.C. 20016  
 (202) 364-2526

March 26, 2002

Dear Senator *Lieberman*:

In the centerfold of the attached *The Common Denominator* newspaper, you will find the text of a petition asking for voting rights in Congress for District residents. Along with the text are the names of approximately 400 of the nearly 1,000 residents who have signed it, including all of the top elected officials of the District starting with our Delegate Eleanor Holmes Norton. The petitioners represent the wide diversity of our population. All wards of the District are included. You will find the names of laborers, clerks, postal workers, educators, physicians, accountants, ministers, and lawyers, as well as a former U.S. Senator, a former Vice-Chair of the Federal Reserve, a former ambassador, two former cabinet Secretaries, and three current university presidents, among others.

All these petitioners agree that when it comes to representation in Congress, District residents should be treated equally with the citizens of the 50 States.

Representation and self-government for the District have been ongoing issues for more than 200 years. In 1801, citizens first petitioned for representation and self-government. One petition specifically urged Congress "...to propose to the several state legislatures an amendment to the Constitution of the United States, so as to admit the citizens within the district to be represented in Congress...." Congress responded to the requests for self-government. On May 3, 1802, President Thomas Jefferson signed a bill giving the City of Washington an appointed mayor and an elected council. On June 7, 1802, an election was held, and finally on June 14, 1802, that council had the first of many meetings on the Senate side of the U.S. Capitol. These three important bicentennial dates are noted in the *We The People* congressional calendar.

Unfortunately, Congress in 1802 did not respond to the calls for representation. Many District residents believe that in this year, which marks the bicentennial of the birth of democracy in the District, it is most appropriate to renew the request for representation. Citizens will file the new petition on June 14, the 200<sup>th</sup> anniversary of the first meeting of the City of Washington Council (June 14 is also Flag Day).

Please take appropriate action this year that will make it clear that District residents are not an exception to the Revolutionary War maxim that there should be "no taxation without representation" for American citizens. As you know, in 1961, the Congress and the States amended the Constitution to allow the District to vote for President and Vice-President even though it is not a state. We believe in the basic fairness of the American people and are confident that they wish to end this 200-year-old inequity in our beloved Constitution. However, Congress must initiate the process.

We look forward to your consideration of this issue.

Respectfully yours,

*Joe Grano*  
 Joseph N. Grano

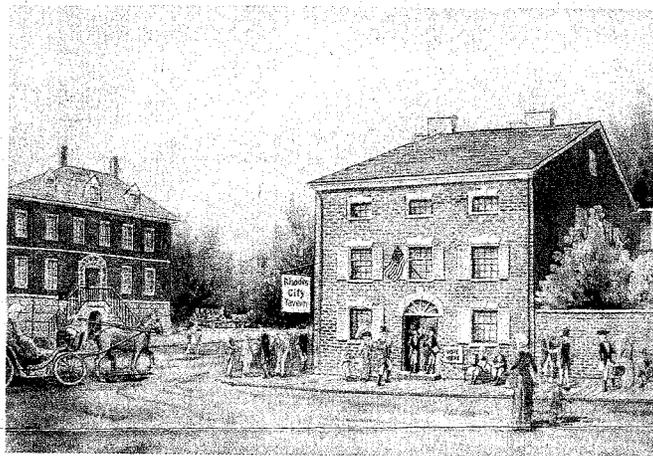


ILLUSTRATION OF RHODES TAVERN BY 1860 BY ANN FIFE

## Stand Up for History and Democracy

This year we observe three bicentennial dates that record the birth of democracy and self-government in the District of Columbia. These dates should be noted, commemorated and even celebrated, as a reminder to ourselves and to Congress of what has been accomplished in 200 years and what has been left undone.

■ On May 3, 1802, President Thomas Jefferson signed into law an Act of Congress giving the City of Washington an elected 12-member council and an appointed mayor.

■ On June 7, 1802, an election for that council was held at three polling places—one of them being the Rhodes Tavern.

■ On June 14, 1802, the City of Washington Council held its first meeting on the Senate side of the U.S. Capitol, where it was to assemble regularly.

The City of Washington's first home rule charter was inspired by several petitions to Congress from District residents in 1801. One petition requested that Congress "establish a system of legislation and government for the District, on principles of rational liberty and free government; and to propose to the several state legislatures an amendment to the Constitution of the United States, so as to admit the citizens within the district

to be represented in Congress." Unfortunately, Congress responded only to the first request.

We should triumphantly mark these dates, as they provide a wonderful opportunity to advance our political status:

(1) There should be an exhibit of the documents relating to the first period of home rule, which lasted until 1874. Such an exhibit can be organized by the Washingtoniana division of the Martin Luther King Jr. Library and be displayed at the library, at the John Wilson building and in a House office building at the request of our delegate, Eleanor Holmes Norton (D).

(2) With the cooperation of Boston Properties, owner of Metropolitan Square, a second Rhodes Tavern plaque will be dedicated on June 7 on the corner of 15th and F streets NW. This plaque will depict Rhodes Tavern as a polling place in the City of Washington's first election. Our delegate, the mayor, the D.C. Council, the school board, the Advisory Neighborhood Commissions and a statehood delegation will be among those invited to the dedication to celebrate the birth of democracy in the District.

(3) Sens. Mary Landrieu, Joseph Lie-

berman and Ted Kennedy, friends of District representation, should invite the D.C. Council to hold a ceremonial meeting in the Old Senate Chamber on June 14 to commemorate the birth of locally elected government in the District.

(4) Also on June 14, citizens will deliver a petition to the Clerk of the House of Representatives asking that the District be given representation in Congress.

(5) Finally, the citizens of the District should establish a \$1 million fund to educate the American people as to why the injustice in the Constitution denying D.C. citizens representation in Congress needs to be corrected. DC Vote and the League of Women Voters of the District of Columbia should administer the fund. By remembering the early history of the District, city residents can be inspired to work for a brighter political future.

—Joseph N. Grano  
is president of the Rhodes Tavern-  
D.C. Heritage Society.

—Nelson Rimensnyder  
is former director of research  
for the House Committee  
on the District of Columbia.

# DC Voting Rights Petition to Congress, 2001-2002



To the Honorable Senate and House of Representatives of the United States of America:  
We the undersigned residents of Washington, DC and citizens of the United States, respectfully petition for representation in Congress as is duly granted to all citizens residing in the fifty states.

Washington, DC  
February 2, 2001-June 14, 2002

This petition, signed by many hundreds of DC residents will be delivered to Congress on Feb. 2, 2001. In order to achieve voting rights in Congress, we must make this a national issue by appealing to the conscience of the American people.

Now only a small minority of the US population knows that the District does not have voting rights in Congress.

We must establish a national advertising campaign to inform the American people of this injustice.

The first paid publicity campaign is a full page ad reproducing this petition and partial list of signers in a national publication the week of its submission to Congress.

If you are willing to make a tax-deductible contribution for such a national publicity campaign, please call DC Vote, an educational and coalition partner at (202) 462-6000, and make your pledge.

If you would like to sign the petition, you may do so at the following locations:

- Ben's Chili Bowl 1213 U Street, NW
- Politics and Prose Bookstore 509 Connecticut Avenue, NW
- Toast and Strawberries Boutique 1608 20th Street, NW
- Rhodes Tavern-D.C. Heritage Society
- Joseph N. Grano, President
- 3881 Newark Street NW, #A-175
- Washington, DC 20016, (202) 364-2526

## "NO TAXATION WITHOUT REPRESENTATION"

**PETITIONERS (Partial List)**  
 (Petitioner's association for identification on purposes only; no written endorsement included)  
**Distalof O'Connell**  
 Delegate, US House of Representatives  
 Chasner Holmes Hester  
 Mayor, District of Columbia  
 Anthony A. Williams  
 District of Columbia Council  
 Linda H. Chapp Chapp  
 Harold Brown At Large  
 David A. Catania At Large  
 Paul Maddox At Large  
 Carol Schwartz At Large  
 Jim Graham Ward 1  
 Jack Green Ward 2  
 Andrew Pittman Ward 3  
 Alicia Frey Ward 4  
 Thomas H. Orange Ward 5  
 Charles Anderson Ward 6  
 Kevin F. Chasner Ward 7  
 Sandy Affan Ward 8  
**Distalof O'Connell to the US Congress**  
 Member of Parliament US Senator  
 Paul Brown, Eng. US Senator  
 Ray Brown US Representative  
**District of Columbia Board of Education**  
 Peggy Cooper Clardy President  
 Julia Adams Director 1  
 Dwight S. Stephens Director 2

Tommy Wells District 2  
 William East-Edge District 4  
**Address Neighborhood Commissioners**  
 Jacqueline Argueta 1A01  
 Mark A. James 1A04  
 Stephen Stephens 1A28  
 Lawrence C. Boyd, Jr. 1B04  
 Theodore A. Riedel 1B10  
 Jack Brown 1D07  
 Christopher Chabon 1D11  
 Maria Yee 2D03  
 Dorothy Miller 2A05  
 Norman J. Zuckerman 2D01  
 David S. Brown 2D02  
 Roger Solender 2D06  
 Thomas L. Beck 2E01  
 David H. Stephens 2E11  
 Christopher James Lynch 2E02  
 Jim Lloyd Stephens 2E03  
 Bill Winkler 2E07  
 Lisa R. Nyka 2E07  
 Rosalyn A. Dwyer 2E08  
 Steve J. McPherson 2E08  
 Thomas A. O'Brien 2E23  
 Frank Gordon 2E25  
 Alan H. Brown 2E26  
 Douglas Stone 4A01  
 Jonathan S. Brown 4A02  
 Leah Link 4B05

Joseph Reever SAG3  
 George A. Andrew SAG5  
 Emily Hunsicker 1B19  
 Charlotte Jones SC03  
 Victoria Leonard-Chambers X204  
 Marjorie J. Potts 5E12  
 James F. Jordan 6E08  
 Emily Chamberlain 7B05  
 Norman Johnson 7C01  
 Ramie Marshall 7D08  
 Johnnie Scott 8E08  
 Charles Wilson SAG3  
**Former District Officials**  
 John Cooper U.S. Representative (Statehood)  
 H. R. Crawford Ward 7 Member, DC Council  
 Archangel Stone, Eng. Chairman, DC Council  
 Ben Walker Deputy Delegate, US House of Rep.  
 Charles Drew, MD, PhD  
 Ward 4 Member, DC Council  
 Betty Ann Zane At-Large Member, DC Council  
 Tony White Cabinet Member, DC Board of Ed.  
 William H. Lightfoot, Eng.  
 At Large Member, DC Council  
 Willie M. Brown At-Large Member, DC Council  
 Jim Matthews, Eng. Ward 3 Member, DC Council  
 Sherry Pratt Mayor, District of Columbia  
 John Ray At-Large Member, DC Council  
 Ashley White Member, DC Board of Education  
 Wilhelmina J. Roberts, Eng.  
 Ward 8 Member, DC Council

Barbara Lee House Member, DC Board of Ed.  
 Frank Smith Ward 1 Member, DC Council  
 Stephen Taylor Chairman, DC Council  
 Wendell Washington  
 Member, DC Board of Education  
 Walter Washington Mayor, District of Columbia  
 Barbara A. Walker Ward 6 Member, DC Council  
 Flynn E. Young At-Large, DC Board of Education  
 Barbara M. Ainsworth, District  
 Richard G. Adams, Jr., Council of Policy Mgt.  
 Samuel A. Durr's DNE Board  
 William A. Durr's DNE Board  
 Gilbert Ainsworth, Jr. Former Sec. of the Army  
 Barry Forman Alexander  
 Richard Justice, DC Superior Court  
 William A. Adams  
 Alan Adams  
 John H. Anderson, DDC National Captain, US Navy  
 Bernard Lewis M. Anthony  
 Santa Prisca Metropolitan Weekly AMEZ Church  
 Walter Archer  
 Richard Administrator, DC Public Schools  
 Robert Arnold  
 Paul Priddy, Brookland Neighborhood Chair, AARP  
 Steve Marie Aschella, Eng.  
 Barbara Ann Auld Pitts, Bacteriophage Protection  
 A. Corbett Butler  
 Executive Director, Whitman-Walker Clinic  
 Lucille Baskin  
 Social Sec. to First Lady Jacqueline Kennedy

White House Historical Association,  
 DC Association Washington  
 Corrie E. Clarke  
 Board Member, David A. Clark School of Law  
 Carla Cohen Politics and Press Bookstore  
 Paul J. Cohen  
 Past President, Emergency Business & Professional Association  
 Robert S. Cohen  
 Stephen R. Cohen Brookings Institution  
 Michelle Cole DC Council  
 Stephen Coleman  
 Executive Director, Washington Parks & People  
 Michael Collins Computer Specialist  
 William A. Condit, MD  
 US Congress Editor Congress Up in Washington, DC  
 David Rubin Curry  
 Richard Rapoport, The Washington Post  
 Paul H. Davis, MD, MD  
 Past President, DC Teachers College  
 Timothy Cooper Exec. Director, Democracy First  
 Howard Dahl  
 Director, Home Care Services Employment Union  
 Dwight C. Dripp Professor, GW University  
 Debra Dwyer Anesthesiologist Brook Center  
 Raymond E. Ellis, MD, MD, MD, MD, MD, MD  
 Howard Emanuel Assistant VP, CWI University  
 John Daniels, Jr. President and CEO, PEP/CO  
 William C. DeBenedictis  
 Houston, First Federal Congress Project

continued on next page...



Date: 6/4/02 10:56 PM  
Subject: DC Voting Rights Hearing / May 23, 2002

Dear Senator Lieberman,

My name is John Forster. I am the Activities Coordinator of the Committee for the Capital City and wish to submit this testimony for the record concerning the May 23, 2002 hearing before your Government Affairs Committee on the subject of Voting Rights for the District of Columbia.

I am writing to thank you for your leadership on this issue. To hear a US Senator of your stature speak so forcefully in favor in addressing and solving this problem is good news.

As you noted in your comments, the problem of taxation without representation is obvious but not widely recognized as an unresolved American issue (in the Nation's Capital City of all places!) Likewise, the solution to this problem is equally obvious and also not widely recognized.

Washington, DC was created on land ceded to the federal government by the States of Virginia and Maryland over 200 years ago. In 1846, the Virginia portion of the District (which is now the city of Alexandria and Arlington County) was reunited with the State of Virginia. It was not turned into a State nor was it awarded two Senators... it was simply reunited with its mother State.

The remaining privately owned property in the District of Columbia (essentially everything except the National Capital Service area) could be similarly reunited with the State of Maryland. This solution would solve the voting rights issue, solve the home-rule issue, and solve the political issue you alluded to by not increasing the number of US Senators. This solution would expand the power and prestige of the State of Maryland, and lead to improved city services, lower taxes, and full and equal participation in the American political process for the residents of Washington DC.

As with most issues, the bottom line is often money. The Committee for the Capital City would like your assistance in determining the best way to arrange for a fiscal and economic study of this issue so that Congress, the citizens of Washington, and the State of Maryland could have accurate financial information to determine the costs and benefits of this proposed solution.

We look forward to working with you and your staff to develop a politically and economically feasible solution to the problem of denied voting rights in Washington, DC.

Sincerely,

John Forster  
Activities Coordinator  
Committee for the Capital City  
[www.washingtonmd.org](http://www.washingtonmd.org)



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May 31, 2002

Dear Chairman Joseph Lieberman and Ranking Member Fred Thompson:

**RE: Voting Representation in Congress for Citizens of the District of Columbia and the No Taxation Without Representation Act of 2001 Bill (S. 603)**

I write this letter on behalf of the Mexican American Legal Defense and Educational Fund (MALDEF), a national non-profit, non-partisan organization dedicated to promoting the civil rights of the 35 million Latinos living in the United States. Founded in San Antonio, Texas, in 1968, MALDEF now is headquartered in Los Angeles with offices in Sacramento, San Antonio, Houston, Albuquerque, Phoenix, Chicago, Atlanta, and Washington, D.C. MALDEF, first and foremost, urges Congress to actively solve the lack of congressional voting representation for Latino and other residents of the District of Columbia. In the interim, MALDEF endorses the *No Taxation Without Representation Act of 2001* bill (S. 603), introduced by Senators Lieberman and Feingold in the Senate, and strongly urges that the members of the Senate Committee on Governmental Affairs support the bill as well.

MALDEF believes remedying the lack of congressional voting representation for the 45,000 Latino residents and the other 572,000 residents of the District of Columbia is long overdue. Although S. 603 is drafted in terms of tax relief, it presents Committee members with an opportunity to take the first step toward full franchise for the District and reaffirm the founding American rallying cry that taxation without representation is counter to a republican form of government and contrary to the basic tenants of self-governance.

**The District of Columbia is Increasingly Latino**

Census 2000 figures demonstrate that the District continues to be one of the few places within the mainland United States where the population is overwhelmingly majority minority (a 70 percent ethnic and racial minority composition). While U.S. Census Bureau records measure the total population of the District of Columbia as decreasing from an all time high of 802,178 in 1950 to 572,059 in 2000, they also measure a growing Latino presence in the District. Specifically, U.S. Census Bureau figures over the last 20 years evidence that the Latino population of the District has steadily risen, growing from 2.8 percent in 1980 to 7.9 percent in 2000. MALDEF believes that these headcounts woefully undercount certain segments of the Latino community and therefore

*Celebrating Our 33<sup>rd</sup> Anniversary  
 Protecting and Promoting Latino Civil Rights  
 www.maldef.org*

are a conservative estimate of the Latinos residing in the District. As all estimates point to the District becoming more Latino, the need for MALDEF to enter the debate regarding D.C. voting rights becomes more pressing.

**The District of Columbia is Increasingly Latino, of Voting Age, and Most Likely to Vote**

The D.C. Board of Elections and Ethics does not collect voter registration figures disaggregated by race or ethnicity. Accordingly, the exact number of registered Latino voters in the District is not precisely known. Nevertheless, various population estimates offer a glimpse into the size and strength of the Latino vote in the District. For example, U.S. Census Bureau population projections, released in July 2000, estimated that 29,000 residents of the District are Latino and over the age of 18. Likewise, a 1999 United States Hispanic Leadership Institute report estimated that there are 17,600 Latinos residing in the District who are citizens of eligible voting age. Finally, the U.S. Census Bureau examined the levels of voting and registration in the November 2000 election and found that the highest voting participation rate in the nation was in the District of Columbia where an estimated 72 percent of the voting-age citizen population turned out at the polls. These figures lead to a safe inference that an increasing number of Latinos in the District are eligible voters who are likely to head to the polls on election day. As such, MALDEF joins the call for securing full congressional representation for all Washingtonians.

**Congressional Inaction Does Violence to the Strong Congressional Record on Voting Rights**

Congress has enacted many important laws over the years protecting, clarifying, enhancing, and securing the right to vote for all Americans. Seminal pieces of legislation such as the Voting Rights Act of 1965 and the National Voter Registration Act of 1993 speak to this distinguished bipartisan congressional legacy. Yet, congressional inaction today on D.C. voting rights endangers this strong bipartisan congressional history. Accordingly, we ask Committee members to begin a congressional debate on remedying the impoverished version of voting rights that are unique to Americans living within the District of Columbia. MALDEF believes S. 603 would be the most expedient place to start.

**Disenfranchisement of the District of Columbia is Not Constitutionally Compelled**

Article I, Section 8, Clause 17 of the Constitution, referred to at times as the District Clause, reads, "Congress shall have Power . . . To exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may, by Cession . . . become the Seat of the Government of the United States." The simplicity of the language can be deceptive. The full meaning behind the District Clause rests in an exploration of the history of the time.

In 1783, an unruly crowd of Revolutionary War veterans threatened to storm the Pennsylvania state house, the meeting place of the Continental Congress at the time, and local officials failed to dispatch the Pennsylvania militia to intercede. Clearly, safety, police security, and military defense were the roots of the Founding Fathers' rationale for exclusive control over the District and not the disenfranchisement of her residents that some argue. Additionally, early congressional voting records undercut such a narrow reading. In 1791, after Congress accepted cession from Maryland and Virginia, residents of this new District continued to vote in congressional elections. This practice only ended in 1801 with the passage of the Organic Act (establishing local government for the District). MALDEF believes the history behind the District Clause and early congressional voting patterns undercut arguments that Congress lacks the ability to solve District disenfranchisement.

Additionally, the disenfranchisement of the District of Columbia is undemocratic. The right to vote is fundamental to American democracy. One of the rights of American citizenship, absent disenfranchisement by criminal conviction, is the right to be represented in both houses of the U.S. Congress. Yet for American citizens living within the District of Columbia their representation is diminished in one house and outright absent in the other. MALDEF believes Committee members should use S. 603 to explore the rich history and constitutional debate that has led to the denial of full representation for District residents.

**Lack of Voting Representation Gives Short Shrift to the Significant Contributions of the District's Latino Population**

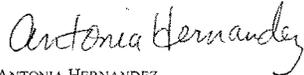
Latino Washingtonians have the same responsibilities as state residents: they pay federal taxes (second highest tax burden in the country); they are drafted, fight, and, at times, die in foreign wars; and they are governed by the Constitution and federal laws. Yet unlike citizens of the states, Latino Washingtonians, like all Washingtonians, are not fully represented before the U.S. Congress. Unlike other American citizens, Washingtonians are governed directly by Congress in all local affairs and left without a local government or constitution to guard against unchecked national power. Washingtonians are left with a lopsided trade. They contribute more as citizens than they receive in return. Such an arraignment strikes MALDEF as fundamentally unfair. MALDEF believes that all political parties have a role and stake in securing full voting rights for residents of the District.

**Latinos are Increasingly Active in Voting and Open to Voting for Candidates from All Parties**

A March 2002 study by the Tomas Rivera Policy Institute found that the Latino electorate is not homogenous as once thought and that Latino voters have shown a growing openness to voting for candidates across the political spectrum. Diminishing the Latino vote in the District does a disservice to all candidates and the various political parties. The same Tomas Rivera Policy Institute survey found that the pressing issues for Latino voters are education, the economy, and issues of safety. Their stake in the shaping of federal law is no less than any other person within the U.S. Yet, Latino voters in the District continue to be excluded from important congressional debates on education, economics, and safety. For example, recent historical policy decisions such as the bipartisan enactment of the *No Child Left Behind Act* and various pieces of legislation aimed at strengthening national security were made without this constituency's input. MALDEF believes that Latino voters in the District, like all other eligible voters nationwide, deserve a voice and vote in shaping federal policy. Such diluted democracy and representation is untenable.

Should you have questions or requests regarding MALDEF's position on DC voting rights, please contact James A. Ferg-Cadima, Legislative Analyst, of our Washington, D.C. office, at 202-293-2828.

Sincerely,



ANTONIA HERNANDEZ  
PRESIDENT AND GENERAL COUNSEL

cc: Members of the Senate Committee on Governmental Affairs

**ANSWERS TO POST-HEARING QUESTIONS FROM SENATOR FRED THOMPSON  
CONCERNING D.C. VOTING RIGHTS FOR PROFESSOR ADAM H. KURLAND**

**May 23, 2002**

**QUESTION NO. 1:**

Recently, there have been some in the legal community who have asserted that Congress may, through simple legislation, provide for full voting representation in Congress for residents of the District of Columbia. In fact, testimony was provided during the hearing supporting this position. This view appears to be a departure from traditional interpretations of the Constitution by other experts, including the Department of Justice under previous Administrations, both Democratic and Republican. In your testimony, you indicated that you believe a constitutional amendment is necessary to provide D.C. with representation in the U.S. House of Representatives and the U.S. Senate, but you acknowledged that Congress may admit a new state by a simple act of Congress. If D.C. were admitted as a state, it would get voting rights in the House and Senate. Given this situation, isn't it inconsistent to assert that the provision for D.C. voting representation in Congress requires a constitutional amendment?

**ANSWER:**

No, it is not inconsistent to conclude that DC Statehood may be achieved by act of congress but that providing DC voting rights for the District as presently constituted requires a constitutional amendment. Different constitutional provisions and different legal and constitutional principles are involved. As I stated in my testimony, representation in the federal legislature is governed by clear constitutional principles. Therefore, providing the District of Columbia with representation in the federal legislature- without going through the statehood process, requires a constitutional amendment. A constitutional amendment was required to provide for direct election of U.S. Senators ( U.S. Const. amend. XVII ), womens' suffrage ( U.S. Const. amend. XIX ), and the District of Columbia's participation in the electoral college in presidential elections. ( U.S. Const. amend. XXIII ). For a more detailed analysis, see ADAM H. KURLAND, PREPARED REMARKS FOR THE SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS, VOTING REPRESENTATION FOR THE DISTRICT OF COLUMBIA, submitted August 30, 1994 ( copy previously provided to Sen Thompson's office ).

Statehood, on the other hand, is governed by different constitutional provisions. The admission of a new state is governed by an act of congress- and a bill signed by the president. However, any proposed DC statehood bill would raise additional significant legal, practical, and constitutional issues beyond representation in the national legislature. As such, simply identifying the statehood process as one that does not require a constitutional amendment is incomplete and misleading.

Moreover, owing to the unique nature of the District of Columbia as the constitutionally required " Seat of the Government of the United States." any proposed DC Statehood bill would raise

constitutional issues not present when other territories seek statehood by act of congress. First, the issue of what would remain of the shrunken federal enclave of the District of Columbia may raise constitutional issues. More important, the 23<sup>rd</sup> amendment provides the Seat of Government of the United States with 3 electoral votes in presidential elections. Any DC Statehood scenario that would provide for a 51<sup>st</sup> state and provide for a drastically reduced federal enclave that would be the remaining Seat of Government of the United States, that federal enclave with a minuscule population would be entitled to 3 electoral votes pursuant to the 23<sup>rd</sup> amendment. To rectify this situation, the 23<sup>rd</sup> amendment would have to be repealed by constitutional amendment. Therefore, as a practical matter, DC statehood would also require resort to the constitutional amendment process. These issues are discussed further in ADAM H. KURLAND, PROPOSED D.C. STATEHOOD AND THE 23<sup>RD</sup> AMENDMENT, PREPARED REMARKS BEFORE THE U.S. HOUSE OF REPRESENTATIVES SUBCOMMITTEE ON THE DISTRICT OF COLUMBIA ( July 28, 1993 ) ( copy previously provided to Sen Thompson's office ).

**QUESTION NO. 2:**

Congress has enacted many pieces of legislation treating the District of Columbia "as if it were a state" in relation to qualifying for federal funding or for other federal laws and programs. Doesn't this type of legislation support the principle that Congress can grant D.C. voting rights by passing legislation treating the District "as if it were a State" for the purposes of representation in the national legislature?

**ANSWER:**

No, the myriad of federal statutes passed by Congress treating the District " as if it were a state" does not provide legal support for the proposition that Congress can treat the District "as if it were a state" in legislation purporting to provide DC representation in the national legislature. Congressional legislation treating the district "as if it were a state" is a permissible use of legislative authority when Congress is legislating pursuant to its article one, section 8 powers. However, Congress lacks the legislative authority to alter the make-up of the federal legislature, the constitutional requirements of which are set forth in Article I, section 2 ( the House of Representatives ) and Article I , section 3 ( the Senate ).

Congressional legislation permitting District residents to sue in federal courts under diversity jurisdiction arguably raises a closer question, but is not controlling because Congress possesses substantial legislative authority to create lower federal courts and to modify federal court jurisdiction. Moreover, the Supreme Court case upholding a statute providing DC residents to sue under diversity jurisdiction, *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582 ( 1949 ), has been characterized by leading constitutional commentators as a "confusing case" because of the absence of a majority opinion. There, five Justices concurred in the result upholding the statute, though there was no agreement as to the basis of finding the law constitutional. In *Tidewater*, six Justices actually reaffirmed Justice Marshall's 1805 opinion in *Hepburn & Dundas v. Ellzey*, 6 U.S. ( 2 Cranch ) 445 ( 1805 ), which held that citizens of DC

*are not* citizens of a State for the purposes of diversity jurisdiction, and that Congress lacked the legislative authority to alter that constitutional result. Thus, *Tidewater* is a wholly inadequate legal precedent upon which to claim that Congress can legislatively grant DC with voting rights in the national legislature. Whatever *Tidewater* may stand for with respect to Congress' legislative flexibility to modify the jurisdiction of the federal courts, Congress has no such legislative flexibility in modifying the make-up of the federal legislature.

**QUESTION NO. 3:**

During the hearing, testimony was provided that suggested that the lack of voting representation in Congress is a civil rights issue. Does the present lack of D.C. voting rights in the federal legislature constitute a deprivation of civil rights to residents of the District of Columbia? If you do not believe it does, please explain your position.

**ANSWER:**

No, the present lack of DC voting rights does not present a civil rights issue. The existing limitations on DC voting rights have existed continuously since 1801, when the voting population of the District was entirely white. Current limitations on DC voting rights apply to all District residents. The voting limitations arise out of our constitutional structure, and are features of American Federalism. Thus, they do not raise constitutional civil rights issues as that term is normally understood in that the limitations are not constructed to discriminate on account of race, creed, color, or sexual orientation. For further comments, see my August 30, 1994 comments referenced in Answer to Question 1 and ADAM H. KURLAND, PREPARED REMARKS BEFORE THE U.S. COMMISSION ON CIVIL RIGHTS ( March 26, 1993 ) ( copy previously provided to Sen. Thompson's office ). Finally, it is important to reiterate that many features of American Federalism reflect the Framers' conscious rejection of pure majoritarian democratic principles. Those features, which are in the Constitution and are therefore constitutional, obviously do not raise constitutional civil rights issues.

**QUESTION NO. 4:**

Testimony was offered during the hearing that from 1790 to 1800, District of Columbia residents were allowed to continue to vote through Maryland and Virginia for Senators and Representatives and that there is no historical indication that Congress or the framers who created the federal district ever intended that D.C. residents would be denied voting representation in Congress. Some have suggested that the lack of voting representation for D.C. residents in Congress was a simple congressional oversight. Do you agree with this assessment? If so, why? If not, please explain.

**ANSWER:**

The historical record is clear that, as the court exhaustively noted in *Adams v. Clinton*, 90 F. Supp. 35 ( D.D.C. 2000 ) ( three judge court ), "such evidence as does exist, however, indicates a

contemporary understanding that residents of the District would not have a vote in the national Congress.” 90 F. Supp. at 49-53. Thus, any suggestion that the situation was inadvertent or accidental is simply incorrect and without support in the objective historical record. Moreover, the District did not come into existence until 1801, so the fact that residents who would later become residents of the District continued to vote in Maryland and Virginia elections in 1790-1800 is irrelevant. During that time those residents continued to reside in, and voted in, their respective states. The 1790-1800 experience is therefore *sui generis* and provides no support for the contention that Congress can confer, by simple legislation, voting rights on DC citizens to vote in elections for the national legislature.

Submitted June 10, 2002 by Professor Adam H. Kurland



SCHOOL OF LAW

**HOWARD UNIVERSITY**  
2900 Van Ness Street, N.W.  
Washington, D.C. 20008

**PREPARED REMARKS FOR THE UNITED STATES SENATE COMMITTEE ON  
GOVERNMENTAL AFFAIRS**

**VOTING REPRESENTATION FOR THE DISTRICT OF COLUMBIA**

**Adam Harris Kurland**  
**Professor of Law**  
**Howard University School of Law**

**Submitted August 30, 1994**

My remarks will be limited to 1) some constitutional issues with respect to providing full voting representation in the House and Senate for the District of Columbia; and 2) whether the current lack of full voting representation for the District of Columbia raises constitutional civil rights issues.

**I**

The District of Columbia, as presently constituted, is not a state. As such, the only way the District can achieve full voting representation in the House of Representatives and the Senate is by constitutional amendment. The Constitution provides that "[t]he Senate of the United States shall be composed of two Senators from each State." U.S. Const. Art. I, § 3. Similarly, Article I, § 2 requires that the House of Representatives be composed of members chosen by the people of the several states, and that each member of Congress be an inhabitant of the state from which he or she shall be chosen. The D.C. Circuit confirmed the obvious when it noted

that "it would be unconstitutional to permit anyone but members of the House to vote in the full House under any circumstances."

*Michel v. Anderson*, 14 F.3d 623, 630 ( D.C. Cir. 1994 ).

Thus, in order to grant full voting rights in the House and Senate to the District of Columbia, these constitutional provisions would have to repealed or otherwise overridden by subsequent constitutional amendment. Such an effort was undertaken in 1978, but fell well short of passage.<sup>1</sup>

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<sup>1</sup> Conceivably, a proposed constitutional amendment could provide for full representation for D.C. in the House, but not the Senate -- or full representation in the Senate, but not the House. In addition, a proposed constitutional amendment could provide for the District of Columbia to elect one senator. Similar proposals were made at various times during the 1800's. See *1987 Report of the Attorney General: The Question of Statehood for the District of Columbia* 11. As long as the District is not a state, the constitutional proscription that "No state, without its consent, shall be deprived of equal suffrage in the Senate," U.S. Const. art. V, would not apply.

However, I am aware of no recent effort to propose a constitutional amendment containing some limited hybrid form of representation for the District of Columbia. Moreover, such a proposal would be difficult to justify today.

A claim that granting the District full representation in the House, but not the Senate, on the grounds that the District's claim of "no taxation without representation" would be satisfied because all revenue bills must originate in the House, U.S. Const. art. I, § 7, would seem overly technical to the point of being absurd. It would hardly be worth the effort required to amend the Constitution, and unlikely to assuage the District's quest for increased self-determination.

Moreover, such a proposal would seem to acknowledge that the District's claim of "no taxation without representation" is factually and legally persuasive. Not all would agree. The *1987 Report of the Attorney General* stated:

The District is hardly in the position of the American colonies two-hundred years ago. Its residents pay only those taxes paid by all other citizens of the United States. They are not victims of a far off imperial power, imposing taxes

Of course, were the District of Columbia to achieve Statehood, it would obtain full voting rights in the House and Senate. I have previously set forth my views on the constitutionality of D.C. Statehood in a 1992 article in the *George Washington Law Review*,<sup>2</sup> and in live testimony before the U.S. Civil Rights Commission and before a subcommittee of the U.S. House of Representatives.<sup>3</sup> Briefly, it is my position that, one way or another, the 23rd amendment must be repealed by constitutional amendment either before, or contemporaneous with, the actual granting of D.C. Statehood. Thus, as a very real matter, D.C. Statehood cannot be viewed as something that can be achieved through wholly legislative action. Amending the Constitution is required.

H.R. 51, a wholly legislative vehicle to obtain Statehood, includes at least two constitutionally questionable provisions. It is my understanding that S. 898 contains them as well. First, H.R. 51 contains a provision, Section 207, that purports to repeal the enabling legislation that provides the mechanism to enable the District to participate in the Electoral College. For reasons that

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selectively as a means of economic exploitation. In return, the District receives five and one-half times the national average in per capita federal aid.

1987 *Attorney General Report* at 47 ( citations omitted ).

<sup>2</sup> Adam H. Kurland, *Partisan Rhetoric, Constitutional Reality, and Political Responsibility: The Troubling Constitutional Consequences of Achieving D.C. Statehood by Simple Legislation*, 60 *GEO. WASH. L. REV.* 475 ( 1992 ).

<sup>3</sup> I appeared before the Civil Rights Commission on March 26, 1993 and before the House Subcommittee on the District of Columbia on July 28, 1993.

I have previously explained, this provision is unconstitutional.<sup>4</sup>

Second, H.R. 51 includes a provision for an "expedited" effort to repeal the 23rd amendment immediately upon the admission of New Columbia via legislation.<sup>5</sup> Although the timing with respect to the 23rd amendment in H.R. 51 is constitutionally improper, the inclusion of such a provision ultimately proves my point -- that the Constitution must be amended in order to accommodate D.C. Statehood. Those that contend otherwise make at least two critical errors in their analysis.

First, the admission of New Columbia by legislation would not make the 23rd amendment an obsolete redundancy, like the so called fugitive slave provisions of the Constitution. The fugitive slave provisions became obsolete because of the passage of the 13th amendment in 1865. No piece of simple legislation could have accomplished that. Likewise, the 23rd amendment will not become obsolete until it is repealed by constitutional amendment.

Second, Statehood by legislation without repeal of the 23rd amendment would give the small remaining federal enclave three electoral votes. This would create a situation most would agree is absurd, but a constitutional reality nonetheless. That the States should then be compelled to consider for ratification a constitutional amendment in order to eliminate an intentional congressionally created absurdity is unprecedented and is contrary to the purpose of the constitutional amendment process. As

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<sup>4</sup> Kurland, *Partisan Rhetoric*, *supra* note 2, at 486-500.

<sup>5</sup> H.R. 51, § 208.

Alexander Hamilton observed in FEDERALIST No. 85, a proposed amendment to the Constitution that would alter our basic charter of government should face "mature consideration" as to whether the amendment "be thought useful."<sup>6</sup> Purportedly forcing the states to ratify a congressional fait accompli is inconsistent with this first principle of our system of government.<sup>7</sup>

## II

Finally, the current status of D.C. representation ( or lack thereof ) in the national legislature is not based on racial considerations. The existing limitations on D.C. voting rights have existed continuously since 1801, when the voting population of the District was entirely white.<sup>8</sup> According to Census Bureau

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<sup>6</sup> THE FEDERALIST NO. 85, at 525 ( Hamilton ) ( C. Rossiter ed. 1961 ).

<sup>7</sup> The sometimes cited Prohibition analogy also fails. The 21st amendment, which repealed Prohibition, was sent to special state ratifying conventions. This suggests that the conventions were called to engage in meaningful and considered debate, and to express the popular will. The procedure was not undertaken to undermine the popular will and to essentially compel the states to rubber stamp a congressional fait accompli.

It also should be noted that state ratifying conventions called for the sole specified purpose to consider a constitutional amendment proposed by Congress are specifically provided for in the Constitution. U.S. Const. art. V. They are not the omnibus constitutional convention required to be called upon application of two-thirds of the state legislatures, a type of convention which some fear would become a "runaway convention" that might rewrite the entire constitution. James L. Sunderquist, CONSTITUTIONAL REFORM AND EFFECTIVE GOVERNMENT 244-45 ( 1986 ).

<sup>8</sup> Professor Raskin's assertion that District residents were allowed to vote for federal office holders in Maryland and Virginia from 1791-1800 is somewhat misleading. By law, those residents had not yet become District citizens. That is because the federal

statistics, the District had a majority white population from 1800 through 1950.<sup>9</sup> In addition, the current limitations on D.C. voting rights apply to all residents of the District. The voting limitations arise out of our constitutional structure, and are features of American Federalism. Thus, they do not raise constitutional civil rights issues as that term is normally understood. By this I mean that the limitations are not constructed to discriminate on account of race, creed, color, or sexual orientation.

#### CONCLUSION

The constitutionally appropriate manner to achieve full D.C. voting rights in the national legislature is to amend the Constitution. Drawing on lessons from 1978, my colleague, Professor Jamin Raskin believes it "inconceivable" that three-fourths of the States would now decide to ratify a constitutional amendment concerned with enlarging D.C. voting rights. I am not so sure.

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legislation setting up the District, by its own terms, did not take effect until the seat of Government was actually established in the District, which occurred in December of 1800. Until that time, federal law required that the land ceded to the federal government remain subject to the law of the respective ceding states, and that the inhabitants retained their state citizenship until then. In other words, the affected citizens did not become District citizens until December, 1800. See *1987 Attorney General Report* at 7 and sources cited therein. Thus, the 1791-1800 voting experience is *sui generis*.

<sup>9</sup> U.S. Dept. of Census, Historical Statistics of the United States: Colonial Times to 1970, at A 195-209 ( Part 1 ) ( copy attached ).

Certainly, the Constitution is, and should be, difficult to amend. That is a source of strength which ensures meaningful and serious deliberation. But much has changed since 1978. In any event, if the attainment of a just cause requires that the more difficult road of the constitutional amendment process be travelled, then there really is no other option. The integrity of the Constitution cannot be ignored when fealty to the Constitution is inconvenient. As Justice Robert Jackson cautioned, " the validity of a [ constitutional ] doctrine does not depend on whose ox it gores."<sup>10</sup>

I hope this brief memorandum is helpful. It has been an honor to provide information to the Committee. If the Committee so desires, I would be happy to provide a more in-depth analysis in the future. Thank you.

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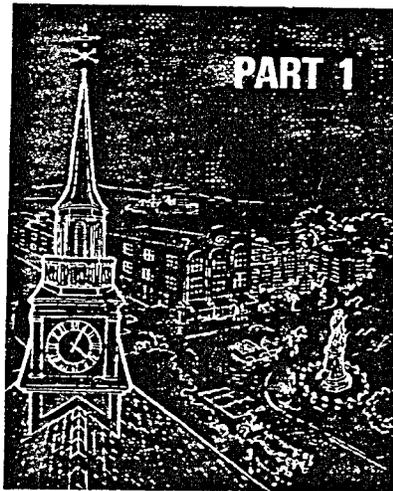
<sup>10</sup> *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 525 ( 1953 )  
( Jackson, J., dissenting ).



**BICENTENNIAL EDITION**

**HISTORICAL  
STATISTICS**  
of the United States

***COLONIAL TIMES TO 1970***



**U.S. Department of Commerce  
BUREAU OF THE CENSUS**



A 195-209 POPULATION Series A 195-209. Population of States, by Sex, Race, Urban-Rural Residence, and Age: 1790 to 1970—Con. (In thousands, except series A 194)

State and year	Resident population		Sex <sup>1</sup>		Race					Residence		Age <sup>2</sup>					
	Total	Per square mile of land area	Male	Female	White	Negro	Other races	Urban	Rural	Under 5 years	5-14 years	15-24 years	25-44 years	45-64 years	65 years and over		
																186	196
<b>DIST. OF COLUMBIA</b>																	
1790	757	12,451.8	351	406	399	358	30	757	-	60	129	145	197	168			
1860	764	12,623.9	358	406	345	412	7	764	-	78	116	129	214	178			
1900	802	13,180.3	378	424	318	381	4	802	-	71	90	117	234	174			
1940	853	14,376.3	398	455	274	187	1	853	-	62	78	114	255	187			
1950	487	7,981.5	232	255	284	182	1	487	-	32	68	84	173	100			
1920	438	7,292.6	204	234	237	110	1	438	-	30	60	85	161	79			
1930	331	5,617.6	158	173	206	84	(2)	331	-	27	46	63	119	64			
1940	279	4,645.3	132	147	192	87	(2)	279	-	23	46	56	94	46			
1960	250	3,972.3	110	121	155	76	(2)	250	-	20	44	50	89	37			
1860	174	3,062.8	84	90	118	60	(2)	160	18	21	38	54	94	34			
1870	182	2,970.7	82	70	88	48	(2)	182	11	18	28	56	84	16			
1880	74	1,294.4	35	40	61	14	(2)	70	6	10	17	32	52	8			
1890	63	1,048.8	30	33	54	13	(2)	58	5	8	13	24	34	4			
1840	34	485.7	16	18	24	10	(2)	31	3	4	6	8	11	1			
1850	30	442.6	16	16	21	9	(2)	27	3	5	7	8	11	1			
1820	23	367.1	11	12	16	7	(2)	21	2	3	4	5	7	2			
1810	15	266.8	6	9	10	6	(2)	13	1	2	3	4	5	1			
1800	8	156.6	3	5	6	2	(2)	6	1	1	1	1	1	1			
<b>FLORIDA</b>																	
1790	6,739	125.16	3,278	3,461	5,719	1,042	28	5,468	1,321	601	1,249	1,073	1,509	1,468			
1860	4,952	91.39	2,437	2,515	4,064	880	7	3,651	1,299	541	928	634	1,279	1,019			
1900	2,771	51.18	1,357	1,404	2,168	603	2	1,914	857	293	438	336	533	360			
1950	1,837	35.70	941	894	1,385	514	1	1,557	1,203	321	524	349	602	349			
1920	1,468	27.71	738	730	1,035	432	1	760	708	142	236	276	441	246			
1930	988	18.71	495	493	688	329	1	364	619	105	218	178	277	147			
1910	763	14.77	394	369	444	209	(2)	219	534	97	171	165	216	90			
1900	529	9.65	253	233	297	231	(2)	197	422	73	131	111	186	60			
1890	391	7.11	202	189	225	166	(2)	177	314	54	104	81	98	43			
1880	269	4.9	138	133	143	127	(2)	27	243	44	74	64	65	27			
1870	188	3.44	93	95	96	82	(2)	15	172	33	52	41	44	18			
1860	140	2.6	73	67	78	63	(2)	6	131	23	39	40	32	4			
1850	87	1.6	46	42	47	40	(2)	6	87	16	24	25	21	4			
1840	84	1.5	30	25	28	27	(2)	6	84	6	7	9	7	4			
1830	25	0.6	19	16	15	16	(2)	6	35	4	5	5	4	2			
<b>GEORGIA</b>																	
1790	4,590	79.0	2,231	2,359	3,309	1,187	11	2,768	1,822	422	961	860	1,122	868			
1860	3,943	67.38	1,926	2,017	2,317	1,123	3	2,189	1,763	426	822	808	1,013	718			
1900	2,462	42.29	1,268	1,194	1,583	583	1	1,329	1,381	423	467	368	1,006	562			
1950	1,324	23.7	638	686	1,038	388	1	1,426	2,018	315	544	335	837	477			
1920	2,969	49.7	1,435	1,474	1,837	1,071	(2)	2,915	2,013	816	838	823	744	417			
1930	2,856	49.38	1,445	1,461	1,689	1,206	(2)	2,728	2,161	865	748	680	737	322			
1910	2,409	44.41	1,205	1,204	1,432	1,177	(2)	2,339	2,078	577	623	541	645	299			
1900	2,216	37.77	1,103	1,113	1,331	1,038	(2)	2,446	1,875	323	391	471	510	246			
1890	1,837	31.35	920	917	978	869	(2)	2,177	1,580	267	323	381	424	186			
1880	1,442	26.33	763	779	817	725	(2)	1,445	1,397	282	427	307	352	150			
1870	1,184	20.82	579	605	639	648	(2)	1,050	1,084	189	323	256	255	116			
1860	1,037	19.03	532	525	592	485	(2)	781	923	177	303	307	232	35			
1850	906	15.48	466	480	522	383	(2)	39	861	168	269	271	189	29			
1840	691	11.39	361	350	406	334	(2)	23	667	84	119	112	82	11			
1830	517	8.81	263	253	297	230	(2)	14	603	64	83	82	39	8			
1820	341	6.38	178	185	193	161	(2)	8	335	69	80	88	33	20			
1810	232	4.35	76	70	145	107	(2)	6	247	54	62	66	27	14			
1800	123	1.9	54	48	103	80	(2)	6	154	28	18	19	20	8			
1790	89	1.6	27	26	58	30	(2)	8	85	14	14	13	10	3			
<b>HAWAII</b>																	
1790	769	119.6	399	369	298	8	463	639	130	71	180	133	203	138			
1960	823	98.65	382	396	322	5	426	484	149	81	177	106	183	97			
1950	600	73.0	274	226	116	3	382	348	145	64	92	84	159	70			
1940	423	66.0	245	178	104	(2)	319	294	165	40	91	99	127	53			
1930	368	57.5	223	145	80	1	347	188	175	48	83	76	105	46			
1920	256	39.8	151	105	65	(2)	201	92	164	30	62	45	79	26			
1910	192	30.0	123	69	44	(2)	147	59	133	24	33	34	78	23			
1900	124	24.0	106	48	29	(2)	126	39	113	16	20	22	70	14			

See footnotes at end of table.

## PROPOSED D.C. STATEHOOD AND THE 23RD AMENDMENT

PREPARED REMARKS BEFORE SUBCOMMITTEE ON THE DISTRICT OF COLUMBIA  
U.S. HOUSE OF REPRESENTATIVES  
July 28, 1993

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Thank you very much for inviting me to testify before this committee today. This is a tremendous honor. My comments today will focus primarily on the legal, historical and constitutional issues surrounding the 23rd amendment, which provides the Seat of Government of the United States, the District of Columbia, with the constitutional right to participate in the Electoral College in elections for President and Vice-President of the United States.<sup>1</sup>

The debate concerning D.C. Statehood and the 23rd amendment has undergone a subtle but significant transformation in the past year. Two years ago, most influential proponents of D.C. Statehood contended that the 23rd amendment could be rendered a nullity simply by the passage of statehood legislation. In other words, it was contended that the 23rd amendment did not need to be repealed, either prior to or after the admission of New Columbia, by constitutional amendment. Essentially, proponents contended that simply repealing the underlying enabling legislation that provides the mechanics for selection of the District's presidential electors would extinguish the constitutional rights provided by the 23rd amendment.

In January 1992 I authored an article in the George Washington Law Review that helped renew focus on the 23rd amendment.<sup>2</sup> The main thrust of my article analyzed several of the constitutional and legal issues surrounding D.C. Statehood and the 23rd amendment. I concluded that the amendment could not be mooted by legislation, and that any purported repeal of the underlying enabling legislation would be unconstitutional. Further, I contended that,

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<sup>1</sup> U.S. Const. amend. XXIII.

<sup>2</sup> Adam H. Kurland, Partisan Rhetoric, Constitutional Reality, and Political Responsibility: The Troubling Constitutional Consequences of Achieving D.C. Statehood by Simple Legislation, 60 Geo. Wash. L. Rev. 475 ( 1992 ).

if the 23rd amendment was not repealed by constitutional amendment, the handful of residents of the small remaining enclave that would be the remaining federal District of Columbia, would be entitled to three electoral votes under the 23rd amendment. The article concludes that, in order to avoid this politically irresponsible, indeed "absurd" ( but not unconstitutional ) situation, any D.C. Statehood legislation should be made contingent on a prior repeal of the 23rd amendment effectuated through constitutional amendment.

Today, the 23rd amendment has moved to the forefront of the Statehood debate. The Constitution, the legislative process, and the Nation are the beneficiaries of this development. The legal landscape has changed now. Virtually all influential proponents of D.C. Statehood now agree that the 23rd amendment will have to be repealed by constitutional amendment.

The present version of H.R. 51 is silent on the fate of the 23rd Amendment. Thus, if this bill were passed and nothing else occurred, the new shrunken District of Columbia would be constitutionally entitled to three electoral votes. Any effort to repeal, by legislation, the District's right to these electoral votes is flatly unconstitutional. The fact that H.R. 51 purportedly allows residents of the shrunken District to participate in New Columbia elections does not alter the result.<sup>3</sup> Moreover, residents of the remaining District of Columbia would have standing to challenge any legislative attempt to extinguish the rights afforded under the 23rd amendment.<sup>4</sup>

Apparently, a lurking question today is whether, as is apparently envisioned by H.R. 51, D.C. Statehood should be obtained by legislation first, and then, after Statehood is obtained, seek to repeal the 23rd amendment in order to eliminate the "absurd" situation created by New Columbia Statehood and the existence of the 23rd amendment. As noted above, the situation, although not unconstitutional, is "absurd" because, if not repealed, the 23rd amendment would give three electoral votes to the few remaining residents in the shrunken federal District of Columbia.

Proponents All Now Agree that 23rd Amendment Must be Repealed by Constitutional Amendment

As a starting point, I would like to cite for the record the near unanimous position that the 23rd amendment cannot be inoculated by simple legislation, and that a constitutional repeal is necessary. Professor Jamin Raskin appeared with me on the Fox Morning News in December, 1992, and stated that repeal is

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<sup>3</sup> H.R. 51, § 5 (f).

<sup>4</sup> These arguments are set forth fully in my George Washington Law Review article.

necessary, but after statehood is obtained "who would oppose it?" I expect that he will echo similar thoughts today. The Staff Summary Conclusions to H.R. 2482 ( Nov. 14 & 18, 1992 ) quotes Rep. Ronald V. Dellums as saying that "he is committed to work for the repeal of the 23rd amendment as soon as New Columbia is admitted as the 51st state."<sup>5</sup> Rep. Norton was quoted in the Wall Street Journal as saying she "would be willing to try to get the 23rd amendment repealed after New Columbia is admitted into the union."<sup>6</sup> Similarly, D.C. Corporation Counsel John Payton has written that "repeal of the 23rd amendment would be appropriate."<sup>7</sup>

Thus, the current state of the record is clear. For New Columbia to be admitted as a state, and for absurd constitutional results not to flow from that result, the Constitution will have to be amended. Thus, even focusing solely in this limited context, and ignoring all other constitutional issues relating to proposed D.C. Statehood, amending the constitution is an unavoidable and inherent dimension of the quest for D.C. Statehood. This is a serious, indeed solemn matter, and it is not one concerning mere timing of when the 23rd amendment is repealed. There are important legal, historical and constitutional consequences which need to be addressed if the 23rd amendment is sought to be repealed after New Columbia is admitted by legislation.

Before I discuss those concerns, I want to reemphasize the above point for a moment. One way or another, the 23rd amendment needs to be repealed by constitutional amendment. Thus, as a practical matter, D.C. Statehood cannot be viewed as something that can come about through a wholly legislative solution. This is important, not only for the reasons discussed below, but because it directly impacts on how the Clinton administration, after considered analysis, is likely to view this issue.

President Clinton supports D.C. Statehood. However, President ( then Governor ) Clinton testified before Congress on this issue at a time when most Statehood proponents contended that the 23rd amendment issue could be resolved exclusively by legislation, and that a constitutional amendment, either prior to or after the admission of New Columbia, was not necessary. As

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<sup>5</sup> 2 Admission of State of New Columbia into the Union. Hearing and Markup before House Subcomm. on Judiciary and Educ. and Committee on the Distr. of Colum., H.R. 2482, 102d Cong., 2d Sess., March 24, 26 and Apr. 2, 1992, Intro at VIII [ hereinafter H.R. 2482 Hearings ].

<sup>6</sup> Jonathan M. Moses, D.C. Statehood Still Facing Major Obstacle, Wall St. Jour., Dec. 9, 1992 at B14.

<sup>7</sup> 2 H.R. 2482 Hearings, supra note 2, at 354, 358 ( letter to Hon. Eleanor Holmes Norton ).

noted above, that position has changed. It is important, because when Mr. Clinton testified in support of a bill virtually identical to H.R. 51, one of his key assumptions was that D.C. Statehood could, and would, be achieved without a constitutional amendment. In his November 18, 1991 testimony, he stated:

All other things being equal, I would always prefer to do something with legislation than constitutional amendment, because I think the less we amend the constitution the better, unless there is an overwhelming case. So if this can be done legislatively, it is far better than to do it with a constitutional amendment.<sup>8</sup>

Thus, while President Clinton's support of D.C. Statehood remains firm, the proponents of H.R. 51 are now operating on a constitutional assumption critically different than was the case when President Clinton testified. Thus, it seems clear that the Clinton administration will analyze very carefully the legal issues raised during today's testimony, because, as noted above, the constitutional repeal of the 23rd amendment by constitutional amendment is integrally related to H.R. 51, and cannot be ignored. Thus, whether H.R. 51 should be supported in its present form, or whether another bill which, for example, would make New Columbia statehood contingent on a prior repeal of the 23rd amendment, should be supported, deserves careful scrutiny.

Status of 23rd Amendment if H.R. 51 is Enacted

Under H.R. 51, New Columbia would become a state. If nothing else occurred, then, as noted above, the shrunken remaining federal District of Columbia would still be constitutionally entitled to three electoral votes pursuant to the 23rd amendment. However, although nowhere mentioned in H.R. 51, if H.R. 51 is enacted, apparently an immediate effort would be undertaken to repeal the 23rd amendment by constitutional amendment, in order to eliminate Congress' intentionally created absurd situation as discussed above. In short, under this scenario, the repeal of the 23rd amendment would be presented to the states as a congressional fait accompli.

However, never in our nation's history has a constitutional amendment been presented to the states for ratification based on a congressionally created absurdity, essentially forcing the states acquiesce and amend the Constitution. Since the adoption of the Bill of Rights, the Constitution has been amended only 17 times in 202 years. The unprecedented action apparently contemplated after the passage of H.R. 51 would cheapen the constitutional amendment process, which is supposed to have substance and is supposed to

<sup>8</sup> 1 H.R. 2482 Hearings, supra note 2, Nov. 14 and 18, 1991 at 556 ( remarks of Gov. Clinton ).

allow the states to meaningfully debate whether changes should be made in our basic charter of government. As Alexander Hamilton observed in Federalist No. 85, a proposed amendment to the constitution should face "mature consideration" as to whether the amendment "be thought useful."<sup>9</sup>

True, there are some provisions in the Constitution that have not been explicitly repealed, but have been superseded and thus have no force or effect. However, these provisions have been superseded by subsequent constitutional amendment after proper consideration by the states, and not by a congressionally created emergency. In addition, in some cases, legislation passed pursuant to section 5 of the 14th amendment has arguably served to supersede an earlier constitutional provision. However, properly understood, those instances simply demonstrate the proper operation of the 14th amendment superseding earlier provisions of the Constitution. Neither situation is analogous to what is being presented here.

It has also been suggested that there are a few instances when simple legislation purportedly made a constitutional provision a nullity.<sup>10</sup> This is a somewhat inaccurate mischaracterization, and the examples offer no real support for the present situation.

Virtually all of the purported examples concern actions undertaken during the Civil War period, 1861-1865. This is particularly troublesome precedent that is almost certainly sui generis, because much of what occurred during that time, starting with secession, was "extra-constitutional," and thus operates far outside the normal constitutional framework. Thus, these examples hardly offer a sensible focus to analyze the issues presently before us. Moreover, many of the actions taken by Congress and President Lincoln during the Civil War period may have been unconstitutional, but because of war time exigencies, may not have been challenged. To the extent those actions arguably now are being implicitly relied on to support the principle that one should do whatever is necessary as long as one can get away with it, even if it means supporting unconstitutional action, such a position would be seemingly at odds with every elected representative's oath of office to uphold the Constitution. I do not think that is anyone's actual legal position, but at times, it seems that it is

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<sup>9</sup> The Federalist No. 85, at 525 ( Hamilton ) ( C. Rossiter ed. 1961 ).

<sup>10</sup> See, e.g., Comments of Professor Peter Raven-Hansen, 1 H.R. 2482 Hearings, supra note 2, at 419 ( discussing Congressional abolition of slavery in the District of Columbia in 1862, ostensibly rendering moot the so called fugitive slave provisions of the constitution. U.S. const. art. IV, § 2, cl. 3 ). This clause was ultimately constitutionally mooted by passage of the 13th amendment in 1865.

very difficult to distinguish that principle from some of the legal principles sought to be relied on in order to overcome the legal obstacles presented by the 23rd amendment.

Moreover, even using the Civil War examples, they do not offer clear support for the proposition that Congress has made a constitutional provision a nullity by simple legislation, and that the provision can then simply be subsequently repealed. The point is sometimes made that, in 1862, Congress by legislation, abolished slavery before the ratification of the 13th amendment. Professor Raven-Hansen has argued that this 1862 legislation effectively rendered obsolete provisions of the Constitution concerning the return of fugitive slaves.<sup>11</sup>

I must take issue with this legal and historical characterization. The law did no such thing. First, the statute abolished slavery in the District of Columbia, it did not abolish

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<sup>11</sup> Professor Raven-Hansen testified:

You have an obsolete provision in the Constitution, but it is not unprecedented. In April 1862, the Congress abolished slavery. With that legislation they made the fugitive slave clause obsolete for the District of Columbia. The fugitive slave clause is obsolete to all parts of the country. The same would be true of the 23rd amendment.

1 H.R. 2482 Hearings, supra note 2, at 419.

It must be noted that Professor Raven-Hansen's statement is demonstrably inaccurate. The 1862 Act did not abolish slavery. It only abolished slavery in the District of Columbia and further provided for compensation to loyal slaveholders. The Act did not abolish slavery in the border slave states that remained loyal to the Union ( e.g., Maryland, Delaware ), nor did it abolish slavery in Confederate territory under Union control. Finally, with respect to the fugitive slave provisions, the 1862 Act did not render the fugitive slave clause obsolete or otherwise repeal the Fugitive Slave Act of 1850 because the 1862 Act specifically stated that acts would constitute kidnapping only if one sought to "transport ... out of the District any person or persons discharged or freed by the provisions of this act." 12 Stat. 376, 378, § 8, Apr. 16, 1862. Thus, since Maryland slaves were not freed by this Act, the Act, by its own terms, did not render obsolete the operation of the fugitive slave clause. As a consequence, the 1862 Act did not prohibit a Maryland slave that had escaped to the District from being returned. See generally Benjamin Quarles, Lincoln and the Negro 77-85 ( 1962 ) ( discussion of enforcement of Fugitive Slave Law in Civil Wartime Washington, particularly with respect to claims of loyal slaveholders from loyal slave states ).

slavery. Second, the 1862 legislation provided compensation for loyal slave holders, thus becoming nothing more than a constitutionally compensated taking consistent with applicable constitutional provisions then in operation. With respect to effected slaveholders in states that had seceded, they were, by definition, engaged in rebellion against the union, had adopted their own Confederate Constitution, and thus had no legal standing to claim that the fugitive slave clause had been unconstitutionally been rendered a nullity. Finally, with respect to loyal slaveholders in slave states loyal to the Union, contrary to Professor Raven-Hansen's suggestion, the 1862 Act did not extinguish the operation of the fugitive slave clause. The Act did not free slaves in loyal slave states, and the kidnapping provisions in the 1862 Act did not prohibit efforts to return slaves of loyal slaveholders who had escaped and were found in the District of Columbia.<sup>12</sup>

Or, to look at the issue in another way, the fugitive slave clause was not rendered a nullity vis a vis any U.S. citizen not in rebellion. Those in rebellion had essentially renounced their rights under the Constitution, so as a practical matter, the congressional legislation operated constitutionally on all citizens and did not trump any citizen's constitutional right even prior to the adoption of the 13th amendment.

Similarly, the Civil Rights Act of 1866 was enacted prior to the adoption of the 14th amendment. Since the 14th amendment, when enacted, would essentially mirror the language of the 1866 Act, one might try to argue that the 14th amendment was enacted in response to the congressionally created exigency of the passage of the Act because of the need to find a source of constitutional authority. However, the analogy is inapposite. Congress enacted the Act of 1866 pursuant to its powers under the enforcement clause of the 13th amendment, which had been ratified the previous year.<sup>13</sup> Thus, the enactment of the 1866 Act did not create a congressionally created exigency inevitably requiring a subsequent constitutional amendment to remedy an absurd situation. Moreover, there was no need to repeal an earlier constitutional provision allegedly rendered absurd or a nullity because of the passage of the Act.

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<sup>12</sup> See note 11 supra.

<sup>13</sup> See, e.g., Eric Foner, Reconstruction: America's Unfinished Revolution 244 n. 29 ( 1988 ) ( "Senator Bingham believed the Civil Rights Bill unconstitutional, but every other influential Republican considered it warranted by the second clause of the Thirteenth Amendment ).

The Prohibition Analogy

Some supporters of H.R. 51 assert that the manner in which Prohibition was enacted and then repealed lends support for the position that there is no problem with simply repealing the 23rd amendment after H.R. 51 is enacted.<sup>14</sup> However, the enactment and repeal of Prohibition by constitutional amendment lends no support for the proposition that D.C. Statehood legislation should be enacted first, and then work to repeal the 23rd amendment. Rather, the Prohibition experience supports the principle that, when a constitutional amendment is sought to be repealed, it should be sent to the States under circumstances where the issue, and all integrally related issues, are able to receive careful and, to use Hamilton's words, "mature" consideration.

The 21st amendment, enacted in 1933, repealed the 18th Amendment, which has been enacted in 1919, thus ending Prohibition. But Congress did not submit the 21st amendment to the states in order to eliminate a congressionally created absurdity. Rather, the experiences of Prohibition resulted in a citizenry strongly convinced that Prohibition was unworkable or against the interests of a vast majority of the populace. Congress acted in response to overwhelming public sentiment and proposed the 21st amendment.<sup>15</sup>

Here, in contrast, it appears that precisely the opposite is sought to be accomplished. H.R. 51 appears to attempt to craft a legislative solution that effectively minimizes, if not downright avoids or eliminates, the States' and the citizenry's inherent right in our Federalism to have meaningful input into whether the Constitution should be amended. H.R. 51 attempts to do this by masking the inherent core connection of the 23rd amendment and D.C. Statehood. It thus seeks to present the issue of the repeal of the 23rd amendment as a fait accompli necessary in order to avoid the intentionally and knowingly created "absurd" situation, rather than allowing the ratifying process to include, as was intended, intelligent debate on the fate of the 23rd amendment and all related consequences.

This was not the manner in which the 18th amendment was presented to the states for possible repeal. There, Congress was so concerned about repealing such a relatively new constitutional provision, only 14 years old, that it took the unprecedented step of referring the adoption of the 21st Amendment to State

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<sup>14</sup> See e.g., Testimony of Professor Jamin Raskin before the U.S. Commission on Civil Rights, March 26, 1993 at 111.

<sup>15</sup> See James L. Sundquist, Constitutional Reform and Effective Government 12 ( 1986 ) ( noting "waves of popular enthusiasm" to repeal Prohibition ).

Conventions, as opposed to state legislatures, in order to obtain the opinion of bodies especially chosen for the purpose of determining the amendment's subject. This suggests that the conventions were called to engage in meaningful and considered debate, not to rubber stamp a congressional fait accompli.

That stands in stark contrast to the scenario apparently envisioned by H.R. 51. As noted above, if H.R. 51 is enacted in its present form, the issue of D.C. Statehood and the repeal of the 23rd amendment ( an amendment only 32 years old ) would then be presented to the States as a fait accompli emergency measure necessary to remedy an absurd situation intentionally created by Congress, thereby denying the States their proper constitutional role of meaningful constitutional consideration of real options. Such a scenario is unprecedented in its denigration of the constitutional amendment process.

#### Conclusion

In conclusion, the inherent constitutional connection of D.C. Statehood and the 23rd amendment cannot be avoided. That is a constitutional reality. The District is a unique constitutional creature. Because of the District's unique constitutional status and the presence of the 23rd amendment, unique steps may be required in order to obtain Statehood. Thus the manner in which other territories have obtained statehood is largely irrelevant. The states deserve to deal with the issues in a substantive and meaningful way. That means that Statehood should be made contingent on prior repeal of the 23rd amendment. Such a scenario avoids reducing the 23rd amendment repeal process to a hollow and essentially substanceless fait accompli that denigrates the constitutional amendment process.

Apparently, there is some concern that any attempt to tie Statehood to passage of a prior constitutional amendment will effectively defeat D.C. Statehood. Tying D.C. Statehood to a prior passage of a constitutional amendment may be more difficult, more time consuming and more expensive, but it is not impossible. More important, it is legally and constitutionally appropriate. Indeed, the Constitution was purposely made difficult to amend. I see this a strength, not a weakness. Most important, if there is suspicion that state legislatures are somehow out of tune with their constituents or captivated by partisan interests, and might delay or otherwise defeat a proposed constitutional amendment, there is a constitutional method to deal with the issue. The Constitution provides that Congress may specify the means of state ratification of proposed constitutional amendments, either via the state legislatures or state conventions specifically called to

consider a particular proposed amendment.<sup>16</sup> If the same Congress that enacted D.C. Statehood legislation contingent on the repeal of the 23rd amendment chose the state convention route of ratification ( as it constitutionally can do ), it could bypass state legislatures entirely, and could send the issue to state conventions specifically convened for this sole purpose.<sup>17</sup>

Proponents of H.R. 51 have said that nationwide public opinion polls run 9-1 in their favor. If that is the case, good grass root organizing should result in at least three fourths of the state conventions having strong majorities in favor of repealing the 23rd amendment, at which time the New Columbia Statehood legislation would become operative. This might not be as difficult as it may seem at first. As noted earlier, the 21st amendment was enacted under this procedure. Ratification by state conventions was completed in the course of barely nine months, between February 20 and December 5, 1933.<sup>18</sup>

In a somewhat analogous context, former President and former Chief Justice William Howard Taft wrote:

The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant or the harm which will come by breaking down recognized standards.<sup>19</sup>

In summary, I generally support the aspirations of D.C. Statehood. I see no constitutional or legal objections to a Statehood bill that is made contingent on the prior repeal of the 23rd amendment effectuated through constitutional amendment. However, for the reasons discussed above, and for the other constitutional reasons fully discussed in my George Washington Law Review Article, I must oppose H.R. 51.

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<sup>16</sup> U.S. const. art. V.

<sup>17</sup> These conventions are called for the sole specified purpose of considering the proposed constitutional amendment. They are not the omnibus constitutional convention required to be called upon application of two-thirds of the state legislatures, a type of convention which some fear would become a "runaway" convention that might rewrite the entire constitution. See generally Sundquist, supra note 11, at 244-45.

<sup>18</sup> Id. at 244.

<sup>19</sup> Bailey v. Drexel Furniture Co., 259 U.S. 20, 37 ( 1922 ) ( Taft, C.J. ).

PREPARED REMARKS BEFORE  
THE UNITED STATES COMMISSION ON CIVIL RIGHTS  
D.C. VOTER REPRESENTATION AND STATEHOOD

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I want to thank the U.S. Civil Rights Commission for inviting me to speak to you on the issue of D.C. Voter Representation and Statehood. My main research area on this topic has concerned the Twenty-Third Amendment to the Constitution, which provides the Seat of Government of the United States-- The District of Columbia-- with the right to participate in the selection of the President and Vice-President through the Electoral College. The Commission has been provided with reprints of my article on that topic, which appeared in the January 1992 issue of The George Washington Law Review.<sup>1</sup> Through my research, I have developed some understanding of the other interrelated legal issues concerning D.C. voter representation and Statehood.

My brief remarks today will focus on several interrelated issues concerning D.C. voting rights, proposed D.C. Statehood, and civil rights issues generally.

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<sup>1</sup> Adam H. Kurland, Partisan Rhetoric, Constitutional Reality, and Political Responsibility: The Troubling Constitutional Consequences of Achieving D.C. Statehood by Simple Legislation, 60 Geo. Wash. L. Rev. 475 ( 1992 ).

The proposed D.C. Statehood legislation currently pending in Congress, H.R. 51, would provide for the federal District of Columbia to be reduced in size to the National Capital Service Area ( e.g., the principal monuments, the Mall, the Capitol and the White House ), and for the remaining area that makes up the present District of Columbia to become the 51st State of New Columbia. The proposed legislation is silent on what would happen to the 23rd Amendment. Thus, should the present bill become law, the 23rd Amendment would remain in full operation, which would provide the few remaining residents of the new drastically reduced federal District of Columbia with a constitutional right to three electoral votes as provided for under the 23rd Amendment.

Current Status of Voter Rights in the District of Columbia

Presently, residents of the District of Columbia who are U.S. citizens can vote for President of the United States and for Vice-President by voting for presidential electors as provided for by the 23rd Amendment. D.C. residents cannot vote for U.S. Senator, and cannot vote for a member of the U.S. House of Representatives. ( The current delegate to the House, Eleanor Holmes Norton, is not a full voting member of the U.S. House. ) With respect to local matters, the District operates under limited home rule, which provides for an elected mayor and elected city council. By law, virtually every action of local government is subject to veto by Congress, if Congress so desires. In practice, however, very few

local decisions are overridden by Congress. That does not minimize the reality that Congress can have the last word on any local issue if it wants to exercise its prerogative. However, in evaluating the current status of voting rights of the residents of the District, it would be inaccurate to suggest that Congress often imposes its will over the District on local matters.

The limitations on D.C. voting rights noted above arise out of the fact that the District of Columbia is not a state, a limitation that, itself, arises out of federalist principles and the U.S. constitutional structure. Article I, Section 8, clause 17 provides in relevant part:

Congress shall exercise exclusive legislation in all cases whatsoever, over such district ( not exceeding ten miles square ) ..[ that shall constitute ] the seat of Government of the United States.

Additionally, Article I, section 3 of the Constitution provides "The Senate of the United States shall be composed of two Senators from each State." Similarly, Article I, section 2 requires that the House of Representatives be composed of members chosen by the people of the several states, and that each member of Congress be an inhabitant of the state from which he or she shall be chosen. As such, these voting rights limitations arise out of our constitutional structure, and thus do not raise civil rights issues as that term is normally understood. By that I mean these limitations are not constructed to discriminate on account of race, creed, color, sex, ethnic origin, or sexual orientation. As a consequence, the limitations, and what to do about them, raise

essentially political questions.

Although, presently the District is predominantly African-American, the constitutional voting limitations of D.C. residents affects all D.C. residents in the same manner, whether they be African-American, white, or of any other racial or ethnic background. Moreover, the limitation prohibiting District residents from voting for U.S. Senator or for members of Congress dates back to the creation of the District in 1801, at a time when the voting population of the District was entirely white.

#### General Comments

The current Statehood issue has become a highly partisan political issue. If the Commission's efforts with respect to this matter be perceived as too partisan, such a perception might ultimately undermine other efforts of the Commission. Obviously, the Commission should not shirk from taking a stand on controversial issues. Indeed, the nature of the Commission obligates itself to be involved in issues that often are controversial. However, as evidenced by this hearing, the Commission is wisely carefully examining all dimensions to this issue to evaluate the true extent of the "civil rights" dimension to this particular problem. In a highly charged atmosphere with partisan overtones, the Commission's actions are to be commended.

Several reasons support this cautious approach:

1. The imbalance of D.C. voter rights vis a vis other citizens who live in a state, is functionally identical to the issue of whether Puerto Rico should become a state. Puerto Ricans are full U.S. citizens who cannot vote for President, let alone vote for Senator and members of Congress. Moreover, from a percentage standpoint, the residents of Puerto Rico are more monolithically minority than are the residents of the District. From a civil rights standpoint, there is no basis to be involved in one cause, and not the other.<sup>2</sup>

2. Over the years, it has sometimes been asserted that the constitutionally mandated equal representation of States in the Senate, where a state with a small population, like Wyoming or Rhode Island, receives the same representation as a much more populous state like California, New York, Florida, or Texas, is inequitable, violates the "one person one vote" principle, and should be changed. ( I do not support this argument, but that is irrelevant for these purposes ). From a voting rights equity standpoint, one must recognize there is some merit to the argument that this scheme of things results in unequal, or unbalanced voting

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<sup>2</sup> In addition, in the past few years bills have been introduced proposing to divide California into two or more states. The motivation behind these bills is based, in part, on the concern that the huge California population is underrepresented in the Senate. This raises a voting rights- equity issue, but, like Puerto Rico and the District of Columbia statehood issues, it is grounded in federalism, not civil rights.

rights among the citizenry. However, this imbalance, a product of the "Great Compromise of 1787," is also a feature of American federalism. While good faith arguments can be made that such a system should be changed to provide for more equal voting rights, functionally, that issue does not raise a civil rights claim. It is doubtful that the Commission would get involved in endorsing a position on that issue.

3. Several interrelated issues concerning D.C. Statehood must be confronted candidly by any body that is interested in the topic. These key issues have nothing to do with civil rights issues --no matter how broadly one defines the term.

For example, one issue that must be confronted with D.C. Statehood is the status of the federal payment to the District. Currently, the payment is \$ 650 million annually. Contrary to popular belief, the federal payment is not based on the large amount of land owned by the federal government in the District that theoretically deprives the District of tax revenues. Several states contain a much larger percentage of federal lands than the District;<sup>3</sup> lands which are exempt from local taxation, and those

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<sup>3</sup> E.g., Alaska, Nevada, Idaho, Utah, Oregon, Wyoming, California, Arizona, Colorado, and New Mexico. U.S. Dept. of Justice, Report to the Attorney General: The Question of Statehood for the District of Columbia 62 ( 1987 ). Moreover, if the National Capital Service Area is removed from New Columbia ( as provided for in the proposed legislation ), the percentage of federal lands in New Columbia would be dramatically reduced to far less than the current 32%.

states receive no federal payment. Rather, the federal payment is based on a variety of factors, most of which relate to the fact that the federal government, the entity that retains exclusive jurisdiction over the District, has a significant financial and inherent responsibility to this area precisely because it is under exclusive federal jurisdiction.

Thus, if New Columbia is created, the justification for the payment, money paid by the entity that retains exclusive jurisdiction over the area ( the federal government ), evaporates. Yet significant partisan debate has ensued over the status of the federal payment and virtually all statehood proponents want statehood and the continued substantial federal payment.

Unless the Commission intends to take a position on the status of the federal payment, an issue that has nothing to do with Civil Rights, the Commission should exercise extreme caution before it determines to take a position on Statehood.<sup>4</sup>

4. Other legislative proposals have been offered which would rectify the inequity of D.C. voting rights vis a vis other citizens. One proposal that was introduced in the last session of Congress would retrocede the District to Maryland. This would allow current D.C. residents to vote for two U.S. senators and for

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<sup>4</sup> In fact, a continued federal payment for New Columbia would create a substantial inequity among New Columbia and every other state that did not receive a similar federal payment.

members of Congress by virtue of their new status as residents of Maryland. It would also eliminate the possibility of congressional meddling over local matters. From a voting rights-equity standpoint, which appears to be the Commission's area of concern, this would accomplish all of the objectives and redress the voting inequalities facing D.C. residents. It is difficult to see how the Civil Rights Commission could be in a position to favor one legislative proposal over another, as each accomplishes the identical "voting rights-equality" objectives. To be sure, virtually all Statehood proponents do not favor the retrocession proposal for some very good, powerful political reasons. However, the fact that the reasons are ultimately political underscores the essential nature of the issue as a classic partisan political issue, not a civil rights issue.

There are two areas concerning D.C. Statehood which raise civil rights issues, although these two areas are not free from controversy.

First, since the founding of the Republic, the exercise of the police power has been considered an essentially local matter.<sup>5</sup> The first duty of Government is to protect its citizenry. Yet the District of Columbia does not have a local prosecutor accountable to the local populace. Virtually every state has elected local prosecutors. Having some say in the manner in which local

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<sup>5</sup> See The Federalist No. 45 ( Madison ).

prosecutorial and criminal justice policies are implemented raises concerns which more closely resemble civil rights issues. In the past several months, the local media has reported on several cases where local charges against suspects have been dropped ( some of the charges have been serious violent felonies ), because of some perceived overriding federal interest in a federal prosecution or ongoing federal investigation. Since the same person, the U.S. Attorney for the District of Columbia, is in charge of federal and local prosecutions, but does not have any accountability to the local citizenry, there exists no give and take in the District of Columbia of the type that occurs in virtually every other jurisdiction where an elected local prosecutor and the U.S. Attorney consult with each other in an effort to reach common ground on how the public interest is best served in these difficult criminal justice matters.

The District should have a locally elected local prosecutor. Under the current state of affairs, federal legislation is needed to expand the local home rule powers to effectuate this change. Criminal justice administration and the prevention of crime is a civil rights issue worthy of further study by the Commission.

Second, I will briefly discuss a few points related to the 23rd Amendment issues raised in my George Washington Law Review article. The method by which the current proposed D.C. Statehood legislation seeks to obtain statehood, raises troubling issues

concerning whether constitutional protections are being abrogated by legislation. Statehood proponents who support the current proposed legislation seek a legislative solution that would, in essence, make the 23rd amendment dead letter. Any proposed legislation that would render a constitutional provision a nullity, or meaningless, needs to be scrutinized carefully, regardless of how noble the particular cause may be. To allow constitutional protections to be avoided by legislation could set drastic precedent that could then be used by others in a far less noble manner.

In response to this argument, several statehood proponents have proposed that a constitutional amendment repealing the 23rd amendment be enacted after statehood has been obtained, on the ground that the statehood legislation creating New Columbia would have rendered the 23rd amendment "absurd." For example, Professor Janin Raskin, a strong supporter of Statehood and the current Statehood bill, has argued that the 23rd Amendment would be dangerously absurd after statehood had been obtained, asking "who would be in favor of giving Chelsea Clinton and the homeless three electoral votes."<sup>6</sup> In essence, Professor Raskin's argument concedes that the current statehood legislation, if passed, would result in an intentional congressionally created emergency that would require an immediate constitutional amendment repealing the 23rd amendment.

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<sup>6</sup> Fox Morning News, T.V. Interview, Dec. \_\_, 1992.

This argument necessitating a further constitutional amendment after statehood is obtained by legislation, concedes the merit of my constitutional arguments concerning the legal operation of the 23rd amendment. Apparently, for political and strategic reasons, Statehood proponents do not want the 23rd amendment repeal issue to be put before the states prior to New Columbia statehood because there is fear that if Statehood it is not presented to the ratifying states as a fait accompli, and the 23rd amendment repeal issue is not presented as an "emergency" to eliminate the Congressionally created absurd situation, Statehood will fail on its own merits.<sup>7</sup>

However, "forcing" the states to enact a new constitutional amendment that would repeal another constitutional provision because an act of Congress has intentionally created an absurdity and resulting constitutional emergency, is anathema to the American constitutional experience. No constitutional amendment in our nation's history has been presented to the states for ratification based on such a premeditated congressionally created exigency.<sup>8</sup>

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<sup>7</sup> At a D.C. Statehood Debate held on February 9, 1993 ( which I was moderator ), D.C. Councilmember Kevin Chavous claimed that public opinion polls show that U.S. citizens favor D.C. Statehood by a 9-1 margin. If that figure is anywhere near accurate, a constitutional amendment creating New Columbia should easily pass the required three fourths of the state legislatures, thereby obviating all of my constitutional concerns.

<sup>8</sup> Moreover, only once has a constitutional amendment been ratified which has repealed an earlier constitutional amendment. ( Several provisions of the original constitution have been

This Commission might consider further study of how the proposed D.C. statehood legislation may set dangerous precedent for the fate of other constitutional rights. This point has been eloquently raised by Professor Judith Best as early as 1984.<sup>9</sup>

#### Conclusion

In conclusion, the issues surrounding D.C. Statehood, and the interrelated issues concerning voting rights, are substantial and deserving of careful and considered study. In a general sense, the current status of D.C. voter representation raises equity issues. However, upon close examination, the current situation derives from the federalist structure of our Constitution, not from invidious or

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effectively repealed or modified by subsequent constitutional amendment.) The 21st Amendment, ending Prohibition, repealed the 18th Amendment. However, the 21st Amendment ratification procedures bear particular emphasis here. Congress was so concerned about repealing such a relatively new provision of the Constitution, that it took the unprecedented step of referring the adoption of the 21st Amendment to state conventions, as opposed to state legislatures, in order to obtain the opinion of bodies especially chosen for the purpose of determining the amendment's subject. See U.S. Const. art. 5, and amend. 21 sec. 3 ( language of proposed amendment specifically states that ratification must be by "conventions in the several states" ). This suggests that the conventions were called to engage in meaningful and considered debate, not to rubber stamp a fait accompli.

In contrast, statehood proponents apparently envision the exact opposite situation with the procedures to repeal the 23rd Amendment, which is only 32 years old. As noted above, if the current statehood bill passes, the issue of D.C. Statehood and the repeal of the 23rd amendment would be presented to the states as a fait accompli emergency measure necessary to remedy an intentionally created "absurd" situation, without any avenue for meaningful constitutional consideration of real options. Such a scenario denigrates the constitutional amendment process.

<sup>9</sup> Judith Best, Congressional Representation for the District of Columbia 71 ( 1984 ).

discriminatory reasons. Powerful advocates have made substantial legal arguments on all sides of the issue. However, as noted above, one must recognize the issue as a structural federalism and political issue-- not a civil rights issue. Moreover, the status of the federal payment, an issue inexorably intertwined with Statehood, raises issues that are not civil rights issues, even broadly defined.

I have tried to keep my comments focused on the legal and constitutional issues surrounding D.C. voting rights and statehood, and have sought to avoid injecting my own personal opinions concerning the political merits of the issue. I am concerned that the current proposed D.C. Statehood legislation raises fundamental legal and constitutional problems. I see no legal and constitutional obstacle to Statehood if statehood is made contingent on the repeal of the 23rd Amendment. The present proposed bill does not include this ingredient. I have written previously that when moral claims seek vindication through the legislative process, they must adhere to constitutional requirements. William Howard Taft, the only person ever to serve as both President and as Chief Justice, made a similar point far more eloquently. In 1922 he wrote:

The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant or the harm

which will come from breaking down recognized standards.<sup>10</sup>

As presently drafted, I believe the proposed D.C. statehood legislation, if passed, would inevitably result in a scenario which would run roughshod over important constitutional principles. Supporting a flawed D.C. statehood bill, even in the name of equity and civil rights, which may set precedent that would cause lasting damage to the concept of constitutional rights previously thought to be immune from abrogation by momentary legislative majorities, is an unduly high and irresponsible price to pay even for a noble and worthy cause.

Again, the Commission is to be commended for undertaking a serious evaluation of all the relevant issues as it makes a determination whether to formally endorse any particular piece of legislation concerning D.C. voting rights and Statehood. Again, I thank the Commission for giving me an opportunity to appear before you. I hope my comments have been informative and helpful. I would be happy to answer any questions you might have.

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<sup>10</sup> Bailey v. Drexel Furniture Co., 259 U.S. 20, 37 ( Taft, C.J., ).