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## HISTORICAL CONSIDERATIONS AND CONGRESSIONAL REPRESENTATION FOR THE DISTRICT OF COLUMBIA: CONSTITUTIONALITY OF THE D.C. HOUSE VOTING RIGHTS BILL IN LIGHT OF SECTION TWO OF THE FOURTEENTH AMENDMENT AND THE HISTORY OF THE CREATION OF THE DISTRICT

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*A State is represented in the Senate and in the House as a State. There is no constitutional capacity for representation except through State organization. Representatives in this House are apportioned by the Constitution among the several States.*

—Representative George S. Boutwell, a leading “Radical” Republican, after arguing for constitutional amendments, including a version of what would become Section Two of the Fourteenth Amendment.<sup>1</sup>

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\* Professor of Law, Pepperdine University School of Law. The author would like to thank Professors Edward J. Larson, Akhil Reed Amar, Christine Chambers Goodman, Robert J. Pushaw, Douglas W. Kmiec, and Edward A. Hartnett for their helpful suggestions. The author also would like to thank his dean, the Hon. Kenneth W. Starr (Duane and Kelly Roberts Dean and Professor of Law at the Pepperdine University School of Law), for his support and encouragement and for engaging in constructive dialogue on the subject of this Article.

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1. CONG. GLOBE, 39th Cong., 1st Sess. 2509 (May 9, 1866); *see infra* text accompanying note 171 (giving longer quotation including these two sentences). Representative Boutwell, “a guiding member of the House Judiciary Committee,” had served as Governor of Massachusetts and (from 1862 to 1863) as the first Commissioner of Internal Revenue. Michelle LaFrance, *Boutwell, George S.*, in 1 ENCYCLOPEDIA OF THE RECONSTRUCTION ERA 100 (Richard Zuczek ed., 2006); *see also* Biographical Directory of the United States Congress, Boutwell, George Sewel, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=B000674> (last visited Apr. 17, 2009). He served as one of the nine House members on the Joint Committee on Reconstruction and later was the “leader of the House forces supporting a Fifteenth Amendment.” JAMES M. MCPHERSON, THE STRUGGLE FOR EQUALITY: ABOLITIONISTS AND THE NEGRO IN THE CIVIL WAR AND RECONSTRUCTION 426 (1964); *see also* BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT

*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.*

—House Committee on the Judiciary, in a 1967 report submitted by its long-time Democratic chairman, Representative Emanuel Celler.<sup>2</sup>

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COMMITTEE OF FIFTEEN ON RECONSTRUCTION 39 (1914), available at <http://books.google.com/books?id=pg9CAAAIAAJ>; LaFrance, *supra*, at 100 (“Boutwell’s commitment to freedmen’s civil rights and universal suffrage compelled him to become one of the primary voices to guide drafts of the Fourteenth and Fifteenth Amendments to the U.S. Constitution and early drafts of plans that would later form the basis of congressional strategies for southern Reconstruction.”).

2. H.R. REP. NO. 90-819, at 4 (1967); see also Biographical Directory of the United States Congress, Celler, Emanuel, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=C000264> (last visited Apr. 17, 2009). An identical statement appears in the House Judiciary Committee Report that accompanied the proposed constitutional amendment, H.R.J. Res. 554, 95th Cong. (1978), that would have granted the District both House and Senate representation had it been ratified by sufficient states. H.R. REP. NO. 110-52, pt. 2, at 30 (2007) (quoting H.R. REP. NO. 95-886, at 4 (1978)); see also *District of Columbia Representation and Vote: Hearings Before Subcomm. No. 5 of the Comm. on the Judiciary of the H.R. on H. J. Res. 529*, 86th Cong. 824–25 (1960) [hereinafter *D.C. Representation and Vote*] (statement of Sen. Hubert H. Humphrey) (“Mr. Chairman, the only reason that people are denied the right to vote here [in the District] is . . . geography. The only way that this geographical set of circumstances can be corrected, in my mind, is by a constitutional amendment.”) Only sixteen states ratified H.R.J. Res. 554 by its 1985 deadline, far short of the thirty-eight that would have constituted the required three-quarters of the states. See KENNETH R. THOMAS, CRS REPORT FOR CONGRESS, THE CONSTITUTIONALITY OF AWARDED THE DELEGATE FOR THE DISTRICT OF COLUMBIA A VOTE IN THE HOUSE OF REPRESENTATIVES OR THE COMMITTEE OF THE WHOLE 20 (2007), reprinted in *Equal Representation in Congress: Providing Voting Rights to the District of Columbia: Hearing Before the S. Comm. on Homeland Sec. and Governmental Affairs*, 110th Cong. 202 (2007) [hereinafter *Equal Representation in Congress*].

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## I. INTRODUCTION

### *A. The Setting—The Proposed D.C. House Voting Rights Act, The Need for Careful Consideration by Congress and the President of its Constitutionality, and the Only Initially Somewhat Plausible Argument for its Constitutionality: The Argument from Inadvertence*

Congress stands ready to attempt to amend the constitutional provisions for the composition of the House of Representatives—Article I and, crucially, Section Two of the Fourteenth Amendment—by a simple statute that would purport to grant the District of Columbia a voting member in the House: the District of Columbia House Voting Rights Act of 2009.<sup>3</sup> As

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3. See District of Columbia House Voting Rights Act of 2009, S. 160, 111th Cong. (2009). The bill, if constitutional, would permanently expand the size of the House of Representatives by two, to 427, with the District of Columbia receiving one of the seats and Utah almost certainly receiving the other, pending reapportionment following the 2010 census. S. REP. NO. 110-123, at 1–2 (2007) (analyzing similar bill introduced in 110th Congress, District of Columbia House Voting Rights Act of 2007, S. 1257, 110th Cong. (2007)).

a Senator, President Obama supported the Act—the 2007 version of which was only barely defeated in Congress<sup>4</sup>—and thus it appears nearly certain,

As is discussed fully *infra* note 4, the District of Columbia House Voting Rights Act of 2007, S. 1257, 110th Cong. (2007), failed in the Senate only because its supporters fell three votes short of the sixty votes needed to invoke cloture. A similar bill, the District of Columbia House Voting Rights Act of 2007, H.R. 1905, 110th Cong. (2007), passed the House but was not acted upon in the Senate. Had one of those bills been passed by both houses of Congress and sent to President Bush, he likely would have vetoed it. See *infra* note 5. With Democratic Party gains in the House and Senate in the 2008 elections, and with the election of President Obama, who supported the D.C. House Voting Rights Act as a Senator, the stage was set for enactment of the bill. See, e.g., Aaron Blake, *Kilroy Win Gives Dems 79-Seat House Majority*, THE HILL, Dec. 7, 2008, available at <http://thehill.com/leading-the-news/kilroy-win-gives-dems-79-seat-majority-2008-12-07.html>; David M. Herszenhorn, *Democrats Widen Their Senate Edge to a Solid Majority*, N.Y. TIMES, Nov. 5, 2008, at P12 (noting that Democrats had only a fifty-one to forty-nine advantage over Republicans in the Senate prior to the 2008 elections); Carl Hulse, *Democrats Gain as Stevens Loses Race*, N.Y. TIMES, Nov. 19, 2008, at A1 (noting the Democrats would have at least fifty-eight Senate seats, counting Senators Lieberman and Sanders); Carl Hulse & Adam Nagourney, *Specter Switches Parties; More Heft for Democrats*, N.Y. TIMES, April 29, 2009, at A1 (noting that Democrats could have sixty votes in the Senate if Al Franken were to succeed in the dispute over the 2008 Minnesota Senate election).

On January 6, 2009, Senator Lieberman introduced S. 160 in the Senate. On February 24 cloture was invoked by a vote of 62–34. Senator McCain's point of order that the bill violated the Constitution was rejected on February 25 by a vote of 36–62. 155 CONG. REC. S2,435 (daily ed. Feb. 25, 2009). It then seemed certain that the bill would pass the Senate, pass the House, and be signed by the President.

The Senate indeed did pass the bill, on February 26, 2009, by a vote of 61–37, but not before adopting several amendments, including Senator Ensign's amendment that would strip away much of the District government's authority to enact gun control legislation and repeal much of the existing law in the District concerning gun control. See 155 CONG. REC. S2,538 (daily ed. Feb. 26, 2009) (showing adoption of Senator Ensign's Senate Amendment 575 by a vote of 62–36, showing that all 36 Senators who voted against Amendment 575 then voted in favor of passage of S. 160, and showing passage of S. 160 as amended by a misleadingly similar tally of 61–37); *id.* at S2,490–91 (daily ed. Feb. 25, 2009) (setting forth text of Senate Amendment 575). Because of opposition to Senator Ensign's amendment, the House has taken no action as yet on S. 160. See THOMAS (Library of Congress), <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:SN00160:@@L&summ2=m&l/bss/111search.html> (last visited May 16, 2009) (showing the only action taken on S. 160 after its arrival in the House was that it was “[h]eld at the desk”); see also Mike Soroghan, *Democrats Offer NRA Gun Vote to Move D.C. Voting Rights Act*, THE HILL, Mar. 10, 2009, available at <http://thehill.com/leading-the-news/democrats-offer-nra-gun-vote-to-move-d.c.-voting-rights-act-2009-03-10.html>; Nikita Stewart, *Gun Amendment Assailed at Capitol Hill Rally*, WASH. POST, Apr. 22, 2009, at B4 (“[T]he gun amendment has caused several delays in getting the bill to the House floor for a vote. Late May [2009] is now the target for House Majority Leader Steny H. Hoyer (D-Md.).”).

Note also that Michael Steele, the new Chairman of the Republican Party and former Lieutenant Governor of Maryland, is on record supporting the D.C. House Voting Rights Act. See Adam Nagourney, *Republicans Choose First Black Party Chairman*, N.Y. TIMES, Jan. 31, 2009, at A13; Michael Steele & J.C. Watts, Op-Ed, *D.C. Vote Threshold*, WASH. TIMES, Sept. 11, 2007, at A15.

4. See District of Columbia House Voting Rights Act of 2007, S. 1257, 110th Cong. (2007); District of Columbia House Voting Rights Act of 2007, H.R. 1905, 110th Cong. (2007).

A dispute over the 2000 census created political traction for the Act in the 110th Congress. Utah's Senators believe that Utah was improperly denied a fourth House seat in the apportionment under the 2000 census. See Press Release, Sen. Orrin Hatch, Hatch, Lieberman Introduce DC, Utah House Voting Bill in the Senate—Bill Also Creates Fourth District for the State of Utah (May 1, 2007), available at [http://hatch.senate.gov/public/index.cfm?FuseAction=PressReleases.Print&PressRelease\\_id=6f8aba95-a353-4bd3-a4b3-10c06a0df895&suppresslayouts=true](http://hatch.senate.gov/public/index.cfm?FuseAction=PressReleases.Print&PressRelease_id=6f8aba95-a353-4bd3-a4b3-10c06a0df895&suppresslayouts=true). The Supreme Court affirmed, without opinion, the decision of a three-judge panel upholding one aspect of the Census Bureau's approach that Utah thought improper—the decision to allocate federal employees serving abroad (mostly military personnel) and their dependents to the state of their home of record but not to

absent a serious reconsideration by him of its constitutionality, that he will sign the bill should Congress pass it,<sup>5</sup> as still seems likely despite the delay

allocate religious missionaries similarly. *Utah v. Evans*, 143 F. Supp. 2d 1290, 1298–300 (D. Utah), *aff'd mem.*, 534 U.S. 1038 (2001). In another case, the Supreme Court upheld the Census Bureau's "[h]ot-deck imputation" methodology for filling in gaps in the information collected; thus, the Court refused to grant Utah a remedy. *Utah v. Evans*, 536 U.S. 452, 457 (2002). See generally Nathan T. Dwyer, Note, *Utah v. Evans: How Census 2000's "Sampling in Disguise" Fooled the Supreme Court into Allocating Utah's Seat in the U.S. House Of Representatives to North Carolina*, 31 PEPP. L. REV. 1055 (2004).

The opportunity to redress what was perceived to be a double injustice in a way that would be unlikely in the short run to affect the partisan balance in the House created an unusual political opportunity. The additional member elected from Utah would likely be a Republican, balancing the Democrat who would be elected from the District, very likely the Hon. Eleanor Holmes Norton, currently the nonvoting delegate from the District. See Mary Beth Sheridan & Hamil R. Harris, *D.C. Voting Measure Clears The Senate: Added Gun Language Might Pose a Problem*, WASH. POST, Feb. 27, 2009, at A1. The bills, H.R. 1905 and S. 1257, each included a nonseverability clause (as does S. 160 in the 111th Congress), so that Utah would not receive an additional seat if the provision of a voting member for the District were found unconstitutional.

The House passed H.R. 1905 on April 19, 2007, by a vote of 241 to 177. H. Bill Clerk, 110th Cong., Vote Summary, Vote No. 231 (Apr. 19, 2007), available at <http://clerk.house.gov/evs/2007/roll231.xml>. The Senate did not act on H.R. 1905, probably because Utah's Senators objected to its provision for the additional Utah seat to be elected at-large. The Senate Majority Leader sought unanimous consent for a motion to proceed to consideration of S. 1257, but there was objection. A majority of Senators voted to invoke cloture on the motion to proceed to consideration of S. 1257, but cloture failed on a 57 to 42 vote because sixty votes were needed. See S. Bill Clerk, 110th Cong., Vote Summary, Vote No. 339 (Sept. 18, 2007), available at [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=110&session=1&vote=00339](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=110&session=1&vote=00339) [hereinafter S. Vote No. 339]. One Democratic Senator (Senator Baucus) and forty-one Republican Senators voted against cloture; eight Republican Senators voted in favor of cloture. *Id.*; see also Senate.gov, *Senators of the United States, 1789–2009: A Chronological List of Senators from the First Congress to the 111th Congress*, <http://www.senate.gov/artandhistory/history/resources/pdf/chronlist.pdf> (last visited Apr. 30, 2009) (noting the Senators' partisan affiliations).

5. President Bush probably would have vetoed either bill, H.R. 1905 or S. 1257, had one of them been passed by Congress, as shown by statements of administration policy with respect to S. 1257 and a very similar bill that carried the same title. See *Ending Taxation Without Representation: The Constitutionality of S. 1257: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 16, 58, 127 (May 23, 2007) [hereinafter *Ending Taxation Without Representation*] (statements and responses of John P. Elwood, Deputy Assistant Att'y Gen., Office of Legal Counsel) (stating Department's view that D.C. House Voting Rights Act of 2007 would be unconstitutional if enacted); OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: H.R. 1433—DISTRICT OF COLUMBIA HOUSE VOTING RIGHTS ACT OF 2007, at 1 (2007), available at <http://www.whitehouse.gov/omb/legislative/sap/110-1/hr1433sap-r.pdf> ("The Administration strongly opposes passage of H.R. 1433. The bill violates the Constitution's provisions governing the composition and election of the United States Congress. Accordingly, if H.R. 1433 were presented to the President, his senior advisers would recommend that he veto the bill."). Deputy Assistant Attorney General Elwood's written testimony appears to have constituted a formal memorandum or opinion of the Office of Legal Counsel; it appears, with an indication of his signature, on the Office of Legal Counsel web page and is listed as one of the OLC's "Memoranda & Opinions" for 2007. See USDOJ, 2007 Memoranda & Opinions, <http://www.usdoj.gov/olc/2007opinions.htm> (last visited May 17, 2009); see also John P. Elwood, *Constitutionality of D.C. Voting Rights Act of 2007* (May 23, 2007), <http://www.usdoj.gov/olc/2007/devotingrights-act-2007.pdf> (reproducing testimony with indication of signature by Mr. Elwood, with summary preface stating: "S. 1257, a bill to grant the District of Columbia representation in the House of Representatives as well as to provide an additional House seat for Utah, violates the Constitution's provisions governing the composition and election of the United States Congress.").

By contrast, President Obama, as a Senator, supported S. 1257 and voted to invoke cloture. S.

caused by Senator Ensign's gun rights amendment<sup>6</sup> given the strong Democratic majorities in the House and Senate.

The Constitution's denial of representation in the House for the residents of the District is unjust and should be corrected. But this claim of power by the Congress undermines the foundations of our Republic<sup>7</sup>—foundations forged in crisis—and must be rejected. Both Article I of the United States Constitution and Section Two of the Fourteenth Amendment provide only for apportionment of representation in the House “among the several *States*.”<sup>8</sup> Members of Congress have a duty under their oaths of

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Vote No. 339, *supra* note 4. Thus it is nearly certain that President Obama would not veto a bill providing voting representation for the District in the House, at least absent a serious reconsideration by him of the constitutional issues.

6. *See supra* note 3.

7. *See* Jonathan Turley, *Too Clever by Half: The Unconstitutionality of Partial Representation of the District of Columbia in Congress*, 76 GEO. WASH. L. REV. 305, 305 (2008). Professor Turley notes: “Allowing Congress to create a new form of voting member would threaten not only the integrity of the House but the stability of the legislative branch in the carefully balanced tripartite system.” *Id.* Moreover, relying on the District Clause for this purpose would “do great violence to the traditions of constitutional interpretation.” *Id.* at 325; *see also id.* at 359 (“Granting a vote in Congress . . . would touch upon the constitutionally sacred rules of who can create laws that bind the nation.”). Professor Turley argues:

By adopting a liberal interpretation of the meaning of “states” in Article I, Congress would be undermining the very bedrock of our constitutional structure. The membership and division of Congress was carefully defined by the Framers. The legislative branch is the engine of the Madisonian democracy. It is in these two houses that disparate factional disputes are converted into majoritarian compromises, the defining principle of the Madisonian system. Allowing majorities to manipulate the membership rolls would add dangerous instability and uncertainty to the system. The obvious and traditional meaning of “states” deters legislative measures to create new forms of voting representatives or shifting voters among states. Under this approach, the House could award a vote to District residents and a later majority could take it away. The District residents would continue to vote, not as do other citizens, but at the whim and will of the Congress like some party favor that can be withdrawn with the passing fortunes of politics. Moreover, the evasion of the 435-member limitation created in 1911 would encourage additional manipulations of the House rolls in the future. Finally, if the Congress can give the District one vote, they could by the same authority give the District ten votes or . . . award additional seats to other federal enclaves.

*Id.* at 361–62 (footnotes omitted).

8. U.S. CONST. art. I, § 2, cl. 3 (emphasis added); U.S. CONST. amend. XIV, § 2; *see also* *Adams v. Clinton*, 90 F. Supp. 2d 35, 48, 48 n.21 (D.D.C.), *aff'd mem.*, 531 U.S. 941 (2000). In *Michel v. Anderson*, 14 F.3d 623 (D.C. Cir. 1994), the court upheld a House rule allowing territorial delegates and the delegate from the District of Columbia to vote in the committee of the whole, subject to revote by the House without their votes counting if their votes had been decisive in the initial vote. According to the court, the language of Article I, Section Two “precludes the House from bestowing the characteristics of [House] membership on someone other than those ‘chosen every second Year by the People of the several States.’” *Id.* at 630. The court noted that the “ability . . . to vote in the full House” would be one of those prohibited characteristics, *id.*, and reasoned that

it would blink reality to deny the close operational connection between the Committee of the Whole and the full House. The House itself recognized how perilously close the rule change came to granting delegates a vote in the House. That is why the House sought to ameliorate the impact of the change through the revote provision. . . . Suffice it to say that we think that insofar as the rule change bestowed additional authority on the delegates, that additional authority is largely symbolic and is not significantly greater than that which they enjoyed serving and voting on the standing committees. Since we do not believe that the ancient practice of delegates serving on standing committees of the House can be success-

office to support the Constitution and thus to vote against the bill.<sup>9</sup> If Congress passes it, the President will have a duty under his oath of office to veto it.<sup>10</sup> Detailed discussion of standing issues is beyond the scope of this Article. Nevertheless, to the extent there may be a question whether anyone would have standing to promptly challenge the D.C. House Voting

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fully challenged as bestowing “membership” on the delegates, we do not think this minor addition to the office of delegates has constitutional significance.

*Id.* at 632.

The holding in *Michel* seems to be that a grant of voting representation for the District in the House would be inconsistent with Article I, Section Two. It seems that such a grant would continue to be inconsistent with Article I, Section Two, even if the asserted basis for the grant were the District Clause rather than the power of the House to “determine the Rules of its Proceedings” under Article I, Section Five, Clause Two. Thus the analysis used by the court in *Michel* leads to the conclusion that the D.C. House Voting Rights Act would violate the Constitution. In 2007, the Third Circuit rejected a claim that residents of the Virgin Islands were entitled to representation in Congress and endorsed very explicit language from the district court decision in *Michel*:

After addressing certain jurisdictional and prudential considerations, the *Michel* [district] court turned to the plaintiffs’ argument that, by allowing the Delegates to vote in the Committee of the Whole, the House had unconstitutionally invested the Delegates with legislative power. In addressing that contention, the *Michel* court explained:

One principle is basic and beyond dispute. Since the Delegates do not represent States but only various territorial entities, they may not, consistently with the Constitution, exercise legislative power (in tandem with the United States Senate), for such power is constitutionally limited to “Members chosen . . . by the People of the several States.”

It is not necessary here to consider an exhaustive list of the actions that might constitute the exercise of legislative power; what is clear is that the casting of votes on the floor of the House of Representatives does constitute such an exercise. Thus, *unless the areas they represent were to be granted statehood, the Delegates could not, consistently with the Constitution, be given the authority to vote in the full House.*

*Id.* (citing U.S. CONST. art. I, § 8, cl. 1) (emphasis added).

This analysis is directly applicable to the facts here, and militates against Mr. Ballentine, as a Virgin Islands resident, being represented in the House of Representatives, because the Constitution does not permit the Delegate from the Virgin Islands to exercise legislative power.

*Ballentine v. United States*, 486 F.3d 806, 812 (3d Cir. 2007) (quoting *Michel v. Anderson*, 817 F. Supp. 126, 140 (D.D.C. 1993), *aff’d*, 14 F.3d 623, 625, 632 (D.C. Cir. 1994) (citing U.S. CONST. art. I, § 8, cl. 1)) (some citations omitted).

9. See, e.g., Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707 (1985) (arguing that Congress has ample resources to perform effective constitutional analysis); Saikrishna Prakash & John Yoo, *Against Interpretive Supremacy*, 103 MICH. L. REV. 1539, 1556–57 (2005) (reviewing LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004)); Anant Raut & J. Benjamin Schrader, *Dereliction of Duty: When Members of Congress Vote for Laws They Believe to Be Unconstitutional*, 10 N.Y. CITY L. REV. 511 (2007); Stephen F. Ross, *Legislative Enforcement of Equal Protection*, 72 MINN. L. REV. 311, 313–15 (1987) (exploring the legislative role in enforcing constitutional guarantee of equal protection); cf. Paul Brest, *Congress as Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine*, 21 GA. L. REV. 57, 62–65 (1986) (arguing, without reference to their oaths, that members of Congress are obligated to consider the constitutionality of bills and of other matters on which they may act, but also that Congress has not developed the institutional capability to interpret the Constitution that would justify recognizing a power in Congress to reject judicially-declared doctrines of constitutional law); Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587, 587 (1983) (stating that it is unclear what commitment is undertaken with respect to the Constitution by a member of Congress when he or she takes the oath of office).

10. See Saikrishna Prakash, *Why the President Must Veto Unconstitutional Bills*, 16 WM. & MARY BILL RTS. J. 81 (2007).

Rights Act in court, it is especially important that members of Congress (and the President) diligently assess the constitutionality of the Act and vote against it, or veto it, if they conclude that it is inconsistent with the Constitution.<sup>11</sup>

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11. To the extent Congress chooses—contrary to its members’ oaths, in your author’s view—to rely on the courts to determine the constitutionality of the Act, Congress should include in the bill clear provisions authorizing members of Congress, states, appropriate state officials (governors or attorneys general), and registered voters who live in states, rather than in the District, to bring suit to challenge the constitutionality of the Act and to seek declaratory, injunctive, and other appropriate relief. Such a provision would “eliminate[] any prudential concerns” with regard to justiciability, so that “the only open justiciability question [would be] whether [the plaintiffs] satisfy the requirements of Article III standing.” *Dep’t of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 328–29 (1999).

The bill passed by the Senate on February 26, 2009, does not go quite that far, but it does provide that “[a]ny Member of Congress may bring an action . . . to challenge the constitutionality of any provision of this Act or any amendment made by this Act.” District of Columbia House Voting Rights Act of 2009, S. 160, 111th Cong. § 8(c) (2009) (as amended and passed by the Senate). The Senate bill in the 110th Congress did not explicitly authorize anyone to bring such an action, though it did provide—as does the current S. 160—for suits challenging the Act to be heard in the D.C. District Court by a three-judge court, for direct appeal to the Supreme Court, and for the matter to be expedited. District of Columbia House Voting Rights Act of 2007, S. 1257, 110th Cong. § 7 (2007); *see also* District of Columbia House Voting Rights Act of 2009, S. 160, 111th Cong. § 8(a) (2009).

Some members of the House likely would complain that the Act diluted their political power (and that of their constituents), but, despite D.C. Circuit authority, *see, e.g., Michel v. Anderson*, 14 F.3d 623, 625 (D.C. Cir. 1994) (finding standing in a similar case), it is at best unclear whether they would have standing. *See Raines v. Byrd*, 521 U.S. 811, 829–30 (1997); 13B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER, RICHARD D. FREER, JOAN E. STEINMAN & CATHERINE T. STRUVE, FEDERAL PRACTICE AND PROCEDURE § 3531.11.2 (3d ed. 2008) (“The District of Columbia Circuit approach has given way to a more demanding approach. The 1997 decision in *Raines v. Byrd* establishes strict limits on any theory of standing that might be advanced by a member of Congress who seeks to challenge an Act of Congress. These limits, drawn from separation-of-powers concerns that mimic political-question doctrine, may well preclude such standing entirely.”) (footnotes omitted). It would be helpful, therefore, if S. 160 were amended to provide explicitly for standing not only for members of Congress but for states, state officials, and voters.

Even then it would be possible that neither states, nor state officials, nor voters who claimed that their representation (or their state’s representation) in Congress was diluted by inclusion of a voting member for the District of Columbia would have standing. There is no state that could gain a House seat due to invalidation of the proposed Act. The Act includes a nonseverability provision, S. 160, § 7; thus, a holding that the District is not entitled to a voting member would not entitle any other state to an additional member of the House because the size of the House would shrink from 437 back to 435. Thus, it is not clear that the holding in *Utah v. Evans*, 536 U.S. 452, 462 (2002)—that the State of Utah had standing to challenge census methods because if successful it would gain a seat in the House—would apply to give standing to a state, state officials, or voters in the state, to challenge the D.C. House Voting Rights Act. The same is true of the decision in *Franklin v. Massachusetts*, 505 U.S. 788 (1992) (relied on by the Court in *Utah v. Evans*, 536 U.S. at 459), in which the Court apparently determined—at least as seen by Justice Scalia in dissent—that “Massachusetts and two of its registered voters” had standing to challenge census methods in hopes that they might gain another House member for Massachusetts. *Franklin*, 505 U.S. at 790; *id.* at 824 n.1 (Scalia, J., dissenting). That rationale simply would not apply to a challenge to the Act.

The Court’s decision in *Department of Commerce v. U.S. House of Representatives*, which held that the Census Bureau may not use statistical sampling in counting persons for apportionment purposes, may strongly support a conclusion that such plaintiffs who are voters in states would have standing because of the dilution of their representation in Congress due to addition of a voting member for the District: “In the context of apportionment, we have held that voters have standing to challenge an apportionment statute because ‘[t]hey are asserting “a plain, direct and adequate interest in maintaining the effectiveness of their votes.”’” *Dep’t of Commerce*, 525 U.S. at 331–32 (quoting *Baker v.*

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Carr, 369 U.S. 186, 208 (1962) (quoting *Coleman v. Miller*, 307 U.S. 433, 438 (1939))). But *Department of Commerce* may not support standing where a state would not obtain an additional member by prevailing in the litigation; consider the context of the text quoted above from *Department of Commerce*:

In support of their motion for summary judgment, appellees submitted the affidavit of Dr. Ronald F. Weber, a professor of government at the University of Wisconsin, which demonstrates that Indiana resident Gary A. Hofmeister has standing to challenge the proposed census 2000 plan. Utilizing data published by the Bureau, Dr. Weber projected year 2000 populations and net undercount rates for all States under the 1990 method of enumeration and under the Department's proposed plan for the 2000 census. He then determined on the basis of these projections how many Representatives would be apportioned to each State under each method and concluded that "it is a virtual certainty that *Indiana will lose a seat . . . under the Department's Plan.*"

Appellee Hofmeister's expected loss of a Representative to the United States Congress undoubtedly satisfies the injury-in-fact requirement of Article III standing. *In the context of apportionment, we have held that voters have standing to challenge an apportionment statute because "[t]hey are asserting 'a plain, direct and adequate interest in maintaining the effectiveness of their votes.'*" The same distinct interest is at issue here: *With one fewer Representative, Indiana residents' votes will be diluted.* Moreover, the threat of vote dilution through the use of sampling is "concrete" and "actual or imminent, not 'conjectural' or 'hypothetical.'"

*Dep't of Commerce*, 525 U.S. at 330-32 (quoting *Baker*, 369 U.S. at 208; *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)) (emphasis added) (first alteration in original) (footnote and internal citations omitted).

It is important to see that the dilutive effect of having the same number of representatives in a large body that is increased by one or two—though definite and calculable—is not as great as the effect of losing one member. A state that has, for example, ten House seats, would still have ten House seats if the Act were implemented, but the state's share of the seats would be reduced from 2.30% of the total seats in the House (10 out of 435) to 2.29% (10 out of 437). That is a reduction of .01% of the total representation in the House (2.30% minus 2.29%), and a percentage reduction of .43% (.01% loss divided by 2.3% original share) in the state's percentage share of total representation. In other words, the state would still have 99.57% of its original voting strength in the House. Whether that is a sufficient injury to give the state or officials or citizens of the state Article III standing is beyond the scope of this Article.

By contrast, if a state lost one of its ten seats in a 435 seat House, its share of the total seats would drop from 2.30% (10 out of 435) to 2.07% (9 out of 435), for a loss of .23% of the total representation in the House—twenty-three times as large a loss as the .01% loss that would occur under the Act. Not surprisingly, a loss of one seat out of ten originally held is a loss of 10% of the state's original percentage share of total representation (which can also be calculated by dividing the .23% loss by the original 2.30% of the total representation: .23% divided by 2.30% = .1, or 10%). That again is roughly twenty-three times as large a loss as would occur under the Act. The state would end up with only 90% of its original voting strength in the House, as opposed to 99.57% under the Act.

If the constitutionality of the Act were not conclusively determined in the courts, and if the Republicans were to regain a majority in the House of Representatives, the House might refuse to seat the member from the District. The person elected to the District's supposed seat but excluded by the House would be directly injured and would have standing. *See Raines v. Byrd*, 521 U.S. 811, 820-21 (1997) (citing *Powell v. McCormack*, 395 U.S. 486 (1969)).

There might yet be a question whether an exclusion of a representative from the District would be justiciable. The House might exclude the representative on the basis that the representative was not "when elected, . . . an Inhabitant of that State in which he shall be chosen." U.S. CONST. art. I, § 2, cl. 2. The House might conclude that the person seeking to be seated was ineligible because he or she was not an inhabitant of a "State." The question whether a person seeking to be seated in the House meets the explicit requirements (the "standing qualifications") set by the Constitution may be a nonjusticiable political question committed to the House. See U.S. CONST. art. I, § 5, cl. 1; *Powell v. McCormack*, 395 U.S. 486, 521 n.42, 548 (1969) (concluding "that Art. I, § 5, is at most a 'textually demonstrable commitment' to Congress to judge only the qualifications expressly set forth in the Constitution," and expressing no view on the question whether "federal courts might still be barred by

The most prominent and persistent academic proponent of the Act's constitutionality is Professor Viet Dinh, whose arguments continue to be essentially the same as those he and Mr. Adam Charnes submitted to the House Committee on Government Reform in their 2004 memorandum.<sup>12</sup> Professor Dinh readily concedes that the District is not, in the relevant sense, a "State."<sup>13</sup> In his view, the constitutionality of the Act flows not from any supposed status of the District as a state, but rather from an asserted power of Congress to treat the District as if it were a state under the power given to Congress in the District Clause.<sup>14</sup> He argues that the Supreme Court has allowed Congress in several settings to treat the District as if it were a state in legislation enacted pursuant to the District Clause. He argues further that Congress twice has authorized U.S. citizens who are not citizens or residents of states—including, according to Professor Dinh, U.S. citizens residing in the District from 1790 to 1800—to vote in congressional elections.<sup>15</sup> Thus, it is argued, Congress may treat the District as if it were a state for purposes of House apportionment and allow

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the political question doctrine from reviewing the House's factual determination that a member did not meet one of the standing qualifications"). A court might find that this question is sufficiently independent of the broader question—the question whether the District may be treated as a "State" for purposes of apportioning House seats—for it to be nonjusticiable even if the broader question is justiciable. Further discussion of justiciability is beyond the scope of this Article.

12. See VIET D. DINH & ADAM H. CHARNES, THE AUTHORITY OF CONGRESS TO ENACT LEGISLATION TO PROVIDE THE DISTRICT OF COLUMBIA WITH VOTING REPRESENTATION IN THE HOUSE OF REPRESENTATIVES 10, 17 (2004), available at [http://www.dcvote.org/trellis/research/finaldinh\\_opinion.cfm](http://www.dcvote.org/trellis/research/finaldinh_opinion.cfm). The memorandum was prepared pursuant to a 2004 contract with the House Committee on Government Reform. See H.R. REP. NO. 109-593, pt. 1, at 12 (2006), available at <http://www.dcvote.org/advocacy/material.cfm?legID=12>.

13. See DINH & CHARNES, *supra* note 12, at 10; *District of Columbia House Voting Rights Act of 2007: Hearing Before the Comm. on the Judiciary, H.R.*, 110th Cong. 17, 106 (2007), available at <http://www.dcvote.org/pdfs/111th/DinhTestimony090127.pdf> (prepared statement and oral testimony of Prof. Viet D. Dinh).

14. U.S. CONST. art. I, § 8, cl. 17. Attempts to obtain representation for the District by arguing that it is a "State" for purposes of Article I of the Constitution have failed. See *Adams v. Clinton*, 90 F. Supp. 2d 35, 56 (D.D.C.), *aff'd mem.*, 531 U.S. 941 (2000). The argument that Congress has power nevertheless to treat it as a state and give it representation in Congress by statute was first made, apparently, in a 1991 student comment in the *University of Pennsylvania Law Review*. See Lawrence M. Frankel, Comment, *National Representation for the District of Columbia: A Legislative Solution*, 139 U. PA. L. REV. 1659, 1674 (1991).

15. See DINH & CHARNES, *supra* note 12, at 8–9, 17–18. The memorandum explicitly notes that an overseas voter authorized to vote in a state's congressional elections under the Uniformed and Overseas Citizens Absentee Voting Acts "need not be a citizen of the state where voting occurs." *Id.* at 18. With respect to residents of the District who voted in Maryland or Virginia's congressional elections during the 1790s, the memorandum states that they were able to vote in those elections "not because they were citizens of those states—the cession [supposedly in 1790] had ended their political link with those states." *Id.* at 9. Presumably the argument is that they no longer were citizens of Maryland or Virginia—how could they be if "the cession had ended their political link with those states"?—yet Congress authorized them to vote in Maryland or Virginia congressional elections. *Id.* Thus, the argument seems to go, just as those persons who were not citizens of any state were authorized to vote in congressional elections, current residents of the District who are not citizens of any state may be so authorized.

citizens residing in the District to vote for a member of Congress from the District.

Professor Dinh's argument fails for several reasons. Of course Congress's power "[t]o exercise exclusive Legislation in all Cases whatsoever, over [the] District" allows Congress to create laws for the District that may in many cases treat the District the same as the states,<sup>16</sup> but that does not mean the District is being treated as if it were a state for purposes of constitutional provisions. In both of the cases in which Congress has, according to Professor Dinh, authorized citizens who are not residents of states to vote in congressional elections, the members of Congress for whom they voted were members apportioned to states, not to some other entity like the District.<sup>17</sup> And although it is true that from 1790 to 1799 citizens who were residents in what was to become the District voted in congressional elections in Maryland and Virginia,<sup>18</sup> Professor Dinh's claim that when they did so they were not residents of a state appears to be simply wrong, at least as the courts have viewed the matter.<sup>19</sup> The citizens who resided in the area that was being ceded appear to have retained their Maryland or Virginia citizenship through that entire time. Professor Dinh cites three cases for the proposition that those persons lost their Maryland and Virginia citizenship in 1790, but none of them stands for that proposition or for what seems to be the equivalent proposition that in 1790 "the cession had ended their political link with those states."<sup>20</sup> One of the cases

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16. U.S. CONST. art. I, § 8, cl. 17; *see also infra* note 79. One case is quite difficult to understand, though it was also difficult for the Supreme Court, with the result that there was no majority opinion. *See Nat'l Mut. Ins. Co. of D.C. v. Tidewater Transfer Co.*, 337 U.S. 582, 603–04 (1949) (judgment permitting Congress to provide for federal court jurisdiction to resolve disputes between residents of the District and residents of states); *see also infra* note 79.

17. *See* DINH & CHARNES, *supra* note 12, at 8–9, 17–18.

18. *See infra* text accompanying notes 108–113.

19. *See infra* notes 20, 22 and text accompanying notes 20–23; *see also* *Adams v. Clinton*, 90 F. Supp. 2d 35, 62 (D.D.C.), *aff'd mem.*, 531 U.S. 941 (2000) (holding that it was the completion of the cession of the District by Congress's enacting of the Organic Act in 1801—"a step expressly contemplated by the Constitution"—that "transformed the territory from being part of a state, whose residents were entitled to vote under Article I, to being part of the seat of government, whose residents were not"); Turley, *supra* note 7, at 345–46 (treating *Adams* as Supreme Court authority, as it must be considered by courts); *infra* text accompanying note 94; Peter Raven-Hansen, *Congressional Representation for the District of Columbia: A Constitutional Analysis*, 12 HARV. J. ON LEGIS. 167, 174 (1975) ("District residents did not lose state citizenship until December, 1800, and the prior decade of voting and representation provided no precedent for the representation of District citizens.").

20. DINH & CHARNES, *supra* note 12, at 9, 9 n.36 (citing *Downes v. Bidwell*, 182 U.S. 244, 260–61 (1901); *Reily v. Lamar*, 6 U.S. (2 Cranch) 344, 356 (1805); *Hobson v. Tobriner*, 255 F. Supp. 295, 297 (D.D.C. 1966)). *Reily* treats the loss of state citizenship as happening no earlier than December of 1800. *Reily*, 6 U.S. (2 Cranch) at 356; *see also infra* note 22 and the text accompanying notes 21–23. *Downes* states that the cession of the District "relinquished the authority of the states," but it says nothing about when that occurred. *Downes*, 182 U.S. at 261. *Hobson*, a district court opinion, cites and quotes *Reily* for the proposition that residents in the District ceased to be citizens of Maryland or Virginia in 1800, not in 1790. *Hobson*, 255 F. Supp. at 297. The court in *Hobson* discussed occurrences from 1788 to 1791 and noted that "the effect of cession upon individuals was to terminate their state citizenship and the jurisdiction of the state governments over them." *Id.* But when did cession have that effect? Apparently, according to the court in *Hobson*, in *December 1800*:

he cites, the Supreme Court's 1805 opinion in *Reily v. Lamar*,<sup>21</sup> in fact treats them as losing their state citizenship no earlier than December of 1800,<sup>22</sup> more than a year after the last time they voted in congressional elections.<sup>23</sup>

Since Professor Dinh's argument fails, the only remaining argument in favor of the constitutionality of the Act—at least the only remaining argument that might seem initially to be somewhat plausible—is the argument

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On the first Monday of December, 1800, jurisdiction over the District was vested in the United States. As to the effect upon the citizens of this vesting, Chief Justice Marshall stated:

“By the separation of the District of Columbia from the state of Maryland, complainant ceased to be a citizen of that state, his residence being in the city of Washington, at the time of that separation.”

*Id.* (quoting *Reily*, 6 U.S. (2 Cranch) at 356) (citations and footnote omitted). This may have been an over-reading of *Reily*, which leaves open whether the loss of citizenship occurred in 1800 or in 1801, *see infra* note 22, but in any event, it provides no support for the memorandum's position that it occurred in 1790.

21. 6 U.S. (2 Cranch) 344 (1805).

22. *Id.* at 357. The question was whether a creditor (Beall) would be enjoined from collecting a debt. One asserted basis for the injunction was a kind of discharge obtained by the debtor (*Reily*) in a Maryland court under a Maryland statute providing for an assignment for the benefit of creditors. The circuit court of the District of Columbia had dismissed the action for an injunction. As interpreted by Justice Marshall, the Maryland statute required that the debtor be a citizen of Maryland at the time that the debtor executed the “deed” making the assignment of assets for the benefit of creditors. There was a question whether the deed was executed on December 23, 1800, or on March 23, 1801. If the debtor, as a resident of Washington city lost his Maryland citizenship when the District became the seat of government on the first Monday in December 1800, then the deed would have been executed too late to give any protection to the debtor no matter whether it had been executed on December 23, 1800, or on March 23, 1801. But if the debtor lost his Maryland citizenship only when Congress exercised its power to legislate for the District—on Feb. 27, 1801, when the Organic Act became law, *see infra* notes 61, 110—then the result would depend on the date on which the deed was executed. If it was executed on December 23, 1800, the debtor would be entitled to protection. Justice Marshall held that the deed had to be considered to have been executed on March 23, 1801:

It has been said, that the true date of that deed was the 23d of December 1800, and that the certificate of the chancellor, which states the date to be the 23d day of March 1801, is incorrect.

But the certificate of the chancellor, is the only evidence before the court as to that subject, and we must take it to be true.

*Reily*, 6 U.S. (2 Cranch) at 357. As a result, Justice Marshall was able to conclude that it did not matter whether the debtor lost his Maryland citizenship in December 1800 or in February 1801, because either date would be before the date of the deed:

It is therefore, not material to inquire whether the inhabitants of the city of Washington, ceased to be citizens of Maryland on the 27th of February 1801, or on the first Monday of December 1800, as it is not contended that they were under the jurisdiction of Maryland so late as the 23d of March 1801.

The complainant, therefore, not being a citizen of Maryland at the time of executing the deed, did not bring himself within the provisions of the insolvent law, under which he claims relief.

*Id.* Note, of course, that if citizens in the area being ceded lost their state citizenship in 1790, as Professor Dinh claims, there would have been no need for the Court to give a second thought to the dispute over the date on which the deed was executed. Even if it had been executed on the earlier of the claimed dates, December 23, 1800, that would have been ten years too late—ten years after residents in the District would have lost their Maryland or Virginia citizenship. Obviously, Justice Marshall did not think that was the case.

23. *See infra* text accompanying notes 108–113.

from inadvertence. Perhaps the drafters and ratifiers of the Constitution failed to consider whether the people of the District should be represented in the Congress. Perhaps the lack of representation is so unjust, and so contrary to our nation's founding principles, that the people of the District would have been provided representation in Congress had the matter been seriously considered. And perhaps, in light of this inadvertence, the District's lack of representation should be treated as an omitted case, one that Congress reasonably could handle under its broad District Clause power by providing for apportionment of a voting member in the House to the District.<sup>24</sup>

Your author would suggest that the remedy for omitted cases dealing with the basic features of the institutions created by our Constitution is amendment of the Constitution, not the passage of a simple statute. In any event, the argument from inadvertence suffers from a basic flaw: its premise simply is not true. The failure of the original text of the Constitution to provide for congressional representation for the District was not the result of inadvertence.<sup>25</sup> And it is perfectly clear that there was no inadvertence when, after the Civil War, the 39th Congress proposed, and the states ratified, the Fourteenth Amendment, which provided in Section Two that "Representatives shall be apportioned among the several *States*."<sup>26</sup> For reasons that will be discussed at length, it was quite obvious to all involved that the District was not included in the allocation of House members.<sup>27</sup>

The main purpose of this Article is to provide the historical evidence showing that there was no inadvertence. In light of that evidence it is simply clear, in your author's opinion, that the D.C. House Voting Rights Act, if enacted, would be unconstitutional.

### *B. Two Crises Concerning the Composition of Congress*

Two crises in United States history turned on disputes over the composition of the Congress.<sup>28</sup> Each crisis resulted in a constitutional provision that the D.C. House Voting Rights Act effectively would seek to amend by a simple statute.

First, the 1787 Philadelphia Convention nearly foundered over the issue of the composition of the Congress before settling on the Great (or

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24. See *infra* text accompanying notes 92–99.

25. See *infra* text accompanying notes 443–597.

26. U.S. CONST. amend. XIV, § 2 (emphasis added).

27. See *infra* text accompanying notes 56–76, 118–435.

28. Historical materials showing the original meaning of constitutional provisions are especially important in dealing with structural features of the Constitution such as, here, the composition of the House of Representatives. See, e.g., Stephen L. Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 YALE L.J. 821, 859–65 (1985); Turley, *supra* note 7, at 315–16 (citing Carter, *supra*).

Connecticut) Compromise, embodied in Article I, Sections One through Three, under which the House of Representatives is apportioned among the states based on population, but states are guaranteed equal representation in the Senate.<sup>29</sup> In ratifying the Constitution, the newly independent states would yield a portion of their sovereignty to the new federal government.<sup>30</sup> They would subordinate their own laws and constitutions not just to the federal Constitution but also to laws enacted by the Congress pursuant to that Constitution. How could both large and small states be persuaded to agree? Famously, in one house of the new government's legislature the members would be apportioned based on a population formula,<sup>31</sup> but in the other house each state would have equal representation.<sup>32</sup> Thus the provisions of the Constitution that implemented the Great Compromise were foundational to the new government.<sup>33</sup> And, with respect to the House of Representatives, those provisions provided only for election

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29. See Ralph A. Rossum, *Taking the Constitution Seriously: Akhil Reed Amar's Biography of America's Framing Document*, 57 SYRACUSE L. REV. 289, 300 (2007). Then-Michigan Court of Appeals Judge, and now Michigan Supreme Court Justice, Stephen J. Markman, in rejecting the argument that the Constitution entitled the residents of the District of Columbia to Congressional representation, stated that he:

[could not] imagine that the cases cited by Professor Raven-Hansen and Professor Raskin will persuade the Supreme Court that the Connecticut Compromise should be reversed—that the Connecticut Compromise, which has been at the heart of our Constitution and which has defined federalism for more than two centuries, ought to be effectively nullified.

Symposium, *Is There a Constitutional Right To Vote and Be Represented? The Case of the District of Columbia*, 48 AM. U. L. REV. 589, 690 (1999) (providing transcript of symposium discussion); see also Jamin B. Raskin, *Is This America? The District of Columbia and the Right to Vote*, 34 HARV. C.R.-C.L. L. REV. 39 (1999); Raven-Hansen, *supra* note 19, at 167–68; cf. STEPHEN J. MARKMAN, STATEHOOD FOR THE DISTRICT OF COLUMBIA (1988) (Justice Markman's book relating to the District). Justice Markman previously served as Assistant Attorney General heading up the Department of Justice's Office of Legal Policy, as Chief Counsel of the Senate Subcommittee on the Constitution, and as Deputy Chief Counsel of the Senate Judiciary Committee. See Michigan Courts: One Court of Justice, Biographies of the Justices, <http://courts.michigan.gov/supremecourt/aboutcourt/biography.htm#markman> (last visited Apr. 30, 2009).

30. See, e.g., THE FEDERALIST NO. 32 (Alexander Hamilton), NO. 62 (James Madison).

31. The particular formula that was chosen gave substantial extra power to white voters in the slave states with regard to both the House and the electoral college; for apportionment of House seats it counted not only the "Number of free Persons" in a state but also "three fifths of all other Persons," meaning African American slaves, who of course were not permitted by the slave states to vote. U.S. CONST. art. I, § 2, cl. 3, amended by U.S. CONST. amend. XIV, § 2; see also AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 87–99 (2005). The freeing of the slaves after the Civil War meant that they would now count five-fifths, which would not have created a problem if they had been permitted to vote. But the formerly rebellious states continued to disenfranchise blacks, with the effect that the freeing of the slaves would have given whites in the formerly rebellious states even more power, absent a change in the apportionment formula. That is why Section Two of the Fourteenth Amendment was thought to be so important. See *infra* text accompanying notes 46, 66, 123, 143–150, 183–184.

32. See, e.g., *Adams v. Clinton*, 90 F. Supp. 2d 35, 56 (D.D.C.), *aff'd mem.*, 531 U.S. 941 (2000); Bradford R. Clark, *Constitutional Compromise and the Supremacy Clause*, 83 NOTRE DAME L. REV. 1421 (2008); John F. Manning, *Lessons from a Nondelegation Canon*, 83 NOTRE DAME L. REV. 1541, 1546 n.20 (2008).

33. See Clark, *supra* note 32.

of members “by the People of the several States,”<sup>34</sup> based on an apportionment of House seats “among the several States.”<sup>35</sup>

The text of the new Constitution certainly could have provided for entities other than states to have voting representation in the Congress under the new Constitution. In fact, on July 13, 1787, three days before the Philadelphia Convention delegates approved the Great Compromise,<sup>36</sup> the Continental Congress passed the Northwest Ordinance.<sup>37</sup> The Northwest Ordinance provided for creation of a territorial government for the Northwest Territory<sup>38</sup> and for the territorial legislature to elect a nonvoting delegate to the Continental Congress.<sup>39</sup> The members of the state conventions who voted to ratify the Constitution would not generally have known that these events occurred so close together in time,<sup>40</sup> but they would have known that the Continental Congress had passed the Northwest Ordinance as the Philadelphia Convention was meeting. Members of the ratifying conventions would have been aware of the possibility of providing entities other than states with some sort of representation in Congress, and it would have been obvious that the new Constitution provided voting representation—“Members”—only to the states. The court in *Adams v. Clinton*<sup>41</sup> made much the same point in its opinion, holding that citizens resident in the District do not have a constitutional right to elect members of Congress because they are not citizens of a state and because the Constitu-

34. U.S. CONST. art. I, § 2, cl. 1.

35. U.S. CONST. art. I, § 2, cl. 3, *amended* by U.S. CONST. amend. XIV, § 2.

36. See 1 JAMES MADISON, THE JOURNAL OF THE DEBATES IN THE CONVENTION WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES 364–69 (Gaillard Hunt ed., 1908), *available* at <http://books.google.com/books?id=50qtcVryJSIC> (reporting debate and decisions in the Convention on Monday, July 16, 1787). The author has not located any evidence that news of the Continental Congress’s July 13 passage of the Northwest Ordinance reached any of the convention delegates in Philadelphia by July 16, but it is certainly possible that it did. Even in 1771 there was one and one-half to two day wagon service between New York and Philadelphia, and by 1785 the trip took less than a day. See KENNETH R. BOWLING, THE CREATION OF WASHINGTON, D.C.: THE IDEA AND LOCATION OF THE AMERICAN CAPITAL 35 (1991); 1 SEYMOUR DUNBAR, A HISTORY OF TRAVEL IN AMERICA 185–86 (1915); JANE BELKNAP MARCOU & JEREMY BELKNAP, LIFE OF JEREMY BELKNAP, D.D.: THE HISTORIAN OF NEW HAMPSHIRE 114–15 (Jane Belknap Marcou ed., 1847). Dunbar quotes Jeremy Belknap’s description of a wagon or carriage trip from New York to Philadelphia that took about sixteen hours and attributes it to *Belknap’s History of New Hampshire*, but the description—taken from Belknap’s diary—seems to be reported only in the Life of Jeremy Belknap, *supra*.

37. An Ordinance for the Government of the Territory of the United States, North-West of the River Ohio (July 13, 1787), *reprinted* in 1 Stat. 51 n.(a) (1789), *available* at <http://www.ourdocuments.gov/doc.php?flash=true&doc=8> [hereinafter Northwest Ordinance] (signed by Charles Thomson, Secretary of the Continental Congress); see also 32 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 334–43 (Roscoe R. Hill ed., 1936), *available* at [http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field\(DOCID+@lit\(jc032121\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(jc032121))) (showing passage of Northwest Ordinance on Friday, July 13, 1787).

38. See Northwest Ordinance, *supra* note 37, at ¶¶ 3–12.

39. See *id.* at ¶ 12.

40. Cf. Max Farrand, *The Records of the Federal Convention*, 13 AM. HIST. REV. 44, 45 (1907) (“It was understood that the members [of the Philadelphia Convention] would regard the proceedings as confidential, and in general this understanding was lived up to.”).

41. 90 F. Supp. 2d 35 (D.D.C. 2000), *aff’d mem.*, 531 U.S. 941 (2000).

tion apportionments members of the House only among the states.<sup>42</sup> According to the court, “The Constitution’s repeated references to states cannot be understood, as the dissent urges, as merely the most practical method then available for holding elections. Rather, they are reflections of the Great Compromise forged to ensure the Constitution’s ratification.”<sup>43</sup>

Second, immediately after the Civil War, Congress struggled to find a basis for political reintegration of the formerly rebellious states.<sup>44</sup> Pending that reintegration, Congress refused to seat persons claiming to be members of Congress from those states.<sup>45</sup> Effectively, the members of Congress from the loyal states claimed the power temporarily to alter the composition of Congress (or at least to keep in place temporarily the alteration caused by the attempted secession of the formerly rebellious states). The Fourteenth Amendment, particularly its Section Two, played a key role in Congress’s plan to allow the needed political reintegration and to return the composition of Congress to a constitutional norm, without jeopardizing the War’s gains.<sup>46</sup> It provided for apportionment of House seats “among the States,” with the apportionment to be based on population, but adjusted downward by the percentage of adult male citizens excluded from voting (for reasons other than “participation in rebellion, or other crime”).<sup>47</sup>

Now Congress is prepared to attempt, by a simple statute, to change the composition of the Congress and thus effectively to amend both Article I and Section Two of the Fourteenth Amendment. Only once before—as we have seen, in the aftermath of a catastrophic Civil War—has Congress claimed anything like this power, and then only temporarily so as to preserve the victory won on the battlefield at a staggering cost. Even that claim of temporary power was backed by much stronger support than the support suggested for the D.C. House Voting Rights Act, a highly strained interpretation of the District Clause<sup>48</sup> that places the District Clause in conflict with the other provisions of Article I and with Section Two of the Fourteenth Amendment.

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42. *Id.* at 45–65.

43. *Id.* at 56.

44. *See, e.g.*, AMAR, *supra* note 31, at 368–80; ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863–1877, 228–80 (1988).

45. *See* AMAR, *supra* note 31, at 373; *see also infra* text accompanying notes 64–67, 122, 155–184, 302–303, 307–308.

46. *See* AMAR, *supra* note 31, at 392–95; FONER, *supra* note 44, at 251–59; JOSEPH B. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT 21–23 (1956); *see also infra* text accompanying notes 141–184, 248–251, 266–316, 416–417.

47. U.S. CONST. amend. XIV, § 2.

48. U.S. CONST. art. I, § 8, cl. 17. The District Clause provides that “[t]he Congress shall have Power . . . [t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States . . . .”

There has been much discussion of whether the D.C. House Voting Rights Act is consistent with the provisions of Article I dealing with the composition of the House.<sup>49</sup> Professor Jonathan Turley has shown convincingly that it is not, and that the District Clause does not empower Congress to grant a voting member in the House to the District.<sup>50</sup> Text,<sup>51</sup> context,<sup>52</sup> and history<sup>53</sup> all lead to that unmistakable conclusion, as do the judicial authorities<sup>54</sup> and both the practical and policy implications of recognizing such a power in the Congress.<sup>55</sup> This Article provides additional

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49. This was the major topic of testimony at hearings held on June 23, 2004, on March 14, May 15, and May 23, 2007, and on January 27, 2009, by the House Government Reform Committee, the House Committee on the Judiciary, the Senate Committee on Homeland Security and Governmental Affairs, the Senate Committee on the Judiciary, and the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the House Committee on the Judiciary, respectively. Witnesses who provided substantive testimony in favor of the constitutionality of the bill included former Solicitor General and United States Court of Appeals Judge for the D.C. Circuit (and currently your author's Dean) Kenneth W. Starr, former Chief Judge for the United States Court of Appeals for the D.C. Circuit Patricia M. Wald, Georgetown University Law Center Professor Viet Dinh, Georgetown University Law Center Professor and nonvoting Delegate to the House of Representatives from the District of Columbia Eleanor Holmes Norton, Harvard Law School Professor Charles J. Ogletree Jr., Utah Attorney General Mark L. Shurtleff, President of the Leadership Conference on Civil Rights Wade Henderson, former member of Congress and former HUD Secretary Jack Kemp, and attorney Richard P. Bress, in addition to several sitting members of the House and Senate. The only academic who testified that the bill was unconstitutional was George Washington University Law Center Professor Jonathan Turley, whose courage should be commended. See *Common Sense Justice for the Nation's Capital, An Examination of Proposals to Give D.C. Residents Direct Representation: Hearing Before the H. Comm. on Government Reform*, 108th Cong. 77 (June 23, 2004) [hereinafter *Common Sense Justice*] (statement of Hon. Kenneth W. Starr), reprinted in H.R. REP. NO. 109-593, pt. I, at 33 (2006); *id.* at 67 (statement of Mr. Wade Henderson); *District of Columbia House Voting Rights Act of 2007: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. 10, 39, 83 (March 14, 2007) (statements of Prof. Viet D. Dinh, Prof. Jonathan Turley, and Mr. Richard P. Bress); *Equal Representation in Congress*, *supra* note 2, at 41, 48, 58, 78 (May 15, 2007) (statements of Hon. Eleanor Holmes Norton, Hon. Jack Kemp, Prof. Viet Dinh, and Prof. Jonathan Turley); *Ending Taxation Without Representation*, *supra* note 5, at 88, 143, 147, 184, 251 (May 23, 2007) (statements of Mr. Richard P. Bress, Hon. Eleanor Holmes Norton, Prof. Charles J. Ogletree, Hon. Mark L. Shurtleff, Prof. Jonathan Turley, Hon. Patricia Wald); *D.C. House Voting Rights Act: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. (Jan. 27, 2009), available at [http://judiciary.house.gov/hearings/hear\\_090127.html](http://judiciary.house.gov/hearings/hear_090127.html) [hereinafter *Hearing Before the Subcomm. on the Constitution*] (statements of Mr. Wade Henderson, Prof. Jonathan Turley, and Prof. Viet Dinh).

Congressional Research Service staff have also raised very serious questions about the constitutionality of the bill, with a CRS Legislative Attorney concluding that "it would appear likely that the Congress does not have authority to grant voting representation in the House of Representatives to the District of Columbia . . ." THOMAS, *supra* note 2, at 20; see also EUGENE BOYD, CRS REPORT FOR CONGRESS, DISTRICT OF COLUMBIA VOTING REPRESENTATION IN CONGRESS: AN ANALYSIS OF LEGISLATIVE PROPOSALS 20 (2007) ("Bills that would convey voting rights to the District Delegate to Congress by defining the District as a state (virtual-statehood and other means) may conflict with Article I, Sec. 2, of the Constitution which conveys voting rights to representatives of the several states."), reprinted in *Equal Representation in Congress*, *supra* note 2, at 173.

50. See Turley, *supra* note 7.

51. *Id.* at 315–19.

52. *Id.* at 319–25.

53. *Id.* at 325–49.

54. *Id.* at 350–61.

55. *Id.* at 361–68.

historical evidence and historical analysis with respect to the Founding period, all of which confirms Professor Turley's conclusion that the D.C. House Voting Rights Bill is not consistent with Article I.

But this Article first deals with an issue that has received very little attention: whether the D.C. House Voting Rights Act is consistent with Section Two of the Fourteenth Amendment. Surprisingly, proponents of the Act have not dealt specifically with Section Two of the Fourteenth Amendment. Until recently, those who have argued that the Act would violate the Constitution had nearly ignored it as well.<sup>56</sup> The first major purpose of this Article is to explain why Section Two of the Fourteenth Amendment, as understood in the context of its proposal by the 39th Congress and of the events occurring during its ratification, renders the D.C. House Voting Rights Act unconstitutional.

Thus Part II of this Article places Section Two of the Fourteenth Amendment in its historical context. Unfortunately, Section Two did not achieve either of its alternative purposes; it neither persuaded the formerly rebellious states to grant effective suffrage to African-Americans,<sup>57</sup> nor was it ever used to penalize those states with reduced representation for refusing to do so.<sup>58</sup> Those purposes, though not the substantive require-

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56. It appears that it was first mentioned, very briefly, by Professor Turley in the last of his several appearances as a witness on the D.C. House Voting Rights Bill in the 110th Congress. *Ending Taxation Without Representation*, *supra* note 5, at 184 (statement of Prof. Jonathan Turley); *see also Hearing Before the Subcomm. on the Constitution*, *supra* note 49 (statement of Prof. Jonathan Turley). His 2008 article in the *George Washington Law Review* includes one short paragraph on the Fourteenth Amendment. *See* Turley, *supra* note 7, at 322. Former senior counsel with the Office of Legal Counsel George C. Smith briefly noted the importance of the Fourteenth Amendment in an opinion piece:

If there were any plausible doubt that congressional representation was intentionally limited to the states when the Constitution was drafted in 1787, it would have been conclusively removed when the 39th Congress reiterated that "Representatives shall be apportioned among the several States" when it revisited the question of congressional apportionment in drafting the 14th Amendment in 1866. (In 1866 as well as in 1787, there was no ambiguity and no mistake in the express linkage of congressional representation to statehood.)

George C. Smith, *Not on Constitution Avenue*, WASH. TIMES, Feb. 13, 2009, at A20. In the debate over S. 160, Senator Cornyn also noted that Section Two of the Fourteenth Amendment "limit[ed] representation in the House of Representatives to the States," and that it would be "odd to argue" that the District is a state for purposes of Section Two given the settled law that the District is not a state for purposes of Section One of the Fourteenth Amendment. 155 CONG. REC. S2,447-48 (daily ed. Feb. 25, 2009). At Senator Cornyn's request, Mr. Smith's opinion piece was reprinted in the Congressional Record. *Id.* at S2,528-29 (daily ed. Feb. 26, 2009).

57. As Professor Gabriel Chin has pointed out, African-Americans were enfranchised after the Civil War by other means, such as the Military Reconstruction Act and the demands of Congress that formerly rebellious states provide for equal suffrage in their constitutions prior to being readmitted to representation in Congress. Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259, 270-71 (2004). Section Two did not dissuade the southern states from disenfranchising African-Americans once again after whites regained political control in the late 1870s. *See* United States Department of Justice, Civil Rights Division, *Introduction to Federal Voting Rights Laws*, <http://www.usdoj.gov/crt/voting/intro/intro.php> (last visited Apr. 30, 2009); FONER, *supra* note 44, at 569-604.

58. *See* MARGO J. ANDERSON, *THE AMERICAN CENSUS: A SOCIAL HISTORY* 75-82 (1990).

ments of Section Two, would seemingly have been mooted to a great degree by the ratification in 1870 of the Fifteenth Amendment.<sup>59</sup> Nevertheless, the historical context of Section Two shows that it did not *inadvertently* fail to provide for House representation for the District; there was no inadvertence at all about the failure to provide representation for the District. Section Two provided only for apportionment of House seats among the “States”—quite obviously (to all involved) *not* including the District—in a context in which the District was front and center.

The historical context of Section Two is deeply interwoven with (1) District suffrage bills introduced as the first bills in each House of the 39th Congress<sup>60</sup> providing for African-American suffrage in local District elections;<sup>61</sup> (2) broader questions of African-American suffrage debated in

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59. One commentator goes so far as to say that Section Two—or at least the second sentence of Section Two—was repealed by the Fifteenth Amendment. See Chin, *supra* note 57. If the second sentence of Section Two were repealed by the Fifteenth Amendment, the Court would have been wrong to rely on it in *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974), to conclude that the Fourteenth Amendment did not prohibit felon disenfranchisement. Of course the Court has not overruled *Richardson*, and thus the Court continues to treat the second sentence of Section Two as a part of the Constitution. Even Professor Chin concedes that the first sentence of Section Two has not been repealed; in fact, he suggests that it continues to be applied by the Supreme Court. See Chin, *supra* note 57, at 279 n.109. For example, in *Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 322 (1999), the Court quoted the first sentence of Section Two as a part of the relevant constitutional text, though the Court did not reach any constitutional issue. Professor Chin’s argument that the second sentence is a dead letter, and hence ought to be considered repealed, relies on what appears to be a misreading of two Supreme Court decisions, *McPherson v. Blacker*, 146 U.S. 1 (1892), and *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45 (1959). See Chin, *supra* note 57, at 287–89. In each case the Court held that Section Two of the Fourteenth Amendment did not affirmatively provide a right to vote and that the reference in Section Two to “the right to vote” was a reference to the right to vote as provided under state law. *Lassiter*, 360 U.S. at 51; *McPherson*, 146 U.S. at 12. The Court’s point in each case was that Section Two does not provide anyone a right to vote. That is certainly true. Section Two was never intended to create an enforceable right to vote but rather, under certain circumstances, to reduce a state’s representation in the House and the Electoral College to the extent the state prevented some of its adult male citizens from voting in certain elections. Your author also disagrees with Professor Chin’s view that a reference to race was omitted from Section Two to make it more palatable to the country. At least some members of the 39th Congress—including Senator Sumner—were adamantly opposed to any mention of race in Section Two so that it would not implicitly authorize disenfranchisement on the basis of race with the only remedy for such discrimination being a reduction in representation. See CONG. GLOBE, 39th Cong., 1st Sess. 673 (Feb. 6, 1866) (the beginning of Senator Sumner’s great speech). Given the Supreme Court’s treatment of felon disenfranchisement in *Richardson*, this seems to have been wise.

60. See *infra* text accompanying notes 118–121, 172, 204–296, 321–432. As historian George P. Smith recognized in 1970, the District suffrage bills and Section Two of the Fourteenth Amendment were inextricably intertwined. See George P. Smith, *Republican Reconstruction and Section Two of the Fourteenth Amendment*, 23 W. POL. Q. 829, 829, 834–52 (1970).

61. See WALTER FAIRLEIGH DODD, THE GOVERNMENT OF THE DISTRICT OF COLUMBIA: A STUDY IN FEDERAL AND MUNICIPAL ADMINISTRATION (1909), available at <http://books.google.com/books?id=jXQSAAAIAAJ> (an easily accessible source of information about local government in the District through 1900). As Dodd explains, the District included land that had been in Maryland’s Montgomery and Prince George’s Counties and in Virginia’s Fairfax County. *Id.* at 28. The incorporated cities of Georgetown, Maryland, and Alexandria, Virginia, were included with the result that initially there were five local governments. *Id.* at 28–29. The terms of the cessions by Maryland and Virginia, and of the acceptance of the cessions, left those local governments in place pending Congress’s action to exercise jurisdiction over the District. *Id.* at 30. In 1801 Congress did so

but provided that existing Maryland and Virginia law would continue to apply in the respective parts of the District; Congress also provided that the District would be divided into two counties, the County of Washington, comprising the area ceded by Maryland, and the County of Alexandria, comprising the area ceded by Virginia. *Id.* When Congress then incorporated the City of Washington in 1802, there once again were five local governments in the District. *Id.* The Virginia portion was ceded back to Virginia in 1846—before the Civil War—and thus will not be discussed further. *See id.* at 32; 1 CONSTANCE McLAUGHLIN GREEN, WASHINGTON: VILLAGE AND CAPITAL (1800–1878) 173–74 (1962); BOYD, *supra* note 49, at 8–9.

Maryland counties were governed by “levy courts” consisting of justices of the peace appointed by state officials. DODD, *supra*, at 28. From 1801 to 1871, the levy courts for Washington County were appointed by the President. *Id.* at 33–34. In 1871, the Washington County government was abolished, along with the governments of Georgetown and Washington city, and replaced by the territorial-style government described below. *Id.* at 40.

Georgetown’s initial government consisted of “a mayor, recorder, six aldermen and ten common councilmen.” *Id.* at 28. The aldermen (who held their positions during “good behavior”) and the recorder were “appointed by the act of incorporation”; they then annually elected one of the aldermen as mayor. *Id.* The initial councilmen and any needed replacements were elected by the free adult white men who owned sufficient property, with councilmen also holding office “during good behavior.” *Id.* When an alderman position became vacant, the aldermen chose a replacement from among the councilmen. *Id.* at 28–29. “This autocratic organization was changed by an act [of Maryland] of 1797, which provided that the members of the common council should be elected for two years only, and that any citizen of Georgetown might be chosen mayor.” *Id.* at 29 (footnote omitted). In 1805, Congress gave Georgetown a new charter that provided for common councilmen and aldermen to be elected every other year by the free adult white male taxpaying citizens who had been residents for a year. The councilmen and aldermen then would elect a mayor and recorder each year by joint ballot. *Id.* at 34. In 1830, Congress provided for the mayor to be elected by the voters, and in 1856 Congress extended the franchise to free adult white male citizens who had resided in Georgetown for a year and paid a school tax. *Id.* at 34–35.

The initial government of the City of Washington provided for the free adult white male taxpayers who had resided in the city for a year to elect twelve members of a council who would in turn choose “from among themselves five members to form a second chamber.” *Id.* at 36. The President appointed the mayor each year, and the mayor appointed other city officials. *Id.* In 1804, Congress provided that the two chambers should each consist of nine elected members. *Id.* In 1812, Congress reorganized the city’s government so that it consisted of an elected common council, an elected board of aldermen, and a mayor chosen by the council and board. *Id.* at 36–37. A new 1820 charter made the office of mayor elective. *Id.* at 37. An 1848 act of Congress made several additional city offices elective. *Id.* In 1864, the council and board were given a role with the mayor in appointing non-elected officials, but that role was ended in 1865. *Id.* at 38.

In 1871, Congress gave the District a territorial-style government, with a governor and an eleven member upper legislative chamber all appointed by the President with the advice and consent of the Senate. Voters elected a twenty-two member lower legislative chamber and a nonvoting delegate to the House of Representatives. *Id.* at 40–41; *see also* Act of Feb. 21, 1871, 41st Cong., ch. 62, 16 Stat. 419 (An Act to Provide a Government for the District of Columbia); 1 GREEN, *supra*, at 336. Section 34 of the Act authorized District voters to elect the nonvoting delegate to the House, “who shall be entitled to the same rights and privileges as are exercised and enjoyed by the delegates from the several Territories of the United States to the House of Representatives, and [who] shall also be a member of the committee for the District of Columbia.” Ch. 62, 16 Stat. at 426.

Financial disaster followed, and, only three years later, Congress imposed a commission-style government on the District, with the three commissioners appointed by the President. That eliminated the territorial-style government, including the provision for a nonvoting delegate to the House, though Congress permitted the nonvoting delegate to the House to finish out his term. *See* DODD, *supra*, at 49; *see also* Act of June 20, 1874, 43rd Cong., ch. 337, 18 Stat. 116 (An Act for the Government of the District of Columbia, and for Other Purposes). Congress set up a committee to “draft a bill for a permanent form of government.” 1 GREEN, *supra*, at 360–61; *see also* DODD, *supra*, at 50–51. In 1878, Congress decided to make the commission-style government permanent and gave the commissioners even more power. *See* 1 GREEN, *supra*, at 394; *see also* Act of June 11, 1878, 45th Cong., ch. 180, 20 Stat. 102 (An Act Providing a Permanent Form of Government for the District of Columbia); DODD, *supra*, at 52–53, 73–92.

Congress during consideration of the District suffrage bills<sup>62</sup> and during consideration of versions of what became Section Two of the Fourteenth Amendment;<sup>63</sup> (3) the struggle over which entities were “States” entitled to voting representation in Congress (in particular whether the formerly rebellious states were so entitled)<sup>64</sup> during which the District was held out as an example of an entity that was not a state and thus not entitled to representation;<sup>65</sup> (4) the crucial question of how to apportion seats in the House so as to preserve the Civil War’s gains;<sup>66</sup> (5) intense debate over issues of the consent of the governed and taxation without representation<sup>67</sup> (the same concerns that make lack of representation for the District unjust or, as one member of Congress noted at the time, anomalous<sup>68</sup>), during which it was noted that the people of the District were taxed and governed without representation;<sup>69</sup> and (6) proposals to give the people of the District a nonvoting representative in the House.<sup>70</sup>

It was clearly understood that the District was not a “State” as that term is used in Article I of the Constitution,<sup>71</sup> just as the Supreme Court had established sixty-one years before.<sup>72</sup> It was also clearly understood,

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In 1970, Congress authorized the people of the District to elect a nonvoting Delegate to the House of Representatives. Act of Sept. 22, 1970, Pub. L. No. 91-405, § 202, 84 Stat. 845, 848-49 (An Act to Establish a Commission on the Organization of the Government of the District of Columbia and to Provide for a Delegate to the House of Representatives from the District of Columbia). In 1973, Congress granted the District a degree of home rule. District of Columbia Home Rule Act, Pub. L. No. 93-198, 87 Stat. 777 (1973).

62. See *infra* text accompanying notes 204, 208-211, 214-247, 253, 263-264, 288-293, 326-336, 350, 359-381, 393-397, 416-418.

63. See *infra* note 146; text accompanying notes 266-273.

64. See *infra* text accompanying notes 155-184.

65. See *infra* text accompanying notes 140, 291, 309, 315.

66. See *infra* text accompanying notes 131-134, 139, 143-151, 183-184, 211-213, 267-316.

67. See *infra* text accompanying notes 155-171, 259-260, 294-308, 315, 327-328, 333, 337-339, 387.

68. See *infra* text accompanying note 205.

69. See *infra* text accompanying notes 205, 238-240, 246, 291, 315, 323, 333, 374, 389, 404-406, 419, 431.

70. See *infra* text accompanying notes 259-261, 323, 390-391. Congress had previously considered giving the District a territorial form of government in 1800-1801 and again during the period from 1818-1826. See 1 GREEN, *supra* note 61, at 25-26, 86.

71. See, e.g., *infra* text accompanying notes 241-247 (noting that members of Congress clearly distinguished between States, as to which Article I arguably denied Congress power to determine the qualifications of voters, and the District, as to which the District Clause gave Congress such power); see also *infra* note 389 and accompanying text (detailing President Johnson’s message accompanying his veto of the District suffrage bill, stating that “residents of the seat of Government are not citizens of any State,” CONG. GLOBE, 39th Cong., 2d Sess. 304 (1867) (reprinting veto message dated Jan. 5, 1867)); CONG. GLOBE, 39th Cong., 1st Sess. 261 (1866) (statement of Rep. J.L. Thomas distinguishing between States on the one hand and the District, on the other, with respect to Congress’s power to determine qualifications of voters).

72. See *Hepburn v. Ellzey*, 6 U.S. (2 Cranch) 445 (1805). In *Hepburn*, Justice Marshall wrote:

The question in this case is whether the plaintiffs, as residents of the district of Columbia, can maintain an action in the circuit court of the United States for the district of Virginia.

and stated by members of Congress, that the people of the District were not entitled to voting representation in Congress<sup>73</sup> and were in fact subject

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This depends on the act of congress describing the jurisdiction of that court. That act gives jurisdiction to the circuit courts in cases between a citizen of the state in which the suit is brought, and a citizen of another state. To support the jurisdiction in this case therefore it must appear that Columbia is a state.

On the part of the plaintiffs it has been urged that Columbia is a distinct political society; and is therefore "a state" according to the definitions of writers on general law.

This is true. But as the act of congress obviously uses the word "state" in reference to that term as used in the constitution, it becomes necessary to inquire whether Columbia is a state in the sense of that instrument. The result of that examination is a conviction that the members of the American confederacy only are the states contemplated in the constitution.

The house of representatives is to be composed of members chosen by the people of the several states; and each state shall have at least one representative.

The senate of the United States shall be composed of two senators *from* each state.

Each state shall appoint, for the election of the executive, a number of electors equal to its whole number of senators and representatives.

These clauses show that the word state is used in the constitution as designating a member of the union, and excludes from the term the signification attached to it by writers on the law of nations. When the same term which has been used plainly in this limited sense in the articles respecting the legislative and executive departments, is also employed in that which respects the judicial department, it must be understood as retaining the sense originally given to it.

*Id.* at 452–53. The Court has never reconsidered its conclusion that the District is not a "State" for purposes of the provisions of Article I. In fact, the Court summarily affirmed a decision holding that the District is not a "State" for purposes of the provisions of Article I that are relevant to voting for members of the House. *See Adams v. Clinton*, 90 F. Supp. 2d 35, 48, 48 n.21 (D.D.C.), *aff'd mem.*, 531 U.S. 941 (2000) (holding that citizens resident in the District have no constitutional right to vote for members of Congress).

In other contexts the Court has been willing to consider whether the District should be treated as if it were a state or territory. *See District of Columbia v. Carter*, 409 U.S. 418, 420, 432 (1973) (holding that the District was not a "State" for purposes of 42 U.S.C. § 1983, stating that the District is "truly *sui generis* in our governmental structure," and stating that "[w]hether the District of Columbia constitutes a 'State or Territory' within the meaning of any particular statutory or constitutional provision depends upon the character and aim of the specific provision involved") (footnote omitted) (cited and quoted in *Adams*, 90 F. Supp. 2d at 47). In *Callan v. Wilson*, 127 U.S. 540, 550 (1888), the Court held that defendants accused of crimes committed in the District had a right to a jury trial. That is hardly surprising, given that Article III of the Constitution provides that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." U.S. CONST. art. III, § 2, cl. 3. As the Court noted, the language of Clause Three was adopted at the Philadelphia Convention, in place of language originally proposed, to ensure that its protections would be available even if a crime was alleged to have been committed somewhere other than in a state. *Callan*, 127 U.S. at 550. The Court in *Callan* did conclude that the particular criminal procedural protections in the Sixth Amendment applied where a crime was alleged to have been committed in the District even though the Sixth Amendment refers to crimes committed in a "State," but the Court so concluded because the Sixth Amendment was thought to be declaratory of the kind of jury trial already required by Article III. *Id.* at 549–50. Thus, the Court noted that the Sixth Amendment had been treated as applying in the territories—as to which the jury trial right in Article III was of course applicable—and stated, "We cannot think that the people of this District have, in that regard, less rights than those accorded to the people of the Territories of the United States." *Id.* at 550. Citizens residing in territories have never voted in elections of members of Congress, though they have been permitted to elect nonvoting delegates to the House. *See supra* text accompanying notes 37–39; *infra* text accompanying notes 138, 323.

73. *See infra* text accompanying notes 205, 238–240, 246, 291, 315, 323–324, 333, 374, 388, 404–406, 419.

to taxation without representation.<sup>74</sup> Of course, Congress was sitting in the District, which had a larger population than some states.<sup>75</sup>

And yet the 39th Congress proposed, and the states ratified, an amendment to the Constitution providing—in Section Two—only for House seats to be “apportioned among the several States . . . counting the whole number of persons in each State,”<sup>76</sup> and not providing for representation to be given to the District. In this historical context, the notion that there was an inadvertent failure to provide representation for the District is beyond belief.

That conclusion, demonstrated in Part II of this Article, is fatal to the constitutionality of the D.C. House Voting Rights Act because the only somewhat plausible argument that the District Clause allows Congress to grant the District voting representation depends on the supposed inadvertent nature of the Constitution’s failure to provide such representation to the District. Because the Constitution’s failure to provide such representation was not inadvertent, the D.C House Voting Rights Act could not be sustained under the District Clause without putting the District Clause in conflict with Section Two of the Fourteenth Amendment (and, as shown below, also in conflict with Article I<sup>77</sup>).

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74. See *infra* text accompanying notes 205, 315, 333.

75. The 1860 census gave a population of 75,080 for the District, which was more than the population of Oregon (52,465). See NINTH CENSUS—VOLUME I: THE STATISTICS OF THE POPULATION OF THE UNITED STATES 3 (1872) (compiled by Francis A. Walker), available at <http://www2.census.gov/prod2/decennial/documents/1870a-01.pdf> [hereinafter NINTH CENSUS]. The population of the District increased during the Civil War, reaching about 130,000 by the end of 1866, according to President Johnson. See CONG. GLOBE, 39th Cong., 2d Sess. 304 (Jan. 7, 1867) (reprinting S. 1 veto message dated Jan. 5, 1867); *id.* at 307 (statement of Sen. Sherman using figure of 130,000); *id.* at 309 (statement of Sen. Cowan using figure of 130,000); *cf.* CONG. GLOBE, 39th Cong., 1st Sess. 215 (Jan. 12, 1866) (statement of Rep. Davis giving population of District as 125,000). A special 1867 census showed the District to have a population of 126,990. Either of those figures—130,000 or 126,990—was more than the populations (in the 1860 census) of Delaware (112,216) and Oregon (52,465). See NINTH CENSUS, *supra*, at 3. Either figure was also more than the populations in the 1860 census of three territories that were admitted or approved for admission as states by 1866: Kansas (107,206, admitted in 1861), Nevada (6,857, made a territory in 1861 and admitted in 1864), and Nebraska (28,841, approved by Congress for admission in 1866 but only admitted after state constitution adopted in 1868). See *id.*; *Kansas, Nebraska, Nevada*, in CONCISE DICTIONARY OF AMERICAN HISTORY 510, 651–52, 657–58 (Wayne Andrews ed., 1962). Either figure also was larger than the populations of four states in the 1870 census: Delaware (125,015), Nebraska (122,993), Nevada (42,491), and Oregon (90,923). See NINTH CENSUS, *supra*, at 3.

76. U.S. CONST. amend. XIV, § 2.

77. See *infra* text accompanying notes 443–597; *cf. Adams*, 90 F. Supp. 2d at 56 (rejecting the argument that, because Article I did not explicitly provide that House seats would be apportioned “only among states,” Article I did not preclude apportionment of a House seat to the District).

*C. The District Clause, Constitutional Limitations, the Argument From Inadvertence, and Feasible Alternatives for Providing District Citizens with Representation*

The most obvious meaning of the District Clause is that, with respect to the District, Congress has not only the enumerated powers listed in the other clauses of Article I, Section Seven, but also power analogous to that of a state legislature, so as to be able to legislate generally for the District. Thus, as the Supreme Court held in *Palmore v. United States*,<sup>78</sup> the District Clause:

provides that Congress shall have power “to exercise exclusive Legislation in all Cases whatsoever, over” the District of Columbia. The power is plenary. Not only may statutes of Congress of otherwise nationwide application be applied to the District of Columbia, but Congress may also exercise all the police and regulatory powers which a state legislature or municipal government would have in legislating for state or local purposes. Congress “may exercise within the District all legislative powers that the legislature of a State might exercise within the State; and may vest and distribute the judicial authority in and among courts and magistrates, and regulate judicial proceedings before them, as it may think fit, so long as it does not contravene any provision of the Constitution of the United States.” This has been the characteristic view in this Court of congressional powers with respect to the District.<sup>79</sup>

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78. *Palmore v. United States*, 411 U.S. 389 (1973); see also Senator Sherman’s comment *infra*, text accompanying note 408.

79. *Palmore*, 411 U.S. at 397 (quoting, respectively, U.S. CONST. art. I, § 8, cl. 17; *Capital Traction Co. v. Hof*, 174 U.S. 1, 5 (1899)) (citation omitted). Such power presumably would include the power to tax as a state legislature could tax, the power to control commerce within the District and commerce with places outside the District just as a state legislature could if it were free of the limitations imposed by the Dormant Commerce Clause and federal preemption, the power to provide for courts to resolve disputes involving District residents, and the power to create rules of liability for civil rights violations within the District. These powers, rather than any supposed power to grant the District the status of a “State” under the Constitution, are sufficient to explain *Palmore* and other related precedents. See, e.g., *Palmore*, 411 U.S. at 397 (justifying Congress’s extension of 42 U.S.C. § 1983 to the District); *Nat’l Mut. Ins. Co. of D.C. v. Tidewater Transfer Co.*, 337 U.S. 582, 603–04 (1949) (permitting Congress to provide for federal court jurisdiction to resolve disputes between residents of the District and residents of states but without a majority opinion); *Stoutenburgh v. Hennick*, 129 U.S. 141, 149 (1889) (holding that Congress was authorized to regulate commerce involving the District); *Loughborough v. Blake*, 18 U.S. (5 Wheat) 317, 323 (1820) (allowing direct taxation in the District but applying Article I, Section Nine, Clause Four, which does not refer to “States,” to regulate such direct taxation); *infra* text accompanying note 408. None of this suggests that the District Clause allows Congress to give the District the constitutional status of a state, Professor Dinh’s views notwithstanding. See *Equal Representation in Congress*, *supra* note 2, at 11–14 (statement of Prof. Viet D. Dinh) (discussing *Loughborough*, *Stoutenburgh*, *Tidewater Transfer Co.*, and 42 U.S.C.

Thus Congress, in legislating for the District, has the same kind of plenary power that a state legislature possesses—subject, of course, to the requirement that Congress “not contravene any provision of the Constitution of the United States,”<sup>80</sup> but not otherwise limited, as a state legislature would be, by the provisions of a state constitution or by provisions of the federal Constitution that apply only against states. For example, the other enumerated powers would not seem to give Congress power to prohibit spitting on city streets throughout the country—or at least would not have been thought by the Founders to give Congress such power—but the District Clause would give Congress that power within the District. Such a power to legislate for the District would not, however, naturally seem to include a power to restructure the basic institutions of the *federal* government by changing the composition of the *federal* legislature.

Proponents of the D.C. House Voting Rights Act, and more generally of the power of Congress under the District Clause to grant the District voting representation in the House, argue that the grant of power under the District Clause is extraordinarily broad, broader perhaps than the power described in *Palmore*.<sup>81</sup> But whatever the scope of Congress’s power under the District Clause, the power may not be exercised in ways that are inconsistent with other provisions of the Constitution, even if those provisions do not explicitly prohibit congressional action.

Thus Congress’s exercise of the District Clause power must respect not only explicit prohibitions on congressional action—such as, for example, Article I’s limitation on the suspension of habeas corpus<sup>82</sup> and the First Amendment’s protection of freedom of the press<sup>83</sup>—but also implicit limitations created by other constitutional provisions—such as, for example, Article II’s provisions making the President the Commander-in-Chief of the Army and Navy,<sup>84</sup> and its provisions for appointment and confirma-

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§ 1983). *Tidewater Transfer Co.* is a difficult case in many respects, which explains why there was no majority opinion. *Tidewater Transfer Co.*, 337 U.S. at 583, 604, 626.

80. *Palmore*, 411 U.S. at 397 (quoting *Capital Traction Co.*, 174 U.S. at 5).

81. See, e.g., *Equal Representation in Congress*, *supra* note 2, at 4–6 (testimony of Prof. Viet D. Dinh); *Common Sense Justice*, *supra* note 49, at 4–5 (statement of Hon. Kenneth W. Starr) (“Congress’s powers over the District are not limited to simply those powers that a State legislature might have over a State. As emphasized by the federal courts on numerous occasions, the Seat of Government Clause is majestic in its scope.”); DINH & CHARNES, *supra* note 12, at 4–6; Frankel, *supra* note 14, at 1688–89 (“Congress’s powers over the District are not limited to simply those powers that a state legislature might have over a state; they are much greater.”). Frankel notes, however, that a grant by Congress to the District of voting representation in the House might exceed Congress’s power under the District Clause and that “stronger constitutional support” may be found in the Fourteenth and Fifteenth Amendments. Frankel, *supra* note 14, at 1690. Contrary to Frankel’s assertions, Section Two of the Fourteenth Amendment provides the clearest basis for rejection of any power in Congress to give the District voting representation in the House.

82. U.S. CONST. art. I, § 9, cl. 2.

83. U.S. CONST. amend. I.

84. U.S. CONST. art. II, § 2, cl. 1.

tion of Supreme Court Justices.<sup>85</sup> Article II does not expressly provide that Congress may not create another Commander-in-Chief with authority in the District equal to that of the President; nor does it expressly provide that Congress may not authorize residents of the District to elect a member of the Supreme Court. Nevertheless, the District Clause does not give Congress the power to take either of those actions because the provisions for the President to be Commander-in-Chief and for nomination and confirmation of Supreme Court Justices are naturally read as exclusive.

Section Two of the Fourteenth Amendment and Article I, Section Two of the original Constitution certainly appear to create such an implicit limitation. They appear to provide for the full composition of the House and for all such House members to be from "States." They provide that "[t]he House of Representatives shall be composed of Members chosen . . . by the People of the several States,"<sup>86</sup> that House seats "shall be apportioned among the several States,"<sup>87</sup> and that those entitled to vote for the "most numerous Branch of the State Legislature" are entitled to vote for members of the House.<sup>88</sup> As has often been noted,<sup>89</sup> these provisions and other provisions of the Constitution that deal with filling vacant House seats<sup>90</sup> and with qualifications for membership in the House<sup>91</sup> seem to require that House members be from "States" rather than from the District.

On what basis then could we ignore the apparent completeness of the Constitution's provisions for the composition of the House of Representatives and allow Congress to supplement those provisions by a simple statute enacted under the authority of the District Clause? The only possibly plausible basis would be an argument that the failure to provide representation for the people of the District was inadvertent, and therefore the Constitution should not be read as limiting apportionment of House seats *only* to "States."<sup>92</sup> But that argument was rejected in a district court opi-

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85. U.S. CONST. art. II, § 2, cl. 2.

86. U.S. CONST. art. I, § 2, cl. 1.

87. U.S. CONST. amend XIV, § 2; U.S. CONST. art. I, § 2, cl. 3, *amended by* U.S. CONST. amend. XIV, § 2.

88. U.S. CONST. art. I, § 2, cl. 1.

89. *See, e.g.*, Turley, *supra* note 7, at 317-18.

90. U.S. CONST. art. I, § 2, cl. 4.

91. U.S. CONST. art. I, § 2, cl. 2.

92. *See, e.g.*, RICHARD P. BRESS & LORI ALVINO MCGILL, CONGRESSIONAL AUTHORITY TO EXTEND VOTING REPRESENTATION TO CITIZENS OF THE DISTRICT OF COLUMBIA: THE CONSTITUTIONALITY OF H.R. 1905, at 3 (2007), *available at* <http://www.acslaw.org/node/4849> ("History suggests that the Constitution's failure to provide explicitly for District residents' voting representation in the House is the result of an inadvertent omission that can be remedied by congressional action."); *Equal Representation in Congress*, *supra* note 2, at 27 (oral testimony of Prof. Viet D. Dinh) ("[W]hen these cases . . . are cited in opposition to congressional authority to enact S. 1257, I think they really serve as red herrings. The reason why they serve as red herrings is because Article I, Section 2, says that representatives are to be chosen 'by the people of the several states.'" It does not say further that States and only States or citizens of States and nothing else. And so the argument in opposition, although seemingly textual in nature, is really one of negative inference from what is not

nion that was summarily affirmed by the Supreme Court<sup>93</sup>—making it a precedent that binds the courts, at least courts other than the Supreme Court.<sup>94</sup> And as Part II of this Article shows, there is no conceivable basis for accepting any argument from inadvertence with respect to Section Two of the Fourteenth Amendment.

Such an argument does have initial plausibility with respect to the original provisions of the Constitution in Article I, though it would conflict directly with the Supreme Court's decision in *Hepburn v. Ellzey*.<sup>95</sup> The District of Columbia did not yet exist when the Constitution was proposed and ratified, and a District might never have been formed; and so it is often further suggested that those responsible for the Constitution's proposal and ratification did not anticipate a District being created that eventually would have a substantial population.<sup>96</sup> They may have expected that the state or states that ceded land for a District would provide by agreement with the United States for the residents of the District to continue to have some sort of political rights—perhaps a right to have a local legislature, or perhaps, as Part IV of this Article suggests, a right to vote in House elections as if they still were residents of the ceding state.<sup>97</sup> The Founders, it is argued, could not have intended for the residents of a future, populous District to be unrepresented, and particularly not to be taxed without representation, contrary to “a rallying cry of the American Revolution.”<sup>98</sup> Thus perhaps the District was an omitted case, so that failure to provide for representation for the District was inadvertent. If this argument were accepted (though it should not be<sup>99</sup>), then Article I might not prevent Congress from giving the District voting representation;

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said in the Constitution and not one of clear and authoritative, affirmative text. And it is the negative inference which normally would control but in this case must be reconciled with the express affirmative grant of plenary and exclusive power in all cases whatsoever under the District Clause, Article I, Section 8, clause 17.”).

93. *Adams v. Clinton*, 90 F. Supp. 2d 35, 56 (D.D.C.), *aff'd mem.*, 531 U.S. 941 (2000) (noting that Article I's exclusion of the District from representation was not inadvertent and therefore rejecting the argument that “the Article's repeated use of the word ‘state’ does not necessarily mean the Framers intended to apportion representatives *only* among states”). Representative Celler argued in 1967 that the Constitution's failure to provide representation for the District in Congress was an “oversight.” *D.C. Representation and Vote*, *supra* note 2, at 2 (statement of Rep. Celler). Nevertheless, as he explicitly noted in 1960, only a constitutional amendment could give the District representation in Congress. *See supra* text accompanying note 2.

94. *See Adams*, 90 F. Supp. 2d at 57 (citing *Hicks v. Miranda*, 422 U.S. 332, 344–45 (1975)).

95. 6 U.S. (2 Cranch) 445, 452–53 (1805); *see supra* note 72.

96. *See, e.g.*, District of Columbia House Voting Rights Act of 2007, S. REP. NO. 110-123, at 3 (noting that “the District did not exist” when Article I, Section Two was ratified); Scott M. Seedorf, A Separate and Unequal District of Columbia 12 (Dec. 19, 2006), *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=947650](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=947650).

97. *See infra* text accompanying notes 622–637.

98. *See Frankel*, *supra* note 14, at 1665.

99. *See supra* text accompanying notes 25–27, 59–77, 86–94; *infra* text accompanying notes 118–597; *see also Adams*, 90 F. Supp. 2d at 56.

though, it must be stressed, Section Two of the Fourteenth Amendment would still prevent it.

Part III of this Article shows that the failure of the original Constitution to provide representation for the District was not inadvertent. Part III regresses to the period from 1775 to 1800 and considers the history that underlies the District Clause and the creation of the District of Columbia.<sup>100</sup> The evidence shows that the issue of creation of a permanent seat of government was as prominent as any other issue from 1779 to 1790. It was such a divisive issue that it nearly led to the breakup of the new nation with its new Constitution. The prominence of that issue has been very substantially understated by both the defenders and the critics of the proposed D.C. House Voting Rights Act. Often the historical discussion has been limited to consideration of a single event—a mutiny by Continental Army soldiers—in 1783,<sup>101</sup> thus focusing attention on the federal government's need for physical security, although it is also often noted, with a citation to Justice Stephen Markman,<sup>102</sup> that the District Clause's purpose was more broadly to ensure that the federal government was independent of the states and that no state had excessive influence over the federal government. As Part III shows, it is simply implausible that constitutional language regarding the permanent seat of government would not have been scrutinized with extreme care or that its implications for our scheme of government would not have been considered in detail. No claim of inadvertence can withstand this historical evidence.

Throughout the Article, evidence is presented of Congress's practice of providing territories with nonvoting delegates, initially (under the Northwest Ordinance) to the Congress under the Articles of Confederation and then, without missing a beat, to the House of Representatives under the new Constitution.<sup>103</sup> This long history shows that it has always been understood that citizens who are not considered to be residents of states but are in another way a part of our nation can and generally should be provided nonvoting representation in the House, though not, interestingly enough, in the Senate. Even before the Constitution was ratified, our nation dealt explicitly with this issue. It simply was not a surprise to the drafters or ratifiers of the original Constitution that when it was formed the District did not receive its own voting member in Congress. They

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100. See *infra* text accompanying notes 442–597.

101. See, e.g., *Equal Representation in Congress*, *supra* note 2, at 2 (statement of Prof. Viet D. Dinh); *Common Sense Justice*, *supra* note 49, at 3–4 (statement of Hon. Kenneth W. Starr); BRESS & MCGILL, *supra* note 92; DINH & CHARNES, *supra* note 12, at 2; Turley, *supra* note 7, at 310–13; Frankel, *supra* note 14, at 1683–84; Seedorf, *supra* note 96, at 8; see also Raven-Hansen, *supra* note 19, at 169–71 (limiting consideration to the 1783 mutiny in the course of arguing that District residents are constitutionally entitled to voting representation in Congress).

102. MARKMAN, *supra* note 29, at 47–48.

103. See *supra* text accompanying notes 37–39; *infra* text accompanying notes 138, 323.

may, however, have been surprised that the ceding states, Maryland and Virginia, did not bargain with the United States for the residents of the District to permanently retain some political rights; it seems possible that Maryland, for example, could have bargained for District residents in the area ceded by it to have a local legislature, or perhaps to be considered to be Maryland residents for purposes of voting in national elections. As discussed below, such a bargain might have been permissible, and it still may be possible for Maryland to make such a bargain with the United States.<sup>104</sup>

The failure of Congress to provide the District with nonvoting representation in the House until 1871 may have reflected a Founding vision that it was especially important to insulate Congress from local political pressure, though internal conflicts between parts of the District played a role—especially prior to the 1846 retrocession to Virginia of the part of the District, including Alexandria, that had been ceded previously by Virginia.<sup>105</sup> In any event, it did not reflect a lack of realization that, under the terms of our Constitution, voting members of Congress were from states, not from territories or the District.

Part IV of this Article provides concluding observations. There may now be a clear opportunity to amend the Constitution to provide House representation for the District. All, or nearly all, opposition to the D.C. House Voting Rights Act is grounded on the lack of constitutional authority for the Act. Its opponents concede the injustice but refuse to countenance unconstitutional means to correct it. The proposed Act has served the very useful purposes of focusing attention on the injustice and causing

104. See *infra* text accompanying notes 622–637. Such an approach would be similar to what has been called “semi-retrocession.” See BOYD, *supra* note 49, at 11–14.

105. See BOYD, *supra* note 49, at 8–9; 1 GREEN, *supra* note 61, at 173–74. Prior to the retrocession, District residents in what had been Virginia and in what had been Maryland resisted being governed by one territorial legislature; thus Rep. Varnum stated that

[h]e did not know whether, if the jurisdiction [over the District] was retained, it would not be proper to indulge the citizens with a territorial legislature. But to this, the people themselves object. Virginia objects to a union with Maryland. There were, manifestly, hostile interests which could not easily be united.

12 ANNALS OF CONG. 503–04 (1803). There were conflicts even between the two cities in the portion of the District ceded by Maryland (Washington City and Georgetown), as there were conflicts among all three cities (including Alexandria), and conflicts even within Washington City. *Id.* at 505 (statement of Rep. Randolph). All of these conflicts made it difficult for Congress to legislate for the District, see *id.*, and would make it difficult for a territorial legislature to be effective. Rep. Findley noted in 1805 that “there were nearly as many interfering interests in this ten miles square, as in the whole United States.” 14 ANNALS OF CONG. 903 (1805). Rep. Alston, arguing in 1805 for retrocession to Virginia of the portion of the District previously ceded by it, pointed out that

[t]he district was composed of a people, who had been heretofore governed by laws passed by two different States; they were separated by the river Potomac; their manners, habits, intercourse, and trade, were very different; their separate interests and wants were as different as those of almost any two States in the Union; that no one uniform system of laws would satisfy them; that so long as they were under the immediate control and government of Congress, strife and discontent would be their inevitable consequence.

*Id.* at 964.

political leaders to publicly recognize the reality of the injustice. As a result, the Act's opponents would be hard-pressed to reject constitutional means—in particular, a constitutional amendment—that would correct the injustice.

In addition, as is noted above and explained in Part IV, there is a possibility that residents of the District could be given voting representation in the House by way of a renegotiation of the terms under which Maryland ceded the land that presently makes up the District.<sup>106</sup> It has been suggested before that District residents could be authorized by Congress to vote in Maryland congressional elections,<sup>107</sup> but the constitutional basis for doing so was not clear.

Residents of the areas of Maryland and Virginia that were to become the District did vote in House elections during the 1790s, even after 1791<sup>108</sup> when the specific location of the District was chosen by President Washington and the particular area that now makes up the District was ceded—with a reservation by Maryland—and was accepted, also with a reservation, by the United States.<sup>109</sup> It is agreed that neither residents of

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106. See *infra* text accompanying notes 622–637.

107. See BOYD, *supra* note 49, at 11–13.

108. See, e.g., Adams v. Clinton, 90 F. Supp. 2d 35, 58–60 (D.D.C.), *aff'd mem.*, 531 U.S. 941 (2000); Turley, *supra* note 7, at 345. Of course Maryland's and Virginia's Senators were chosen by their legislatures, not by vote of their people, under the pre-Seventeenth Amendment provisions of the Constitution. See U.S. CONST. art. I, § 3, cl. 1, *amended by* U.S. CONST. amend. XVII.

109. Virginia authorized Congress to take by cession any “tract of country, not exceeding ten miles square, or any lesser quantity” within the state. 13 WILLIAM WALLER HENING, THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE 43 (1823) (reproducing An Act for the Cession of Ten Miles Square, or Any Lesser Quantity of Territory within this State, to the United States, in Congress Assembled, for the Permanent Seat of the General Government, ch. 32, 13 Va. Stat. at Large, at 43 (1789) [hereinafter Virginia Cession]), available at <http://books.google.com/books?id=JkMVAAAAYAAJ>. Maryland authorized its representatives in Congress to cede an area for the District, in particular to cede “any district in this state, not exceeding ten miles square, which the congress may fix upon and accept for the seat of government of the United States.” An Act to Cede to Congress a District of Ten Miles Square in this State for the Seat of Government of the United States, ch. 46, 1788 Md. Acts, *reprinted in* 1 D.C. CODE 33 (2001) [hereinafter Maryland Cession]. Maryland's congressional delegation did not unanimously support the bill that established the permanent seat of government (PSOG) on the Potomac; four of Maryland's six House members voted in favor of the PSOG bill, as did both of Maryland's Senators, but two of its House members voted against the bill. See H.R. JOUR., 1st Cong. 266–67 (July 9, 1790) (showing that Representatives Carroll, Contee, Gale, and Stone voted in favor of the PSOG bill and that Representatives Seney and Smith (William Smith of Maryland) voted against the bill); S. JOUR., 1st Cong. 173 (1790) (showing Senators Carroll and Henry voting in favor of the PSOG bill); see also United States Senate: Senators from Maryland, [http://www.senate.gov/pagelayout/senators/one\\_item\\_and\\_teasers/maryland.htm](http://www.senate.gov/pagelayout/senators/one_item_and_teasers/maryland.htm) (last visited Apr. 18, 2009) (listing Maryland Senators); Birth of the Nation: The First Federal Congress 1789–1791, <http://www.gwu.edu/~ffcp/exhibit/p1/members/> (last visited Apr. 18, 2009) (listing members of House and Senate in First Congress). Perhaps this decision of a majority of Maryland's congressional delegation was sufficient to constitute Maryland's agreement to cede land for the District, but the PSOG Act called for President Washington to determine the actual location of the ten mile square District within a broader area set by Congress, and it included a reservation: “That the operation of the laws of the state within such district shall not be affected by this acceptance [of the cession of the district], until the time fixed for the removal of the government thereto, and until Congress shall

the portion of the District ceded by Maryland nor residents of the portion ceded by Virginia voted in congressional elections after February 27, 1801, the date of the Organic Act of 1801, by which Congress provided for governance of the District.<sup>110</sup>

In fact, residents of the portion ceded by Maryland did not vote in congressional elections after 1798, and residents of the portion ceded by Virginia did not vote in congressional elections after 1799. Maryland and Virginia held House elections for the Sixth Congress on October 1, 1798, and April 24, 1799, respectively.<sup>111</sup> They did not hold House elections for the Seventh Congress until April 6 and April 22, 1801,<sup>112</sup> respectively, in each case after the Organic Act of 1801 had become law and thus too late for District residents to vote in the elections. As a result, the court in *Adams v. Clinton* seems to have been mistaken when it conceded “the fact that residents of the [District] continued to vote in congressional elections into the year 1800.”<sup>113</sup>

Because the cession probably was not complete until December 1800, participation in Maryland and Virginia congressional elections prior to that date may not show an understanding that Congress could permit District residents to vote in congressional elections in the ceding states. But it is suggestive, and there is other evidence that the drafters and ratifiers of the Constitution thought a state could bargain for such a result when ceding land for the permanent seat of government. Part IV explains that evidence and shows that there may be a plausible argument that the Constitution permitted a ceding state to make such a bargain. In such a case, the residents of the District would count as residents of the ceding state for House

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otherwise by law provide.” Act of July 16, 1790, § 1, 1 Stat. 130 (An Act for Establishing the Temporary and Permanent Seat of the Government of the United States). For both of those reasons it is not clear that Congress had already, in the language of the Maryland statute, “fix[ed] upon and accept[ed]” a “district.” Maryland Cession, *supra*.

The ten mile square area then chosen by President Washington included land in Virginia, including Alexandria, which was not within the area authorized by Congress, and thus only a portion of the District as determined by the President could be initially considered to have been accepted as the permanent seat of government. See BOWLING, *supra* note 36, at 212–13. In March 1791, Congress authorized acceptance of the remaining portion chosen by the President. Whether or not it was necessary, the Maryland legislature then formally ceded the portion of the District that was within Maryland but reserved legal jurisdiction over that area “until Congress shall, by law, provide for the government thereof, under their jurisdiction.” An Act Concerning the Territory of Columbia and the City of Washington, ch. 45, 1791 Md. Acts, *reprinted in* 1 D.C. CODE 35 (2001). Even if the agreement to the cession had already become binding, Maryland’s reservation was consistent with the reservation provided in the 1790 PSOG Act, as noted above, providing for state law to continue to govern the District “until the time fixed for the removal of the government thereto, and until Congress shall otherwise by law provide.” Act of July 16, 1790, § 1, 1 Stat. 130.

110. See, e.g., DINH & CHARNES, *supra* note 12, at 8–9; see also Act of Feb. 27, 1801, ch. 15, 2 Stat. 103 (authorizing governance for the District).

111. See MICHAEL J. DUBIN, UNITED STATES CONGRESSIONAL ELECTIONS 1788–1997, at 18–19 (1998).

112. *Id.* at 23.

113. *Adams*, 90 F. Supp. 2d at 58–59.

apportionment purposes, and the geographical area of the District would be included in one or more congressional districts for the ceding state. Maryland did not negotiate for any such political rights for the residents of the land that it ceded to the United States—at least not for rights that would continue after Congress exercised authority over the District.<sup>114</sup> But it is possible that Maryland could request that the United States renegotiate the cession agreement so that it would include such a provision. Or perhaps, with Maryland's consent, the United States could cede back to Maryland political authority over District residents with respect to representation in the House, as is perhaps suggested by *Adams v. Clinton*.<sup>115</sup> The Twenty-Third Amendment may create problems for this approach, but the problems may be manageable.<sup>116</sup>

A final point will conclude this over-long introduction. This Article does not take a position on the proper method for interpreting the Constitution. It might be thought that the historical evidence presented in this article would primarily be of value under one of the originalist approaches.<sup>117</sup> But the text and structure of the Constitution weigh so strongly against the constitutionality of the D.C. House Voting Rights Act that its supporters must themselves make an argument based on history; they must argue that the failure of the Constitution to provide representation for the District was an oversight. That is a historical claim, one that can be shown by historical evidence to be implausible. Once that showing is made, there is no real choice left for the interpreter who seeks to interpret the Constitution as it is. In that circumstance, any alleged interpretation that supports the constitutionality of the D.C. House Voting Rights Act would, in reality, be an amendment of the text of the Constitution in disregard of the process for amending the Constitution contained in Article V.

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114. See *infra* text accompanying note 631.

115. *Adams*, 90 F. Supp. 2d at 64 (“Congress has ceded none of its authority over the District back to Maryland, and Maryland has not purported to exercise any of its authority in the District.”) (footnote omitted). It is important to note, however, that the court in *Adams* had in mind a cession back to Maryland of substantial authority over the District just as Maryland had exercised, with Congress's permission, substantial authority over the NIH enclave involved in *Evans v. Cornman*, 398 U.S. 419, 422–23 (1970), thus giving residents in the enclave a real stake in having a voice in the Maryland government, a stake that gave them the right to vote in Maryland elections according to the Supreme Court. See *Adams*, 90 F. Supp. 2d at 63–64. For a discussion of the history of attempts to provide representation for the District by way of a “semi-retrocession,” see BOYD, *supra* note 49, at 11–14.

116. See *infra* text accompanying notes 634–635.

117. See, e.g., Symposium, *The Balkanization of Originalism*, 67 MD. L. REV. 10 (2007).

II. THE HISTORICAL EVIDENCE SHOWING THAT THE FAILURE OF SECTION TWO OF THE FOURTEENTH AMENDMENT TO PROVIDE FOR REPRESENTATION FOR THE DISTRICT OF COLUMBIA WAS NOT INADVERTENT

*We are the representatives of this District as we are the representatives of the country at large; and beside us this District has no representative, and by the Constitution was not expected to have.*

—Senator Lot Myrick Morrill, Chairman of the Senate Committee on the District of Columbia, in the debate over whether to override President Johnson’s veto of the District suffrage bill.<sup>118</sup>

A. An Overview

The key place held by the District of Columbia in the debates of the 39th Congress while the Fourteenth Amendment was being drafted, proposed, and ratified makes it amply clear that the failure to provide congressional representation for the District in Section Two of the Amendment was anything but inadvertent. The first bill introduced in the House and the first bill introduced in the Senate during the 39th Congress each dealt with African-American suffrage in the District. When Congress took up the District suffrage bills, the issue of readmission of the formerly rebellious states to representation in Congress, and the various proposals for constitutional amendment, Congress was considering multiple deeply interwoven issues, all of which highlighted the very limited nature of suffrage for any of the people of the District and the District’s lack of representation in Congress. While an anxious nation watched,<sup>119</sup> Congress was

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118. CONG. GLOBE, 39th Cong., 2d Sess. 306 (1867). Senator Morrill left the Democratic Party over slavery issues in the late 1850s after serving as the president of the Maine Senate; he then became the first Republican Governor of Maine, before being elected to Vice President Hannibal Hamlin’s Senate seat, and later served as Secretary of the Treasury. See H. Draper Hunt, *Morrill, Lot Myrick*, in BIOGRAPHICAL DICTIONARY OF THE UNION 363–64 (John T. Hubbell & James W. Geary eds., 1995) (“During the Civil War, he supported a bill to confiscate slaves of rebels, strongly endorsed the Emancipation Proclamation, and, as chairman of the Senate District of Columbia Committee, championed a bill to emancipate slaves in the District. After the [civil] war, he fought for black suffrage [and] strongly supported Congressional Reconstruction . . . . As chairman of the Senate Committee on Indian Affairs, he became well known as a loyal supporter of Indian rights.”); Biographical Directory of the United States Congress, Morrill, Lot Myrick, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=M000970> (last visited May 18, 2009). Lot Myrick Morrill should not be confused with Justin Smith Morrill of Vermont, who served as a House member on the Joint Committee on Reconstruction and later served for thirty-two years in the Senate. See D. Gregory Sanford, *Morrill, Justin Smith*, in BIOGRAPHICAL DICTIONARY OF THE UNION, *supra*, at 363.

119. The *New York Times*, for example, included detailed reports of the proceedings and the debates in the 39th Congress, along with news articles highlighting these issues. See, e.g., *Thirty-Ninth Congress*, N.Y. TIMES, Jan. 11, 1866, at 1 (providing description of Congressional proceedings and

simultaneously considering: (1) equal suffrage in the District, for local elections only, of course;<sup>120</sup> (2) broader questions of black suffrage, in part by way of the debate over District suffrage;<sup>121</sup> (3) entitlement to representation in Congress of entities claiming to be “States” entitled under the Constitution to representation;<sup>122</sup> and (4) the crucial question of how to apportion seats in the House so as to encourage black suffrage, prevent votes of formerly rebellious southerners from counting heavier than votes of citizens from other states, and preserve the gains won at such terrible cost in the Civil War.<sup>123</sup>

As those debates continued, the same concerns that make House representation for the District a matter of justice were raised loudly and repeatedly. The debate over those concerns—consent of the governed and taxation without representation, listed as item (5) in this Article’s introduction<sup>124</sup>—was intense.<sup>125</sup> The formerly rebellious states were not represented in Congress, yet legislation affecting them was being enacted, and they were being taxed.<sup>126</sup> Congress also was considering constitutional amendments to which the people of those states—the majority of the whites, at least—would only consent under the duress of military occupation or the coercion of denial of representation in Congress.<sup>127</sup> The newly freed blacks in the formerly rebellious states were being denied voting rights and thus were subjected to provisional governments to which they had not consented.<sup>128</sup> They could hardly be thought to be represented by the legislators in those provisional governments who were enacting Black Codes and

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debates nearly as complete as that of the *Globe* and noting that the House and Senate each took up their versions of the District suffrage bill); *Washington News*, N.Y. TIMES, Jan. 11, 1866, at 1 (including subhead “Negro Suffrage in the District of Columbia” and describing the debates, including Rep. Kelly’s “sensation speech of the day . . . literally crushing his Democratic colleague”). When the Senate delayed taking action on the District suffrage bill, Senator Morrill noted in June 1866, “the general expectation in the country that Congress should not adjourn until some action upon this subject had been taken.” CONG. GLOBE, 39th Cong., 1st Sess. 3432 (1866). In December 1866, Senator Sumner noted that the country had expected a vote to be taken in the Senate on the District suffrage bill before Congress adjourned in the summer. CONG. GLOBE, 39th Cong., 2d Sess. 2 (1866). That same month, Senator Morrill commented that the D.C. suffrage bill

may be said to be inaugurating a policy not only strictly for the District of Columbia, but in some sense for the country at large. In this respect it is, I suppose, that this bill has received so large a share of the public attention during the last session and the recess of the Congress of the United States.

*Id.* at 38. In fact, Morrill felt the need to defend the Senate against public “misapprehension” that the Senate had delayed its consideration of District suffrage. *Id.*

120. See *supra* notes 60–61.

121. See *supra* notes 62–63.

122. See *supra* note 64.

123. See *supra* note 66.

124. See *supra* text accompanying note 67.

125. See *supra* note 67.

126. See *infra* text accompanying notes 155–181, 304, 314–315.

127. See *infra* text accompanying notes 181–184.

128. See *infra* text accompanying notes 142, 295.

other laws to keep them in subjection,<sup>129</sup> but they were subject to taxation by those governments.<sup>130</sup> Nevertheless, loud complaints were raised, implausibly to twenty-first century ears, that the proposed penalty—a reduction in the number of House seats for states that refused to enfranchise blacks<sup>131</sup>—would result in taxation without representation of the disenfranchised blacks!<sup>132</sup> After all, the argument went, even if they could not vote, the newly freed African-Americans were entitled to full representation in Congress—a very strange form of virtual representation—by members of Congress elected by whites in their states.<sup>133</sup> Further, the proposed amendments that based allocation of House seats on the number of eligible voters would result in taxation without representation of nonvoters such as women, children, and aliens throughout the country, who would lose the protection of their existing (virtual) representation.<sup>134</sup>

It was as obvious then as it is now that the people of the District were taxed without representation—at least without representation in Congress by representatives elected by the people of the District or elected specifically to represent them—and in some sense governed without their consent. Congress's debates over suffrage in the District, suffrage more generally, consent of the governed, and taxation without representation brought the matter into sharp relief. Several members of Congress frankly and expressly noted that the Constitution did not provide for the District to be represented in Congress<sup>135</sup> and that under the scheme required by the Constitution the people of the District were subject to taxation without representation, however anomalous that might be.<sup>136</sup> In fact, proposals were made to give the people of the District broader self-rule by treating the District more like a territory—proposals listed as item (6) in this Article's introduction.<sup>137</sup> The proposals would allow the people of the District to elect some of the legislators who would govern them in local matters and to elect a nonvoting delegate to the House, which already had nonvot-

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129. See FONER, *supra* note 44, at 199–203, 208–09, 244.

130. See *infra* text accompanying note 295.

131. Note that states that disenfranchised substantial numbers of adult males for other reasons, such as literacy or property requirements, also would face a loss of representation, at least in theory.

132. See *infra* text accompanying note 296.

133. See *id.*

134. See CONG. GLOBE, 39th Cong., 1st Sess. 141, 358 (1866). Advocates of voting rights for women were, of course, highly critical of this notion of virtual representation, as they were of efforts to enfranchise African-American men but not women of any race. See, e.g., FONER, *supra* note 44, at 255–56; Ann D. Gordon, Stanton *and the Right to Vote: On Account of Race or Sex*, in ELIZABETH CADY STANTON: FEMINIST AS THINKER: A READER IN DOCUMENTS AND ESSAYS 111, 112–16 (Ellen Carol DuBois & Richard Cándida Smith eds., 2007).

135. See *infra* text accompanying notes 171, 205, 246, 404–406.

136. See *supra* notes 65, 68, and accompanying text.

137. See *supra* text accompanying note 70.

ing delegates from the Arizona, Colorado, Dakota, Idaho, Montana, Nebraska, New Mexico, Utah, and Washington territories.<sup>138</sup>

With all of this focus on the District, and all of this focus on the very issues that even today make unjust the District's lack of representation in the House, the 39th Congress proposed the Fourteenth Amendment, and the states ratified it, including what was seen as its crucial Section Two, providing only for House seats to be "apportioned among the several States . . . counting the whole number of persons in each State . . . ."<sup>139</sup> It is simply beyond belief that Section Two's failure to provide for any seat or seats to be apportioned to the District was inadvertent.

### *B. The Detailed Evidence*

*The second section [of the proposed Fourteenth Amendment] refers to no persons except those in the States of the Union; but the first section refers to persons everywhere, whether in the States or in the Territories or in the District of Columbia.*

—Senator Lyman Trumbull, an influential moderate Republican and Chairman of the Senate Committee on the Judiciary, in arguing for H.R.J. Res. 127, the joint resolution that proposed the Fourteenth Amendment to the states.<sup>140</sup>

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138. See JOINT COMM. ON PRINTING, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 173 (2005), available at <http://www.gpoaccess.gov/serialset/cdocuments/hd108-222/39th.pdf>. The proposals finally were adopted in 1871. See *supra* note 61.

139. U.S. CONST. amend. XIV, § 2 (emphasis added).

140. CONG. GLOBE, 39th Cong., 1st Sess. 2894 (1866). Senator Trumbull, a former Illinois Supreme Court Justice and "[o]ne of the most influential men in Congress," chaired the Senate Committee on the Judiciary in the 37th through 42d Congresses. FONER, *supra* note 44, at 243; Biographical Directory of the United States Congress, Trumbull, Lyman, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=T000392> (last visited Apr. 29, 2009). Trumbull was the principal author of the Thirteenth Amendment, the main author and Senate sponsor of the Civil Rights Act of 1866, and the coauthor and sponsor of the 1866 bill to extend and strengthen the Freedmen's Bureau. See Civil Rights Act of 1866, S. 61, 39th Cong. (1st Sess. 1866); S. 60, 39th Cong. (1st Sess. 1866); see also Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1239 (1992); George Anastaplo, *Amendments to the Constitution of the United States: A Commentary*, 23 LOY. U. CHI. L.J. 631, 792 n.193 (1992); Michele Landis Dauber, *The Sympathetic State*, 23 LAW & HIST. REV. 387, 412–13 (2005); Kamal Ghali, *No Slavery Except as a Punishment for Crime: The Punishment Clause and Sexual Slavery*, 55 UCLA L. REV. 607, 626 (2008); Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 357 (2006). Not surprisingly, Trumbull was "a key figure in the drafting and adoption of the Fourteenth Amendment." John C. Eastman, *Politics and the Court: Did the Supreme Court Really Move Left Because of Embarrassment Over Bush v. Gore?*, 94 GEO. L.J. 1475, 1486 (2006); see also Garrett Epps, *Interpreting the Fourteenth Amendment: Two Don'ts and Three Dos*, 16 WM. & MARY BILL RTS. J. 433, 447–48 (2007).

*1. Formation of the Joint Committee on Reconstruction and Proposal of Precursors to Section Two of the Fourteenth Amendment, Focusing on how House Seats Would be Apportioned Among the States*

The African-American suffrage that the District suffrage bills would pioneer was a matter not only of justice. Equal suffrage—or at least some adjustment in House apportionment—also was necessary to the preservation of the victory won on the battlefield in the Civil War and to the political success of the Republicans.<sup>141</sup> The Thirteenth Amendment and the Emancipation Proclamation had freed the slaves, but the governments recognized by President Johnson in the formerly rebellious states limited suffrage to whites.<sup>142</sup> The existing apportionment provided those states with House representation based on their free populations as of the 1860 census plus three-fifths of their slave populations in that census.<sup>143</sup> It was bad enough that white, mostly anti-Union voters would elect House members from the formerly rebellious states—including House members in numbers inflated by three-fifths of the number of slaves as of 1860—but the next apportionment would be even worse. White anti-Union voters would elect additional House members because the former slaves would now be nominally free,<sup>144</sup> though still disenfranchised; thus the disenfranchised but freed slaves would count not as three-fifths in the apportionment of House

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141. “Republican Party” is used throughout this Article even though the Republican Party, in alliance with pro-Union Democrats, temporarily renamed itself the National Union Party for purposes of the 1864 presidential election. *See, e.g.*, Glenna R. Schroeder-Lein, *National Union Party* (1864), in 2 *ENCYCLOPEDIA OF THE RECONSTRUCTION ERA* 433–34 (Richard Zuczek ed., 2006); JOHN C. WAUGH, *REELECTING LINCOLN: THE BATTLE FOR THE 1864 PRESIDENCY* 21, 88–89 (1997).

142. Before the War’s end, “Union governments had been created within the Confederacy in Virginia, Tennessee, Arkansas, and Louisiana, but none had attracted truly broad support and none had been recognized by Congress.” FONER, *supra* note 44, at 73. On May 10, 1865, Johnson “extended recognition” to these governments, “none of which had enfranchised blacks.” *Id.* at 182. In late May, Johnson ordered the provisional governor of each of the remaining formerly rebellious states to “call a convention to amend the state’s prewar constitution so as to create a ‘republican form of government’ that would entitle [the state] to its rights within the Union.” *Id.* at 183. “White Southerners appreciated that Johnson’s Reconstruction empowered them to shape the transition from slavery to freedom and define blacks’ civil status without Northern interference.” *Id.* at 189. Johnson did not require the conventions to provide for black suffrage; he only required that they “acknowledge the abolition of slavery[.] . . . repudiate secession[.] . . . [and later] void state debts incurred in aid of the Confederacy.” *Id.* at 193. “Southerners who publicly advocated any form of black voting found themselves subject to tremendous abuse.” *Id.* at 192.

143. *See* Act of May 23, 1850, ch. 11, 9 Stat. 428, 432–33 (providing for the Secretary of the Interior to apportion two hundred thirty-three House seats based on each following decennial census, counting slaves at three-fifths); Act of Mar. 4, 1862, ch. 36, 12 Stat. 353 (fixing the number of House seats at two hundred forty-one); *see also* ANDERSON, *supra* note 58, at 62–65.

144. *See* CONG. GLOBE, 39th Cong., 1st Sess. 791–92 (1866) (statement of Rep. Williams); *see also* CONG. GLOBE, 39th Cong., App. 57 (1866) (statement of Rep. Julian) (“The freedmen of the South are not free, and cannot be, when left to the domination of their former masters, exasperated by their defeat in a war . . . . Sir, every gentleman on this floor knows what a shadow and a mockery is the freedom thus far vouchsafed to the millions now declared free by the Constitution . . . .”).

seats but as five-fifths. The extra power given to the formerly rebellious states both in the House and in the electoral college could have allowed them, in conjunction with northern Democrats, to control the government and reverse many of the gains won in the Civil War at such cost in blood.<sup>145</sup>

But neither the Republican “moderates” nor the nation at-large seemed ready yet to require the formerly rebellious states to grant equal suffrage.<sup>146</sup> Thus the congressional Republicans, while temporarily refusing to seat members of the House and Senate from the formerly rebellious states, took a different approach. The approach was designed to encourage

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145. See *supra* text accompanying note 46; *infra* text accompanying notes 146–150, 157–184. In elections for President and members of the House, it certainly would allow the vote of a white voter from a formerly rebellious state to count much more heavily than the vote of a voter from a loyal state. At least that would be the case absent enfranchisement of blacks or a change in the method of apportionment of House seats, and such a weighting of votes in favor of former rebels was unacceptable, or even “not conceivable.” See JAMES, *supra* note 46, at 21–22. Representative Baker spoke for many when he argued that there was a need to protect

the loyal people of the nation from the crying injustice and palpable danger of restoring the late rebel communities, as proposed by some, not to equal rights in this Union . . . as is delusively said, but on a basis giving to the recent traitors of the South, man for man, nearly double the political power in the popular branch of the Government, and over the future destinies of the Republic, which belongs to the loyal citizens of the country who have saved it from destruction at the hands of these very traitors.

. . . [I]s it not right that the ex-rebel . . . should be restored to *no more* political weight in the Government he has striven so hard to destroy, than is enjoyed by the northern patriot who has given all that was mortal of his son to some battle-trench of the South, or southern grave-yard where starved men were buried?

CONG. GLOBE, 39th Cong., 1st Sess. 462 (Jan. 27, 1866). Representative Boutwell waved the bloody flag even more graphically:

Can any party or any man defend the proposition now before the country to allow the States lately in rebellion to come in with their power undiminished, so that two rebel soldiers, whose hands are dripping with the blood of our fellow-men, whose opinions as to the right of this Government to exist are unchanged, shall exercise the political power of three loyal Union soldiers?

*Id.* at 2508 (May 9, 1866).

146. See FONER, *supra* note 44, at 251–55, 259–60; see also CONG. GLOBE, 39th Cong., 1st Sess. 704–05 (Feb. 7, 1866) (statement of Sen. Fessenden). Responding to Senator Sumner’s plea for a statute to be enacted providing for equal suffrage throughout the nation, Senator Fessenden asked,

But the argument that addressed itself to the committee was, what can we accomplish? What can pass? If we report [a Constitutional amendment providing for equal suffrage] is there the slightest probability that it will be adopted by the States and become a part of the Constitution of the United States? It is perfectly evident that there could be no hope of that description.

*Id.* at 704. In support of an amendment to restrict representation of States to the extent they disfranchised adult males, he argued that

the great excellence of it—and I think it is an excellence—is, that it accomplishes indirectly what we may not have the power to accomplish directly. If we cannot put into the Constitution, owing to existing prejudices and existing institutions, an entire exclusion of all class distinctions, the next question is, can we accomplish that work in any other way?

*Id.* at 705. In the debate over the nearly completed Fourteenth Amendment, H.R.J. Res. 127, 39th Cong. (1st Sess. 1866), and in explanation of its Section Two, Sen. Howard stated, “It was our opinion that three fourths of the States of this Union could not be induced to vote to grant the right of suffrage, even in any degree or under any restriction, to the colored race.” CONG. GLOBE, 39th Cong., 1st Sess. 2766 (May 23, 1866).

the formerly rebellious states to extend the franchise but also designed to deprive those states of power in the House and electoral college to the extent they refused to extend it. Thus, on December 4, 1865, in the Senate, and on December 5, 1865, in the House—in each case on the same day that each house’s District suffrage bill was introduced—four versions of what was to become Section Two of the Fourteenth Amendment were introduced as proposed constitutional amendments: one by Senator Sumner,<sup>147</sup> and one each by Representatives Schenck,<sup>148</sup> Stevens,<sup>149</sup> and Broomall.<sup>150</sup> Each provided for apportionment of the House based on the number of voters or qualified voters in each state. Thus, any state that disenfranchised substantial numbers of potential voters—such as African-Americans in former slave states—would lose representation.

Early on, Representative Blaine argued that using qualified voters rather than population as the basis for apportionment could have a dramatic unintended effect: states with large numbers of nonvoters—women, children, aliens—would lose representation, while states with few such nonvoters—particularly some western states to which many men had moved—would receive extra representation.<sup>151</sup> Others disagreed with his analysis,<sup>152</sup> but Blaine claimed that the percentage of the population qualified to vote

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147. S.J. Res. 1, 39th Cong. (1st Sess. 1865). Sumner had introduced a nearly identical resolution in the previous Congress on February 6, 1865, but it was reported back adversely from the Judiciary Committee and died. See S.J. Res. 108, 38th Cong. (2d Sess. 1865), available at <http://lcweb2.loc.gov/ammem/amlaw/lwslink.html> (with notation of referral to Judiciary Committee and adverse report from Senator Trumbell). Note that Sumner’s proposed amendment provided in part that “Representatives shall be apportioned among the several States . . . .” S.J. Res. 1, 39th Cong. (1st Sess. 1865) (emphasis added).

148. CONG. GLOBE, 39th Cong., 1st Sess. 9 (1865). According to the House Journal and Representative Schenck, the resolution was H.R.J. Res. 1. See H.R. JOUR., 39th Cong., 1st Sess. 16 (1865); CONG. GLOBE, 39th Cong., 1st Sess. App. 297 (Jan. 24, 1866) (statement of Rep. Schenck). In describing his resolution, Schenck said, “I propose that representation shall be apportioned among the several States of the Union . . . .” *Id.* (emphasis added).

149. CONG. GLOBE, 39th Cong., 1st Sess. 10 (1865). This was H.R.J. Res. 3, one of four proposed constitutional amendments introduced by Stevens that day. See *id.*; H.R. JOUR., 39th Cong., 1st Sess. 18 (1865). Note that Stevens’s proposed amendment provided in part that “Representatives shall be apportioned among the States which may be within the Union . . . .” CONG. GLOBE, 39th Cong., 1st Sess. 10 (1865) (emphasis added).

150. CONG. GLOBE, 39th Cong., 1st Sess. 10 (1865). This was H.R.J. Res. 6. See H.R. JOUR., 39th Cong., 1st Sess. 32 (1865). The exact text of Broomall’s proposed amendment has not been located. It is described in the *Globe* as “alter[ing] the Constitution of the United States, so as to base the representation in Congress upon the number of electors, instead of the population, of the several States,” CONG. GLOBE, 39th Cong., 1st Sess. 10 (1865) (emphasis added), and identically in the House Journal, except that the Journal omits the first and third commas in the quoted description. See H.R. JOUR., 39th Cong., 1st Sess. 32 (1865). On January 25, 1866, Broomall introduced another proposed constitutional amendment dealing with apportionment, an amendment that took very nearly the same approach finally adopted in Section Two of the Fourteenth Amendment. CONG. GLOBE, 39th Cong., 1st Sess. 433 (1866).

151. CONG. GLOBE, 39th Cong., 1st Sess. 141 (Jan. 8, 1866).

152. See *id.* (noting a suggestion by Stevens that voters who emigrated to and voted in western states would still provide representation for their state of origin); *id.* at 357–58 (Jan. 22, 1866) (argument by Rep. Conkling that the effect of changing from apportionment based on population to apportionment based on voters would be far less than the effect suggested by Blaine).

in the nineteen free states ranged from 19% to 58%. Thus, for example, California, with a population only 14% larger than Vermont's at the time, would be entitled, under a qualified voter apportionment, to over two and a half times as many seats in the House. As a result, states might eliminate literacy requirements and other voting requirements and even expand suffrage to very newly arrived aliens "in a rash and reckless effort" and "an unseemly scramble" to bolster their representation in the House; therefore, Blaine proposed that population should be used, but excluding any persons whose "civil or political rights or privileges are denied or abridged by . . . any State on account of race or color."<sup>153</sup>

Variations on these two approaches—apportionment based on eligible voters and apportionment based on population, not counting certain persons or groups denied various rights—were considered throughout the debates on what was to become Section Two of the Fourteenth Amendment. Notably, all of the proposed amendments appear to have restated, or at least retained, the approach of the original text of Article I, Section Two, Clause Three, providing for apportionment of House seats among the states and not among any other bodies or entities.<sup>154</sup> None provided for apportionment of House seats to the District, even though Congress was using the District suffrage bills to debate African-American suffrage and seeking to use the proposed apportionment amendments to encourage enfranchisement of the newly freed African-Americans.

Meanwhile, the formerly rebellious states lacked representation in Congress.<sup>155</sup> The legislatures of the governments recognized by President

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153. CONG. GLOBE, 39th Cong., 1st Sess. 141–42 (Jan. 8, 1866). For Senator Sumner's criticism of this language as implicitly authorizing states to disenfranchise persons on the basis of race (subject only to the penalty of reduction of representation), see *supra* note 59.

154. For example, Blaine's proposal seems to have been to retain the first portion of Article I, Section Two, Clause Three unchanged, but to replace later language—"adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three-fifths of all other Persons"—with new language: "taking the whole number of persons except those to whom civil or political rights or privileges are denied or abridged by the constitution or laws of any State on account of race or color." CONG. GLOBE, 39th Cong., 1st Sess. 141–42 (1866).

155. "The seats of the senators and representatives from the so-called Confederate States became vacant in the year 1861 . . . by the voluntary withdrawal of their incumbents, with the sanction and by direction of the legislatures or conventions of their respective States." REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, 39th Cong., 1st Sess., at XIX (1866), available at <http://books.google.com/books?id=dUgWAAAAYAAJ>. A few members of Congress from those states retained their seats and supported the Union. *Id.* Andrew Johnson was the only Senator to do so, and he later resigned and was appointed by Lincoln in 1862 to be military governor of Tennessee. *Andrew Johnson*, in 6 ENCYCLOPEDIA BRITANNICA 591 (15th ed. 1985); HANS L. TREFOUSSE, ANDREW JOHNSON: A BIOGRAPHY 143, 150–54 (1989). Horace Maynard continued to serve as a member of the House after Tennessee's attempted secession, though the House later refused to seat him or any other Representatives or Senators from the formerly rebellious states. Biographical Directory of the United States Congress, Maynard, Horace, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=M000284> (last visited Apr. 29, 2009); see *infra* notes 155–156. John Carlile continued to serve as a member of the House from Virginia after Virginia's attempted secession, and then as a Senator through the end of the 38th Congress in March 1865, along with Waitman T. Willey from Virginia after they were elected by the legislature of the

Johnson chose Senators and organized elections, with only whites voting, including elections for members of the House, but Congress refused to seat the would-be Senators and congressmen.<sup>156</sup> When the 39th Congress convened for the first time—on the House side<sup>157</sup>—on December 4, 1865, Representative Thaddeus Stevens introduced a joint resolution calling for a joint committee to be formed—made up of nine House members and six Senators—later known as the Joint Committee on Reconstruction or Joint Committee. The Joint Committee was to “inquire into the condition of the States which formed the so-called confederate States of America, and report whether they or any of them are entitled to be represented in either House of Congress, with leave to report at any time by bill or otherwise.”<sup>158</sup> The House immediately suspended its rules in order to consider the resolution and then adopted it without debate.<sup>159</sup> On December 12, 1865, the Senate adopted the resolution after amending it (1) to make it a

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Reorganized Government of Virginia in Wheeling and admitted to the Senate by an overwhelming vote. See Biographical Directory of the United States Congress, Carlile, John Snyder, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=C000150> (last visited Apr. 29, 2009); Legislation of the Reorganized Government of Virginia Meets in Extra Session, <http://www.wvculture.org/history/statehood/statehood08.html> (last visited April 29, 2009); 53 S. JOUR., 37th Cong., 1st Sess. 39–40 (1861). Senators from the newly admitted State of West Virginia were admitted to the Senate on December 7, 1863. 56 S. JOUR., 38th Cong., 1st Sess. 5–6 (1863).

156. President Lincoln had called the Senate into special session to be held immediately following the conclusion of the 38th Congress. See CONG. GLOBE, 38th Cong., Senate–Special Sess. of 39th Cong. 1424 (Mar. 4, 1865). Thus the 39th Congress convened, on the Senate side, on March 4, 1865, and heard the President’s Second Inaugural Address. 57 S. JOUR., 38th Cong., Senate–Special Sess. of 39th Cong. 346–47 (1865) (included in volume of *Globe* for 38th Congress even though actually a special session of the 39th Congress). Persons elected by the legislatures of the provisional governments of Arkansas, Virginia, and Louisiana sought to be seated as Senators, but the matter was deferred to the December regular session. *Id.* at 352. Senator Sumner introduced the following resolution, on which the Senate did not take action:

*Resolved*, That where a State has been declared to be in insurrection, no person can be recognized as senator from such State or as claimant of a seat as senator from such State until after the occurrence of three several conditions: first, the cessation of all armed hostility to the United States within the limits of such State; secondly, the adoption by such State of a constitution of government republican in form and not repugnant to the Constitution and laws of the United States; and thirdly, an act of Congress declaring that the people of such State are entitled to representation in the Congress of the United States.

*Id.* at 350–51. The Senate adjourned *sine die* on March 11, 1865. *Id.* at 356.

When the Senate reconvened for its first regular session on December 4, 1865, Sumner offered three resolutions combined under the heading of “Conditions of Restoration.” CONG. GLOBE, 39th Cong., 1st Sess. 2 (1865); H.R. JOUR., 39th Cong., 1st Sess. 6, 14 (1865).

When the House convened on December 4, 1865, for its first session of the 39th Congress, claimants to House seats from the formerly rebellious states—including Rep. Horace Maynard of Tennessee, one of the very few members of Congress from a formerly rebellious state who had remained in Congress when his state seceded, see *supra* note 155—were excluded from the roll called by the Clerk, pursuant to instruction from the Republican caucus, according to a Democratic member. CONG. GLOBE, 39th Cong., 1st Sess. 3–5 (1865). A motion to suspend the House rules to allow introduction of a motion to give such claimants the privilege of the floor was rejected a week later by more than a two-to-one vote. CONG. GLOBE, 39th Cong., 1st Sess. 22 (1865).

157. The Senate had met in special session from March 4 to March 11, 1865, on the President’s call, immediately after the close of the 38th Congress. See *supra* note 156.

158. CONG. GLOBE, 39th Cong., 1st Sess. 6 (Dec. 4, 1865).

159. See *id.*

concurrent resolution (which would not require presentment to President Johnson), (2) to delete an express provision prohibiting either House from admitting such representatives prior to receipt and consideration of the Joint Committee's report, and (3) to delete a provision requiring all papers relating to such matters to be referred to the Joint Committee without debate.<sup>160</sup> The proponent of the three amendments was concerned that the resolution as worded by the House would require agreement of the House and Senate not only on the question whether a formerly rebellious state was entitled to representation in the Congress, but also on the question whether a particular person's credentials qualified him to serve; on the former question neither House should act alone, but the latter question was one for each House to decide for itself.<sup>161</sup> The House concurred the next day after Stevens explained the Senate amendments.<sup>162</sup>

Senators Howard, Fessenden, and Trumbull explained why they supported the resolution. Speaking in support of the resolution as it was worded in the House, Howard stated that

the loyal people of the United States who have sacrificed so much of blood and treasure in the prosecution of the war, and who secured to us the signal victory which we have achieved over the rebellion, have a right to at least this assurance at our hands, that neither House of Congress will recognize as States any one of the rebel States

prior to receipt of the joint committee's report.<sup>163</sup> He argued that the formerly rebellious states "are simply conquered communities . . . in which the right of self-government does not now exist" because of their waging of a "bloody war" against the United States: "There is in those States no rightful authority . . . but that of the United States. . . . [The formerly rebellious states] are not to-day loyal States; their population are not willing to-day . . . to perform peaceably, quietly, and efficiently."<sup>164</sup> As of that time Howard could not "consent to recognize them, even indirectly, as entitled to be represented in either House of Congress." Readmission of such states to representation in the Congress would require "consent of both Houses and the formal recognition of the fact that hostilities have ceased and that loyalty is restored in the rebel States." The country was entitled to assurances that Congress would not "hastily readmit to seats in the legislative bodies here the representatives of constituencies who are

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160. See *id.* at 24–30 (Dec. 12, 1865); see also KENDRICK, *supra* note 1, at 142–54.

161. See CONG. GLOBE, 39th Cong., 1st Sess. 24 (Dec. 12, 1865) (statement of Sen. Anthony).

162. See *id.* at 46–47 (Dec. 13, 1865).

163. *Id.* at 24 (Dec. 12, 1865).

164. *Id.*

still hostile to the authority of the United States, and unwilling to cooperate with us in our legislation.”<sup>165</sup>

Senator Fessenden noted that readmission of the formerly rebellious states was a matter of “infinite importance . . . involving the integrity and welfare of the Republic in all future time;”<sup>166</sup> thus, Congress could not abdicate responsibility and simply follow President Johnson’s lead.<sup>167</sup> It was “very important that the two Houses should act in harmony,” and better to give the joint committee “a few weeks’ time, or even a few months’ time [than] take a step to be repented of in all our after lives and in all the future life of the Republic.”<sup>168</sup>

Senator Trumbull noted that it was “very desirable that we should have joint action upon this subject.”<sup>169</sup> He reminded the Senate that

State organizations in certain States of the Union ha[d] been usurped and overthrown. . . . There was a time when the Senator from Indiana, as well as myself, would not have thought of receiving a Senator from the Legislature or what purported to be the Legislature of South Carolina. When the people of that State, by their representatives, undertook to withdraw from the Union and set up an independent government in that State in hostility to the Union, when the body acting as a Legislature there was avowedly acting against this Government, neither he nor I would have received representatives from it. That was a usurpation which by force of arms we have put down. Now the question arises, has a State government since been inaugurated there entitled to representation? Is not that a fair subject of inquiry? Ought we not to be satisfied upon that point?<sup>170</sup>

Thus there was a focus on whether the formerly rebellious states were “States” that were entitled to representation, a focus that was maintained until those states were eventually readmitted to representation.

As Representative Boutwell later pointed out, it was not a question whether some of the people of a formerly rebellious state—or whether the people of a district within such a state—were loyal and thus deserved representation, nor was it a question of whether the would-be Senators and

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165. *Id.*

166. *Id.* at 27.

167. *See id.*

168. *Id.*

169. *Id.* at 29.

170. *Id.* at 29. The reference to “the Senator from Indiana” is to Senator Thomas A. Hendricks, Democratic Senator from Indiana, who had just spoken against the resolution. *See id.* at 28; Biographical Directory of the United States Congress, Hendricks, Thomas Andrews, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=H000493> (last visited Apr. 29, 2009).

Representatives sent by such a state were loyal; the question was whether the state, as a state, was entitled to representation in Congress:

It is said by gentlemen on the other side of the House that when they present a Representative here he must be a loyal man. I need not say to gentlemen acquainted with the technicalities of the law, that a loyal man, for all purposes of representation, is a man whose disloyalty cannot be proved. . . . We are false to our duty if we do not go further and require that in each of these States, before they are allowed representation, the masses of the people shall be loyal, for the representative will reflect the views of the people. You cannot gather figs from thorns or grapes from thistles. . . . *And it is not sufficient that there be loyal districts in the State. A State is represented in the Senate and in the House as a State. There is no constitutional capacity for representation except through State organization. Representatives in this House are apportioned by the Constitution among the several States.*<sup>171</sup>

On December 18, 1865, less than a week after the Senate adopted the resolution creating the Joint Committee, the House suspended its rules to provide that the District suffrage bill (H.R. 1) would be considered in early January 1866, as a “special order,”<sup>172</sup> which thus would take precedence over other matters. The House next proceeded to consider President Johnson’s State of the Union Address;<sup>173</sup> on Stevens’s motion, the House referred various items in the Address to the appropriate House committees. Stevens then provided the only comment in the House on the President’s Address, using the occasion to explain Stevens’s views on readmission of the formerly rebellious states, views which were similar to Senator Howard’s. As a starting point, “[t]he President assumes, what no one doubts, that the late rebel States have lost their constitutional relations to the Union, and are incapable of representation in Congress, except by permission of the Government.”<sup>174</sup>

In his Address, President Johnson noted that he had restored the governments of the formerly rebellious states, that those states had chosen Senators and Representatives, and that he had called on the restored state governments to ratify the Thirteenth Amendment. Ratification of that amendment by a formerly rebellious state, according to Johnson, would open the door to the state once again being represented in the Congress.

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171. CONG. GLOBE, 39th Cong., 1st Sess. 2508–09 (May 9, 1866) (emphasis added).

172. CONG. GLOBE, 39th Cong., 1st Sess. 72 (Dec. 18, 1865).

173. See President Andrew Johnson, First Annual Message, CONG. GLOBE, 39th Cong., 1st Sess. App. 1 (Dec. 4, 1865).

174. CONG. GLOBE, 39th Cong., 1st Sess. 72 (1865).

The next step then would be up to Congress: “Here it is for you, fellow-citizens of the Senate, and for you, fellow-citizens of the House of Representatives, to judge, each of you for yourselves, of the elections, returns, and qualifications of your own members.”<sup>175</sup>

But Stevens had a very different view from that of the President. It was not a matter of judging elections, returns, and qualifications, such as whether the person who claimed a House seat met the age, residency, and citizenship qualifications, all of which would be judged by each House only for itself.<sup>176</sup> There was a much more foundational prior question. In Stevens’s view, the formerly rebellious states had placed themselves outside the Union, or at least had rendered themselves dead or defunct as states of the Union, that is, “as to all national and political action.”<sup>177</sup> Thus, the United States could treat them as conquered territory and action by Congress would be needed to readmit them as new states or to revive them as states entitled to representation in Congress.<sup>178</sup> Only Congress could act to admit a new state, and Congress had authority to determine whether any formerly rebellious state had a republican form of government that would justify reviving its political relations with the Union.<sup>179</sup> Until Congress so acted, the formerly rebellious states should be governed as territories.<sup>180</sup> And the formerly rebellious states should not be readmitted until after the Constitution had been “so amended as to make it what its framers intended; and so as to secure perpetual ascendency to the party of the Union; and so as to render our republican Government firm and stable forever.”<sup>181</sup> Stevens also argued that only loyal states should count in determining whether an amendment had been ratified by a sufficient number of states, so that ratification by three-quarters of loyal states would suffice; he thought establishment of that principle was “of vital importance.”<sup>182</sup>

The first required amendment, according to Stevens, would be an amendment dealing with apportionment of the House, like the provision that is now Section Two of the Fourteenth Amendment, though based on

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175. Johnson, *supra* note 173, at 2.

176. See CONG. GLOBE, 39th Cong., 1st Sess. 73–74 (Dec. 18, 1865).

177. *Id.* at 72.

178. See *id.* at 72–73.

179. See *id.* at 72–74; see also U.S. CONST. art. IV, § 4 (the Guarantee Clause).

180. See CONG. GLOBE, 39th Cong., 1st Sess. 74 (Dec. 18, 1865).

181. *Id.*; see also CONG. GLOBE, 39th Cong., 1st Sess. at 293–98 (Jan. 16, 1866) (statement of Sen. Wade) (explaining requirements he would seek to impose before allowing formerly rebellious states to resume their political status in the Union, including equal suffrage); *id.* (statement of Sen. Stewart disagreeing).

182. CONG. GLOBE, 39th Cong., 1st Sess. 74 (Dec. 18, 1865). For a discussion of this “true-blue-only” theory, which ultimately was not adopted by the Republicans in Congress, see AMAR, *supra* note 31, at 367–68, 378–79. Senator Sumner’s rationale for the theory can be found in his proposed concurrent resolution regarding ratification of the Thirteenth Amendment. See CONG. GLOBE, 39th Cong., 1st Sess. 2 (Dec. 4, 1865).

number of voters rather than population. That is the key for our purposes—though it should be noted that Stevens also argued prophetically that if Congress failed to provide homesteads for the newly freed slaves and “hedge them around with protective laws,” Congress would “deserve and receive the execration of history and of all future ages.”<sup>183</sup> Stevens explained:

The first of those amendments is to change the basis of representation among the States from Federal numbers to actual voters. Now all the colored freemen in the slave States, and three fifths of the slaves, are represented, though none of them have votes. The States have nineteen representatives of colored slaves. If the slaves are now free then they can add, for the other two fifths, thirteen more, making the slave representation thirty-two. I suppose the free blacks in those States [who were not slaves] will give at least five more, making the representation of non-voting people of color about thirty-seven. The whole number of representatives now from the slave States is seventy. Add the other two fifths and it will be eighty-three.

If the amendment prevails, and those States withhold the right of suffrage from persons of color, it will deduct about thirty-seven, leaving them but forty-six. With the basis unchanged, the eighty-three southern members, with the Democrats that will in the best times be elected from the North, will always give them a majority in Congress and in the Electoral College. They will at the very first election take possession of the White House and the halls of Congress. I need not depict the ruin that would follow. Assumption of the rebel debt or repudiation of the Federal debt would be sure to follow. The oppression of the freedmen; the reamendment of their State constitutions, and the reestablishment of slavery would be the inevitable result. That they would scorn and disregard their present constitutions, forced upon them in the midst of martial law, would be both natural and just. . . . If they should grant the right of suffrage to persons of color, I think there would always be Union white men enough in the South, aided by the blacks, to divide the representation, and thus continue the Republican ascendancy. If they should refuse to thus alter their election laws it would reduce the representatives of the late slave States to about forty-five and render them powerless for evil.

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183. CONG. GLOBE, 39th Cong., 1st Sess. 74 (Dec. 18, 1865).

It is plain that this amendment must be consummated before the defunct States are admitted to be capable of State action, or it never can be.<sup>184</sup>

Three days later Congress adjourned for two weeks. When it reconvened in January, the District suffrage bills moved to center stage. Some explanation of why the District played such a key role is in order.

## 2. *The District as Opening Wedge: Abolition*

It is not surprising that the District of Columbia should have figured so prominently in the debates over the Fourteenth Amendment and Reconstruction more generally in the 39th Congress. As early as 1805, a resolution was introduced in the House to provide for slave children in the District to be freed “when they reached maturity,” though it was rejected.<sup>185</sup> (Coincidentally, 1805 was also the year that the Marshall Court in *Hepburn v. Ellzey*<sup>186</sup> clearly held—or at least determined as a key part of its ratio decidendi—that the District was not a “State” within the meaning of that term in Article I of the Constitution.) In 1835 abolitionists began a campaign of petitions to Congress asking for slavery to be abolished in the District, an “arguably more constitutional and assuredly more conservative” goal, given the District Clause, than a request for Congress to abolish slavery generally.<sup>187</sup> The result was an “avalanche” of petitions,<sup>188</sup> leading to a “gag rule” (actually a series of gag rules) in the House prohibiting consideration of such petitions, and then constant struggles within the House over the gag rule, in which John Quincy Adams featured prominently, until the gag rule was abolished in 1844.<sup>189</sup> In 1849, Congressman Abraham Lincoln tried to introduce a provision that would have led to abolition in the District.<sup>190</sup> In 1850, the slave trade was abolished in the District as part of the Compromise of 1850. Southern members of Congress believed abolition of the slave trade in the District “would be merely

184. *Id.* Under his “true-blue-only” view, any coerced ratification by formerly rebellious states before their full readmission would not count. Thus, under his view, the formerly rebellious states could have no effect on ratification until readmitted. Their readmission would increase the number of state ratifications required to reach three-quarters, and they would certainly refuse to ratify such an amendment.

185. 1 GREEN, *supra* note 61, at 53; *see also* 14 ANNALS OF CONG. 995–96 (1805).

186. 6 U.S. (2 Cranch) 445 (1805); *see also supra* note 72.

187. 1 WILLIAM W. FREEHLING, THE ROAD TO DISUNION: SECESSIONISTS AT BAY (1776–1854) 310–11 (1991).

188. *Id.* at 311.

189. *Id.* at 310; WILLIAM LEE MILLER, ARGUING ABOUT SLAVERY: JOHN QUINCY ADAMS AND THE GREAT BATTLE IN THE UNITED STATES CONGRESS 139 (1998). For a description of the Senate’s version of the gag rule, see United States Senate, Art & History Home: Historical Minutes (1801–1850): Gag Rule, [http://www.senate.gov/artandhistory/history/minute/Gag\\_Rule.htm](http://www.senate.gov/artandhistory/history/minute/Gag_Rule.htm) (last visited Apr. 29, 2009).

190. 1 GREEN, *supra* note 61, at 178; CONG. GLOBE, 30th Cong., 2d Sess. 212, 244 (1849).

the first step on a path that would end in emancipation. They fought the proposal for months, and then probably only Henry Clay's insistence that it was an essential part of the great compromise persuaded them to yield."<sup>191</sup> When the Civil War began, the loyalty of the District's citizens was doubted; the mayor of Washington fed those concerns by refusing to take a loyalty oath,<sup>192</sup> whereupon "armed guards hurried him off to Fort Lafayette in New York Harbor, where he remained imprisoned for a month until he resigned the mayoralty, took the loyalty oath, and thus obtained his release."<sup>193</sup> Lincoln's hope that border states would embrace compensated emancipation of slaves did not bear fruit,<sup>194</sup> but in April 1862 Congress established such a plan for the District, emancipating all slaves owned by residents of the District and providing some compensation for slave owners.<sup>195</sup>

As supporters and opponents of black suffrage both recognized, the District of Columbia had served as a testing ground, or leading indicator, during the Civil War. This was true of the abolition of slavery.<sup>196</sup> Abolition in the District was followed five months later, in September 1862, by President Lincoln's Preliminary Emancipation Proclamation,<sup>197</sup> stating that a proclamation would be made on January 1, 1863, "designat[ing] the States, and parts of states, if any, in which the people thereof respectively, shall then be in rebellion against the United States," and stating that slaves held in such areas would be "thenceforward, and forever free."<sup>198</sup> On January 1, 1863, Lincoln followed through on that promise and promulgated the Emancipation Proclamation,<sup>199</sup> freeing slaves in rebel-held territory.

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191. 1 GREEN, *supra* note 61, at 178–79; *see also* Primary Documents in American History: Compromise of 1850, <http://www.loc.gov/rr/program/bib/ourdocs/Compromise1850.html> (providing further information about the Compromise of 1850).

192. 1 GREEN, *supra* note 61, at 249.

193. *Id.*; *see also* ALAN LESSOFF, THE NATION AND ITS CITY: POLITICS, "CORRUPTION," AND PROGRESS IN WASHINGTON, D.C., 1861–1902, at 40 (1994).

194. ALLEN C. GUELZO, LINCOLN'S EMANCIPATION PROCLAMATION: THE END OF SLAVERY IN AMERICA 91–95 (2004).

195. 1 GREEN, *supra* note 61, at 274; *see also* Act of Apr. 16, 1862, ch. 54, 12 Stat. 376–78 (An Act for the Release of Certain Persons Held to Service or Labor in the District of Columbia); DAVID L. LEWIS, DISTRICT OF COLUMBIA: A BICENTENNIAL HISTORY 58 (1976).

196. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 246 (Jan. 16, 1866) (statement of Sen. Davis) (complaining that the same tactic was being used with regard to black suffrage that had earlier been used with regard to abolition of slavery, "when the assault upon slavery in this District heralded the general movement that was to be made against it"). Constance Green calls the abolition of slavery in the District "the first break in sixty years in the protective wall about slavery." 1 GREEN, *supra* note 61, at 275.

197. *See* President Abraham Lincoln, Preliminary Emancipation Proclamation (Sept. 22, 1862), *reprinted in* 12 Stat. 1267 (1863); *see also* New York State Library, Preliminary Emancipation Proclamation: A Virtual Exhibit, <http://www.nysl.nysed.gov/library/features/ep/> (last visited Apr. 29, 2009).

198. *Id.*

199. President Abraham Lincoln, The Emancipation Proclamation (Jan. 1, 1863), *reprinted in* 12 Stat. 1268 (1863), *available at* [http://www.archives.gov/exhibits/featured\\_documents/emancipation\\_proclamation/transcript.html](http://www.archives.gov/exhibits/featured_documents/emancipation_proclamation/transcript.html).

On January 31, 1865, the 38th Congress proposed the Thirteenth Amendment to the states for ratification.<sup>200</sup> In April of that year, President Lincoln was assassinated in Washington, D.C. (less than a week after Lee's surrender to Grant at Appomattox on April 9, 1865).<sup>201</sup> As David Lewis tells us, "[t]he assassination of Lincoln changed the climate of Washington's politics overnight. With the ascendancy of radical Republicans in Congress . . . the speedy advancement of local [District] blacks became the touchstone for a program of national Reconstruction."<sup>202</sup> On December 6, 1865, the legislature of Georgia's provisional state government provided the final needed ratification<sup>203</sup> of the Thirteenth Amendment, and thus slavery was abolished throughout the United States.

### *3. The District as Opening Wedge: African-American Suffrage and Initial Consideration of the District Suffrage Bills*

*The District bill opens the great question of suffrage.*

—Senator Charles Sumner, a leading Radical Republican, in reference to the Senate bill for African-American suffrage in the District of Columbia, S. 1.<sup>204</sup>

*[T]he position of the District of Columbia is entirely anomalous in our system. One hundred and twenty-five thousand people, citizens*

200. CONG. GLOBE, 38th Cong., 2d Sess. 523, 531 (1865) (showing passage in House of S.J. Res. No. 16).

201. See, e.g., FONER, *supra* note 44, at 74–75; JAY WINIK, APRIL 1865: THE MONTH THAT SAVED AMERICA 165–66, 181–91, 315–23, 335–36 (2001) (noting Lee's surrender to Grant at Appomattox, Johnston's surrender to Sherman, the surrender of the other Confederate generals, the capture of Jefferson Davis, and President Johnson's proclamation declaring that the "armed resistance" was "virtually at an end"); Letters from Gen. Robert E. Lee to Gen. Ulysses S. Grant (April 9, 1865), in 43 HARVARD CLASSICS: AMERICAN HISTORICAL DOCUMENTS, 1000–1904, at 447–48 (Charles W. Eliot ed., 1910), available at <http://books.google.com/books?id=MGYCAAAAYAAJ>.

202. LEWIS, *supra* note 195, at 63.

203. See, e.g., AMAR, *supra* note 31, at 366; U.S. GPO, THE CONSTITUTION OF THE UNITED STATES OF AMERICA AS AMENDED, WITH UNRATIFIED AMENDMENTS & ANALYTICAL INDEX, H.R. DOC. NO. 110-50, at 16 (2007), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110\\_cong\\_documents&docid=f:hd050.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_documents&docid=f:hd050.pdf) [hereinafter U.S. CONST. & ANALYTICAL INDEX]; see also AMAR, *supra* note 31, at 376–80 (explaining Congress's approach to counting ratifications by formerly rebellious states that were required to ratify the Fourteenth Amendment to obtain readmission to representation in Congress); *supra* notes 182, 184 (noting that under a "true-blue-only" approach, the Thirteenth Amendment would have been ratified sooner).

204. CONG. GLOBE, 39th Cong., 1st Sess. 231 (Jan. 15, 1866); see also Donald K. Pickens, *Sumner, Charles*, in 2 ENCYCLOPEDIA OF THE RECONSTRUCTION ERA, 620, 620–25 (Richard Zuczek ed., 2006); Lawrence N. Powell, *Sumner, Charles*, in BIOGRAPHICAL DICTIONARY OF THE UNION, 516, 516–17 (John T. Hubbell & James W. Geary eds., 1995). Biographical Directory of the United States Congress, Sumner, Charles, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=S001068> (last visited Apr. 29, 2009). Note that in 1870 Sumner introduced a bill calling for integration of the D.C. school system. LEWIS, *supra* note 195, at 61.

*of the United States, residing within this District, have no representation on this floor. They have no rights as citizens except to pay taxes, to elect their own municipal officers, and to be subject to the exclusive control of Congress without appeal. They are bound hand and foot, and in that condition, without the right to be represented on this floor to present their own grievances, they are subject to the caprice or the despotic power of Congress in all respects.*

—Representative Thomas Treadwell Davis, Republican of New York and supporter only of qualified African-American suffrage, urging caution in consideration of the House bill for District suffrage, H.R. 1.<sup>205</sup>

Only two days earlier, on December 4, 1865, the 39th Congress had convened for its first regular session.<sup>206</sup> The first bill<sup>207</sup> introduced in each House dealt with African-American suffrage, not nationally, but rather in local elections in the District of Columbia.<sup>208</sup> Once again, now with respect to African-American suffrage as before in the context of abolishing slavery, Congress would act first in the District, using it to some extent as a proving ground. As Senator Sumner explained, referring to S. 1, “[T]he District bill opens the great question of suffrage.”<sup>209</sup> The debates over S. 1 and H.R. 1 ranged widely, as if the issue were African-American suffrage generally, not merely suffrage within the District. Referring to H.R. 1, historian George P. Smith noted (in 1970) that “[t]he introduction of a bill allowing Negro suffrage in the District of Columbia precipitated the debate,”<sup>210</sup> and that “[f]rom this debate emerged the outlines of the struggle over Section Two of the Fourteenth Amendment,”<sup>211</sup> which was designed to encourage states to grant voting rights to African-Americans. Several versions of proposed constitutional amendments dealing with the basis of apportionment of the House—precursors to Section Two of the Fourteenth Amendment—had been introduced as joint resolutions during December

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205. CONG. GLOBE, 39th Cong., 1st Sess. 215 (Jan. 12, 1866); *see also* Biographical Directory of the United States Congress, Davis, Thomas Treadwell, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=D000139> (last visited Apr. 29, 2009).

206. CONG. GLOBE, 39th Cong., 1st Sess. 1, 3 (Dec. 4, 1865).

207. Six joint resolutions were introduced the same day in the House, either five or six of them before H.R. 1 was introduced. *Compare* H.R. JOUR., 39th Cong., 1st Sess. 32 (1865) (showing H.R. 1 introduced after Broomall’s H.R.J. Res. 6), *with* CONG. GLOBE, 39th Cong., 1st Sess. 10 (1865) (showing H.R. 1 introduced before Broomall’s resolution).

208. *See* S. 1, 39th Cong. (1st Sess. 1865) (introduced Dec. 4, 1865, by Sen. Wade); H.R. 1, 39th Cong. (1st Sess. 1865) (introduced Dec. 5, 1865, by Rep. Kelley); *supra* notes 60–61 and accompanying text.

209. CONG. GLOBE, 39th Cong., 1st Sess. 231 (Jan. 15, 1866).

210. Smith, *supra* note 60, at 829.

211. *Id.* at 834.

1865.<sup>212</sup> On January 8, 1866, Representative Blaine delivered a powerful and influential speech introducing his proposed version of such a constitutional amendment, a proposal Blaine predicted would “secure the right of suffrage to the colored population throughout the South in a very few years.”<sup>213</sup>

Two days later, on January 10, 1866, the House and the Senate took up their respective District suffrage bills, H.R. 1 and S. 1,<sup>214</sup> also dealing, of course, with African-American suffrage, and designed to serve as possible stepping-stones to enfranchisement of African-Americans nationwide. The House passed H.R. 1 only eight days later, on January 18, 1866.<sup>215</sup> During those few days of debate, supporters of the bill in the House, including Representatives Wilson<sup>216</sup> (who introduced H.R. 1), Farnsworth,<sup>217</sup> Julian,<sup>218</sup> Boutwell,<sup>219</sup> and Thayer,<sup>220</sup> all used the debate on H.R. 1 to address the broader national question of African-American suffrage. Opponents in the House did the same, including Representatives Rogers,<sup>221</sup> Johnson,<sup>222</sup> and Chanler,<sup>223</sup> as did two members in favor of qualified African-American suffrage, Representatives Davis<sup>224</sup> and Kasson.<sup>225</sup>

Thus, many House members argued for use of the District to pioneer or experiment with equal suffrage, including Wilson, Scofield, Julian, Thayer, Clarke, and Boutwell.<sup>226</sup> Julian hoped Congress would

let the experiment be fairly made here, on this model political farm of the nation. Should it fail, Congress will abandon it; should it work well, it may prove a most excellent forerunner of measures of larger justice to the colored race in our land . . . I agree that the passage of this bill would tend to open the way to perfect equality before the law in all the States. I do not deny that the pub-

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212. See *supra* note 207 and accompanying text.

213. CONG. GLOBE, 39th Cong., 1st Sess. 142 (1866).

214. *Id.* at 162, 173.

215. *Id.* at 311.

216. *Id.* at 173–74 (Jan. 10, 1866).

217. *Id.* at 205, 207 (Jan. 11, 1866).

218. *Id.* at 255, 257–59 (Jan. 16, 1866) (noting also that enfranchising the blacks in the District would be an appropriate punishment for disloyal whites in the District).

219. *Id.* at 309 (Jan. 18, 1866).

220. *Id.* at 281–82 (Jan. 17, 1866).

221. *Id.* at 201 (Jan. 11, 1866).

222. *Id.* at 306 (Jan. 18, 1866).

223. *Id.* at 216–18 (Jan. 12, 1866).

224. *Id.* at 215 (Jan. 12, 1866).

225. *Id.* at 238–40 (Jan. 15, 1866).

226. *Id.* at 174–75 (Jan. 10, 1866) (statement by Rep. Wilson); *id.* at 179 (Jan. 10, 1866) (statement by Rep. Scofield); *id.* at 258–59 (Jan. 16, 1866) (statement by Rep. Julian); *id.* at 281 (Jan. 17, 1866) (statement by Rep. Thayer); *id.* at 305 (Jan. 18, 1866) (statement by Rep. Clarke (of Kansas)) (“The establishment of impartial suffrage in this District will be a fitting commencement of the work.”); *id.* at 309 (Jan. 18, 1866) (statement by Rep. Boutwell).

lic would so understand it, and I decline none of the consequences of my vote.<sup>227</sup>

An opponent, Representative Boyer, recognized that the District suffrage bills would “inaugurate here, upon this most conspicuous stage, the first act of the new political drama which is intended to culminate in the complete political equality of the races and the establishment of negro suffrage throughout the States.”<sup>228</sup> Rogers argued that “[i]f this bill becomes a law it will be but the entering wedge to negro suffrage and equality all over this land.”<sup>229</sup> Representative J.L. Thomas argued that the effort “to force negro political equality in this District is not only, in the language of Henry Clay, ‘a gross violation of good faith’ toward the people of this District and of the State of Maryland, but is the beginning of similar efforts to force the States of this Union to adopt negro political equality.”<sup>230</sup>

The District seemed the obvious place to begin with black suffrage. Wilson argued that the Constitution did not discriminate on the basis of color and neither should Congress in legislating for the Republic’s capital.<sup>231</sup> If the Constitution

refrains from trampling on the great truth which glitters like a jewel of the first water in the heart of the old declaration, that “all men are created equal,” and that “Governments derive their just powers from the consent of the governed,” why should the [District’s statute-law] put its unhallowed foot upon this grand central idea of our system and crush it under the very folds of the nation’s flag as it floats on the dome of the Capitol?<sup>232</sup>

Thayer argued that the question of District suffrage “involv[es], it may be, the honor, the justice, the good faith, and the magnanimity of the great nation which makes this little spot the central seat of its empire and its power.”<sup>233</sup> He urged Congress to “give hope and encouragement to that [African] race beginning, as it does now for the first time, its career of freedom, by erecting here in the capital of the Republic a banner inscribed

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227. *Id.* at 259 (Jan. 16, 1866) (statement by Rep. Julian).

228. *Id.* at 176 (Jan. 10, 1866) (statement by Rep. Boyer); *see also id.* at 250 (Jan. 16, 1866) (statement of Rep. Davis) (supporting only qualified African-American suffrage, and stating that the District suffrage issue was an entering wedge for black suffrage in the whole United States).

229. H.R. REP. NO. 2, at 2 (Dec. 15, 1865) (minority report from House Committee on the Judiciary, submitted by Rep. Rogers).

230. CONG. GLOBE, 39th Cong., 1st Sess. 262 (Jan. 16, 1866).

231. *Id.* at 173 (Jan. 10, 1866).

232. *Id.*

233. *Id.* at 281 (Jan. 17, 1866).

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with the sacred legend of the elder days, 'All men are born free and equal.'"<sup>234</sup>

Boutwell gave a different argument for using the District to pioneer black suffrage. He argued generally in favor of black suffrage and stated that unless the formerly rebellious states were required to grant blacks suffrage, any "restoration" of them "to political power in the Government of this country" would "open[] a way to the destruction of this Government from which there is no escape."<sup>235</sup> Boutwell then argued that restrictions on black suffrage in the District should be rejected, because the formerly rebellious states were "not likely to do anything more for themselves," (with respect to black suffrage) than Congress was willing to do "for the country when you pass judgment and establish your policy here."<sup>236</sup> He noted that limitations on black suffrage that Congress might adopt for the District (such as literacy requirements) would be adopted and then applied unfairly in the formerly rebellious states to disenfranchise blacks: "In South Carolina and Alabama it is a question of administration; and do you suppose the men who will preside and decide this question will come to the conclusion that a negro can read when the result is that he must also vote?"<sup>237</sup>

Another reason it seemed to make sense to use the District to pioneer black suffrage, or to serve as such an experiment in black suffrage, was that the stakes seemed lower (initially at least) in the District than elsewhere, in part precisely because the District voters did not elect House members. "In this District no vote is cast for President, member of Congress, judge of the courts, nor any officer except the administrators of local affairs, in which all citizens, however ignorant in national matters, are necessarily well informed."<sup>238</sup> Even Boyer, an opponent, conceded that

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234. *Id.* at 282.

235. *Id.* at 309 (Jan. 18, 1866).

236. *Id.* at 310.

237. *Id.* Unfair application of literacy requirements and other voting requirements of course was a device used through much of the twentieth century to disenfranchise African-Americans. *See, e.g.,* South Carolina v. Katzenbach, 383 U.S. 301, 308-13 (1966); *Need for Preclearance*, 122 HARV. L. REV. 495, 495 (2008).

238. CONG. GLOBE, 39th Cong., 1st Sess. 179 (Jan. 10, 1866) (statement of Rep. Scofield). Representative Julian similarly stated:

It should be further remembered, Mr. Speaker, that the bill before us relates exclusively to this District, and those municipal and police powers which are to be exercised here under the laws of Congress. Were it in fact dangerous and unwise to give the negro a voice in the general legislation of the country, I can see no objection whatever to the experiment of black suffrage in this District, in the purely local administration of its affairs.

*Id.* at 258-59. The author of the bill, Representative Wilson, noted that he hoped the bill would allow the loyal citizens of the District (the "true men") to "control the municipal governments of Washington and Georgetown." *Id.* at 174. Rep. Hale, though denying that the District should be seen as a model for what should be done in the states, *id.* at 280, noted that Congress "simply propose[d] to delegate certain local and administrative powers to the inhabitants of this District, or some of them, in such manner as we shall deem best." *Id.* at 279.

the bill would be unimportant if all that was involved was black suffrage in the District (though, as Boyer noted, there was more involved) because “[t]he people of this District have no political significance. They vote only in municipal affairs . . . .”<sup>239</sup> Of course, as was recognized, this meant that the residents of the District were being taxed without representation.<sup>240</sup>

A final good reason for using the District, rather than a state, for an experiment with (or a stepping-stone for) black suffrage was that the District Clause gave Congress authority to regulate who could vote in the District<sup>241</sup>—as even almost all opponents of the District suffrage bills recognized<sup>242</sup>—but there was great controversy over whether Congress had authority to do so in the states, even in the conquered, formerly rebellious states.<sup>243</sup> Article I, Section Two, of the Constitution seemed to give states the authority to determine who was eligible to vote for Congress because that was determined by who was eligible to vote for the most numerous branch of the state legislature.<sup>244</sup> Thus, supporters of the bill emphasized that Congress was authorized by the District Clause to determine who should have the franchise in the District, so that Congress could make that decision while remaining comfortably within its constitutional powers.<sup>245</sup> In fact, Thayer stressed the point that the residents of the District did not elect members of Congress: “I deny that I sit here as a Representative of the people of this District. They have no Representative . . . .”<sup>246</sup> Thus, Thayer argued, Congress need not defer to any wish of the people of the District (the whites at least, who had voted against allowing black suffrage) in deciding whether blacks should be given voting rights.<sup>247</sup>

House members continued to propose constitutional amendments that would amend Article I, Section Two, with respect to apportionment of the House. Two such proposals were introduced on January 15, 1866: one by

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239. *Id.* at 176 (Jan. 10, 1866).

240. *See supra* text accompanying note 205.

241. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 173 (Jan. 10, 1866) (statement of Rep. Wilson) (“This is too plain a proposition to admit of debate . . . .”); *id.* at 179 (statement of Rep. Scofield); *id.* at 182 (statement of Rep. Kelley); *id.* at 255 (Jan. 16, 1866) (statement of Rep. Julian); *id.* at 303 (Jan. 18, 1866) (statement of Rep. Clarke of Kansas).

242. *See id.* at 303 (Jan. 18, 1866) (statement by Rep. Clarke of Kansas) (“The right of Congress, and not the people of this District, to settle this matter, is clear and undoubted, and is acknowledged by those who oppose this bill.”); *see also id.* at 175 (Jan. 10, 1866) (statement of Rep. Boyer); *id.* at 201 (Jan. 11, 1866) (statement of Rep. Rogers); *id.* at 261 (Jan. 16, 1866) (statement of Rep. J.L. Thomas). *But see id.* at 216 (Jan. 12, 1866) (statement of Rep. Chanler).

243. *See, e.g., id.* at 235–37 (Jan. 15, 1866) (statement by Rep. Kasson); *id.* at 261 (Jan. 16, 1866) (statement by Rep. J.L. Thomas).

244. *See, e.g., id.* at 236 (Jan. 15, 1866) (statement by Rep. Kasson) (quoting language of U.S. CONST. art. I, § 2, cl. 1).

245. *See, e.g., id.* at 179 (Jan. 10, 1866) (statement of Rep. Scofield).

246. *Id.* at 282 (Jan. 17, 1866) (statement of Rep. Thayer).

247. *Id.*

Representative Conkling<sup>248</sup> shortly before the House returned to its discussion of District suffrage (by way of a humorous and very pointed resolution introduced by Representative Broomall<sup>249</sup>) and one by Representative Orth<sup>250</sup> in the middle of further discussion of District suffrage.

Thus, in the context of a bill that was being used to discuss general issues of suffrage, members of Congress highlighted the very limited nature of the voting permitted to District residents, and, in particular, that District residents (although taxed) did not elect any members of Congress,<sup>251</sup> all while considering Article I, Section Two, of the Constitution and the rights it might provide for voters within “the several States.” And that took place in the context of proposals to amend Article I, Section Two, in order to encourage states to grant suffrage to African-Americans. Thus far it would seem undeniable—and it would have been plain at the time to anyone paying attention to what was happening—that the members of the House had their eyes very wide open to the reality that, under the Constitution, the District was not represented in Congress and that it still would not be represented under the proposed constitutional amendments.

The Senate also took up its District suffrage bill on January 10, 1866, and also initially moved quickly. On January 10, the same day S.1 was reported with amendments by the Senate Committee on the District of Columbia, the Senate considered the amendments in the Committee of the Whole and then recommitted the bill to the Committee, which reported the bill back two days later.<sup>252</sup> The bill was considered briefly on January 15 and 16, 1866, with Senator Sumner noting during the discussion of procedure on the 15th that “[t]he District bill opens the great question of suffrage.”<sup>253</sup> The Senate then turned to the question whether to refer a resolution on organization of provisional governments in the South to the Joint Committee,<sup>254</sup> then to the Freedmen’s Bureau bill,<sup>255</sup> and then to other matters. Thus the Senate did not consider S. 1 again until June 27, 1866,<sup>256</sup> and then not again prior to adjournment of the Congress on July

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248. *Id.* at 233 (Jan. 15, 1866).

249. *Id.* Broomall’s resolution called on the House Committee for the District of Columbia to look into holding an election at which black residents of the District would vote on whether white residents should have voting rights. This was a pointed rebuttal to the claims that Congress should defer to the supposed wishes of the residents of the District that suffrage not be extended to African-Americans, *as shown by a whites-only election*. The *Globe* reported the reaction to Broomall’s resolution (which quickly was tabled): “[Great laughter.]” *Id.*

250. *Id.* at 235.

251. *See, e.g., id.* at 215 (Jan. 12, 1866) (statement of Rep. Davis).

252. *See* CONG. GLOBE, 39th Cong., 1st Sess. 162 (Jan. 10, 1866); *see also id.* at 208 (Jan. 12, 1866).

253. *Id.* at 231 (Jan. 15, 1866).

254. *See id.* at 266 (Jan. 17, 1866).

255. *Id.* at 297 (Jan. 18, 1866).

256. *See id.* at 3432 (June 27, 1866); *see also* Smith, *supra* note 60, at 834 (noting that after Jan. 16, 1866, “[d]ue to the press of such other important legislation as the Civil Rights Bill and the Freedmen’s Bureau Bill, however, the Senate did not consider [S. 1] again until June 27, 1866,” and

28, 1866.<sup>257</sup> (When the Congress reconvened in December 1866, for its second session—and while states still were considering whether to ratify the Fourteenth Amendment—the Senate quickly took action on S. 1. The House concurred, and the bill was passed over President Johnson’s veto, becoming law on January 8, 1867.<sup>258</sup> But that is jumping ahead in the story.)

Kentucky Senator Garrett Davis began the substantive discussion of S. 1 on January 16, 1866, by arguing that the people of the District—the white people only, under his racist ideology<sup>259</sup>—were entitled to self-rule in local matters and that Congress therefore should give the District “a government analogous to the territorial governments.”<sup>260</sup> According to Davis, such a governmental scheme would provide for qualified voters in the District “to elect, every two years, a Delegate to Congress to represent the interests of the District to that body.”<sup>261</sup> (Nine territories already were represented in the 39th Congress by such nonvoting delegates.<sup>262</sup>) Davis argued against S. 1, stating that it was

but an experiment, a skirmish, an entering wedge to prepare the way for a similar movement in Congress to confer the right of suffrage on all the negroes of the United States . . . . It is following up the tactics of the party four years ago, when the assault upon slavery in this District heralded the general movement that was to be made against it.<sup>263</sup>

Davis thus proceeded to argue generally against black suffrage, not just against it in the District, and he “move[d] to recommit th[e] bill to the Committee on the District of Columbia, with instructions to report allowing to the white citizens a form of government similar to our territorial governments,”<sup>264</sup> including, as noted above, nonvoting representation in the House by way of a delegate. The Senate then turned to the Freedmen’s Bureau bill,<sup>265</sup> and would not again consider S. 1 until June 27, 1866.

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then “did not consider its bill again, nor did it consider the House version, during the 1st Session of the Congress”).

257. See *supra* note 256; see also CONG. GLOBE, 39th Cong., 1st Sess. 4303, 4310 (1866).

258. See *infra* text accompanying notes 384–432. The Senate never took action on H.R. 1, despite its passage by the House.

259. See CONG. GLOBE, 39th Cong., 1st Sess. 245–49 (Jan. 16, 1866) (including comment on “premature liberation” of slaves and reference to Thirteenth Amendment as a “deed . . . most foully done”).

260. *Id.* at 245.

261. *Id.*

262. See *supra* text accompanying note 138.

263. CONG. GLOBE, 39th Cong., 1st Sess. 246 (Jan. 16, 1866).

264. *Id.* at 251.

265. See *id.*

On January 18, 1866, as noted above, two days after Senator Davis's racist speech on S. 1, the House passed its District suffrage bill, H.R. 1, by more than a two-to-one vote.<sup>266</sup> Only four days later, Representative Stevens, at the direction of the Joint Committee, reported a proposed constitutional amendment to the House stating that "Representatives . . . shall be apportioned *among the several States* which may be included within this Union," basing apportionment of House seats on population, with a potential adjustment: "*Provided*, That whenever the elective franchise shall be denied or abridged in any State on account of race or color, all persons of such race or color shall be excluded from the basis of representation."<sup>267</sup> The same day Representative Sloan introduced a proposed amendment providing that "Representatives in Congress shall be apportioned *among the several States* which may be included within this Union" based on each state's number of eligible voters ("qualified electors").<sup>268</sup> Of course, proposals like these were designed to encourage<sup>269</sup> (or coerce<sup>270</sup>) states to enfranchise blacks or, if that failed, to reduce the states' representation (at least to reduce the representation of states with substantial African-American populations).<sup>271</sup> Senator Fessenden argued in favor of the proposed apportionment amendment recommended by the Joint Committee and as passed by the House<sup>272</sup> by noting its indirect effect of promoting black suffrage:

But, sir, the great excellence of it—and I think it is an excellence—is, that it accomplishes indirectly what we may not have the power to accomplish directly. If we cannot put into the Constitution, owing to existing prejudices and existing institutions, an entire exclusion of all class distinctions, the next question is, can we accomplish that work in any other way?<sup>273</sup>

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266. See *id.* at 311 (Jan. 18, 1866) (noting passage of H.R. 1 by a vote of 116–54).

267. *Id.* at 351 (Jan. 22, 1866) (first emphasis added). Thus the entire African-American population of a state would be excluded from the apportionment base if any voting requirements (such as literacy, ownership of property, or service in the Union Army) were applied to blacks but not to whites.

268. *Id.* at 352 (emphasis added).

269. See *id.* at 142 (Jan. 8, 1866) (statement of Rep. Blaine); *id.* at 705 (Feb. 7, 1866) (statement of Sen. Fessenden); *id.* app. at 96 (Feb. 15, 1866) (statement of Sen. Williams) (supporting Joint Committee's proposal and stating that eventually it would lead to enfranchisement of former slaves); *id.* at 1254, 1282 (Mar. 8 & 9, 1866) (statements of Sen. Wilson).

270. See, e.g., *id.* at 353–55 (Jan. 22, 1866) (statement of Rep. Rogers).

271. See, e.g., *id.* app. at 60 (statement of Rep. J.L. Thomas) (stating that he did not favor black suffrage but did favor reduction of franchise for states that refused to enfranchise blacks, that he did not think this reduction would cause states to enfranchise them, and that he would oppose the amendment if he thought it would have that effect).

272. H.R.J. Res. 51, 39th Cong. (1st Sess. 1866).

273. CONG. GLOBE, 39th Cong., 1st Sess. 705 (Feb. 7, 1866). The Joint Committee's report stated that the apportionment amendment was "in its nature gentle and persuasive" and expressed the Joint Committee's hope that the amendment "would lead . . . at no distant day, to an equal participation of

The connection with the recent House action passing its District suffrage bill was obvious and clearly noted on both sides during the debates over what was to become Section Two of the Fourteenth Amendment. On the House side, the District suffrage bill was referenced by Representatives Rogers,<sup>274</sup> Harding,<sup>275</sup> McKee,<sup>276</sup> Wright,<sup>277</sup> Smith (of Kentucky),<sup>278</sup> Julian,<sup>279</sup> Thomas,<sup>280</sup> and Hogan.<sup>281</sup> On the Senate side, the District suffrage bill (either the Senate bill or the House's action in passing the House bill) was referenced by Sumner,<sup>282</sup> Henry Smith Lane (of Indiana),<sup>283</sup> and James Henry Lane (of Kansas).<sup>284</sup> Senator Wade noted a petition he had received from citizens of Ohio asking Congress not to allow distinctions based on race in the laws of the District and also calling on Congress to propose constitutional amendments, including an amendment dealing with the basis of apportionment of the House.<sup>285</sup> Senator Morgan (not during debate, but in the time set aside for petitions and memorials) noted receipt of concurrent resolutions from the houses of the New York legislature dealing with readmission of southern states to representation in Congress and advocating equal male suffrage in the District.<sup>286</sup> Apparently the Kansas legislature also linked the issues; Senator Lane (of Kansas) informed the Senate that he was "instructed by [his] constituents to vote for a constitutional amendment predicating representation on suffrage, and . . . instructed to vote for extending suffrage in the District of Columbia on an educational [qualified suffrage] basis."<sup>287</sup>

Representative Smith (of Kentucky), for example, had the House clerk read a newspaper article reporting President Johnson's views on the apportionment issue—which would leave to the states the question of whether to enfranchise African-Americans—and noting that "in this connection," the President had given his views on District suffrage: "The President . . . expressed the opinion that the agitation of the negro-franchise question in the District of Columbia at this time was the mere entering-wedge to the agitation of the question throughout the States, and was ill-timed, uncalled

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all, without distinction, in all the rights and privileges of citizenship, thus affording a full and adequate protection to all classes of citizens, since all would have, through the ballot-box, the power of self-protection." REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, *supra* note 155, at XIII.

274. CONG. GLOBE, 39th Cong., 1st Sess. 355 (Jan. 22, 1866).

275. *Id.* at 447–49 (Jan. 26, 1866).

276. *Id.* at 452.

277. *Id.* at 458.

278. *Id.* at 537 (Jan. 31, 1866).

279. *Id.* app. at 57 (Jan. 29, 1866).

280. *Id.* app. at 60 (Jan. 31, 1866).

281. *Id.* app. at 62–63 (Jan. 30, 1866).

282. *Id.* at 674 (Feb. 6, 1866).

283. *Id.* at 741 (Feb. 8, 1866).

284. *Id.* at 1257 (Mar. 8, 1866).

285. *Id.* at 1436 (Mar. 16, 1866).

286. *Id.* at 1843 (Apr. 9, 1866).

287. *Id.* at 1257 (Mar. 8, 1866).

for, and calculated to do great harm.”<sup>288</sup> Apparently the President believed that “agitation” of the suffrage issue would ultimately lead to a race war.<sup>289</sup>

Two more examples of the linkage of the District with the debate over what became the Fourteenth Amendment will suffice. First, Representative Wright, in arguing against the proposed apportionment amendment, noted that it had been “only a few days since a bill was introduced to foist over the unfortunate and unrepresented people of the District of Columbia unqualified universal negro suffrage.”<sup>290</sup> He argued that

this District, so frequently maligned, which has neither Representative nor Delegate, has furnished several thousand patriotic men to swell the noble Army of the Union. They fought to save the Republic, to emancipate the negro race from the thralldom of slavery, and now return to be subjugated by the very race they have freed.<sup>291</sup>

Wright continued to link the District suffrage bill to the apportionment amendment, which was designed indirectly to induce the formerly rebellious states to grant suffrage to the newly freed slaves, by arguing that “if we were startled by such a proposition”—black suffrage granted without qualification—“affecting only the District of Columbia, the nation will be astounded to learn that it is in contemplation by the radicals to seize upon the Constitution and extend by a so-called amendment the area of this iniquity” of black suffrage throughout the nation.<sup>292</sup>

Second, Representative Julian, in arguing for an equal suffrage amendment rather than an apportionment amendment, appealed to the example the House had set in passing the District suffrage bill:

It is only a few days since this nation, speaking through its Representatives on this floor, by a vote of 116 against 54, deliberately sanctioned the very policy I urge as an amendment to the Constitution of the United States. Sir, if that policy is right in this District, shall we decline to extend it over the districts lately in revolt where far stronger reasons plead for it?<sup>293</sup>

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288. *Id.* at 537 (Jan. 31, 1866). Apparently the article was in the Jan. 29, 1866, edition of the *Boston Daily Journal*. See JAMES, *supra* note 46, at 65.

289. CONG. GLOBE, 39th Cong., 1st Sess. 537 (Jan. 31, 1866).

290. *Id.* at 458 (Jan. 26, 1866).

291. *Id.*

292. *Id.*

293. *Id.* app. at 57 (Jan. 29, 1866).

Meanwhile, on January 22, 1866 (only four days after the House passed its District suffrage bill), Representative Rogers launched an attack on all of these proposals to reduce states' representation in the House, claiming that such a reduction would constitute taxation without representation by denying states any representation for their disenfranchised black population.<sup>294</sup> Of course, as Senator Henderson later pointed out, this might be a "powerful argument" if the provisional governments of the formerly rebellious states "did not propose to tax half their people [the African-Americans], for all time to come, without any voice or representation now, and without hope of it in the future."<sup>295</sup> A week later Representative Johnson made the startling claim that members of Congress elected by white voters provided virtual representation for blacks, and thus a failure to provide representation for the black population would be taxation without representation.<sup>296</sup> The important point for our purposes is that once again the cry of taxation without representation—a very strong reason for granting the District representation in the House—is raised in close juxtaposition to consideration of District suffrage for local elections and to consideration of which entities should be represented in Congress. In making his argument against reduction of representation, Rogers even referred to the recent vote on the District suffrage bill, arguing that the House failed to consult the (white) people of the District before passing it, and that the House would fail to consult the people of the country if it proposed an amendment and asked existing state legislatures to ratify it, where the issue of an amendment was not before the voters at the time they had elected their state legislatures. Given all this, the notion that Congress or the nation somehow forgot about the District—that Congress in proposing, or the legislatures of the states in ratifying, the Fourteenth Amendment somehow failed to realize that they were leaving the District without representation—simply is not credible.

In fact, in the congressional debates over apportionment—over what became Section Two of the Fourteenth Amendment—taxation without representation was a continuing subject of discussion. Representatives Conkling,<sup>297</sup> Strouse,<sup>298</sup> Ward,<sup>299</sup> Harding,<sup>300</sup> and Raymond,<sup>301</sup> in addition to Rogers and Johnson, all discussed it.

Similarly, the concept of the consent of the governed—another powerful argument for District representation—was a recurring theme in the

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294. *Id.* at 353.

295. *Id.* app. at 113 (Feb. 13, 1866).

296. *Id.* app. at 55 (Jan. 29, 1866).

297. *Id.* at 359 (Jan. 22, 1866).

298. *Id.* at 426 (Jan. 25, 1866).

299. *Id.* at 434.

300. *Id.* at 449 (Jan. 26, 1866).

301. *Id.* at 491 (Jan. 29, 1866).

debates over apportionment of the House. As noted above, Rogers linked what he considered Congress's failure to consult the (white) people of the District on the District suffrage bill with Congress's supposed failure to consult the people on the proposed constitutional amendments, because the Republicans hoped amendments could be ratified by existing state legislatures who were elected when the issue of amendments was not before the people. In making that argument he was drawing on the principle of consent of the governed, especially with respect to constitutional changes: "It has been said in this country that all power emanates from the people."<sup>302</sup> More directly, of course, consent of the governed was at issue as a Congress that did not include representatives of the formerly rebellious states considered passage of proposed constitutional amendments and also debated whether those states were entitled to a voice in ratification of amendments. Representative Harding asked:

Now, sir, is this fair? I appeal to the honest candor of Republican gentlemen, is this fair? . . . If you shall, by excluding eleven States, make a Constitution for them without their consent, and attempt to force it upon them, may not that come home to plague you in the next generation?<sup>303</sup>

Representatives Raymond and Julian also both raised the issue of consent of the governed, though for different reasons.<sup>304</sup>

Raymond agreed that some apportionment adjustment was needed, but he objected to the proposed change in the basis of apportionment from total population to number of qualified voters, because of the

fundamental principle of free government, that the population, the inhabitants, all who are subjects of law, shall be represented in the enactment of that law and in the election of men by whom the law is to be executed, either directly by their own votes, or through the votes of others so connected with them as to afford a fair presumption that their wishes, their rights, and their interests will be consulted.<sup>305</sup>

A change in the basis of apportionment to eligible voters "departs from that principle, and is thus objectionable as a disturbance of the cornerstone on which our system of republican government—indeed all democratic institutions are supposed to rest."<sup>306</sup> Raymond also strongly rejected

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302. *Id.* at 355 (Jan. 22, 1866).

303. *Id.* at 449 (Jan. 26, 1866).

304. *See id.* at 483, 491, app. at 58 (Jan. 29, 1866).

305. *Id.* at 483.

306. *Id.*

the argument made by one Representative that the formerly rebellious states could be held as “provincial dependencies”<sup>307</sup> as long as necessary, until they demonstrated appropriate loyalty to the Union, and held so forever if they never demonstrated such loyalty:

Has the gentleman seriously thought of the meaning which his words imply? Ten million people held by a republican Government, itself based on the principle that the only just foundation of government is the consent of the governed, as dependencies forever! Why, sir, there has been no such outrage perpetrated or contemplated for a thousand years in the history of nations. . . . I commend to the gentleman . . . to read in the Declaration of Independence the causes which were held then, and which will be held always and everywhere, to justify rebellion. . . . I am not willing, by any such conduct, to sanctify the rebellion we have crushed.<sup>308</sup>

Examples could be multiplied—of discussions of taxation without representation and consent of the governed—from the corresponding debates in the Senate over the basis of apportionment, but the point is clear. The very issues that go to the heart of the injustice of the District’s lack of representation were very, very prominently considered by the same Congress that proposed the Fourteenth Amendment. And those issues were considered in close juxtaposition to what was seen as a critical struggle over the District suffrage bills.

All of this happened in the full glare of publicity, with reports of congressional actions in the newspapers and with the full attention of an anxious nation. Thus, there could have been no question of inadvertence when the states ratified the Fourteenth Amendment. Everyone knew that the amendment reaffirmed that House seats were to be apportioned among the states, not including the District. Near the end of the Senate’s work on the Fourteenth Amendment, Senator Trumbull stated very clearly what everyone knew to be the case—the District was not included among the “States” to which members of the House were apportioned under Section Two of the proposed amendment: “The second section [of the proposed Fourteenth Amendment] refers to no persons except those in the States of the Union; but the first section refers to persons everywhere, whether in the States or in the Territories or in the District of Columbia.”<sup>309</sup>

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307. *Id.* at 491.

308. *Id.*

309. *Id.* at 2894 (May 30, 1866) (statement of Sen. Trumbull) (explaining why inclusion of language—“excluding Indians not taxed”—in Section One would have broader effect than inclusion of the same language in Section Two and thus was not advisable); *see also supra* note 140.

The purpose of this Article is not to give a full recounting of the history of the Fourteenth Amendment. It is sufficient to say that after much struggle Congress proposed the Fourteenth Amendment on June 13, 1866, including what was seen as a very important section—Section Two—on the basis of apportionment.<sup>310</sup>

#### 4. The Fall 1866 Elections

In the fall 1866 elections, the Republicans campaigned against the Democrats and against President Johnson's National Union Party on the issue of ratification of the Fourteenth Amendment. More than anything else, the election became a referendum on the Fourteenth Amendment. "Seldom, declared the *New York Times*, had a political contest been conducted 'with so exclusive reference to a single issue.'"<sup>311</sup> The Report of the Joint Committee on Reconstruction<sup>312</sup> was a part of that campaign;<sup>313</sup> it noted that "[t]he increase of representation necessarily resulting from the abolition of slavery was considered the most important element in the questions arising out of the changed condition of affairs, and the necessity for some fundamental action in this regard seemed imperative."<sup>314</sup> Defending Congress's refusal to seat members from the formerly rebellious states, though those states were still taxed, the Report dealt with the issue of taxation without representation and used the example of the District:

That taxation should be only with the consent of the taxed, through their own representatives, is a cardinal principle of all free governments; but it is not true that taxation and representation must go together under all circumstances, and at every moment of time. The people of the District of Columbia and of the Territories are taxed, although not represented in Congress.<sup>315</sup>

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310. CONG. GLOBE, 39th Cong., 1st Sess. 2538 (May 10, 1866) (statement of Rep. Rogers) (asserting that the "second section . . . is unparalleled in ferocity. It saps the foundation of the rights of the States[,] . . . [and a similar provision was previously] defeated in this House upon the ground that it would destroy a fundamental principle, that there should be taxation only according to representation"); *id.* at 2459 (May 8, 1866) (statement of Rep. Stevens) ("The second section I consider the most important . . . . It fixes the basis of representation in Congress."); *id.* at 432 (Jan. 25, 1866) (statement of Rep. Bingham) ("I think that no question more important than this has yet come before the House . . . ."); *id.* at 426 (statement of Rep. Higby) (asserting that an amendment on the basis of apportionment would be "second only in importance" to the Thirteenth Amendment).

311. FONER, *supra* note 44, at 267.

312. REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, *supra* note 155.

313. See KENDRICK, *supra* note 1, at 325 ("The report was highly satisfactory to the radical politicians, who realized that upon its reasoning they must defend their position before the country. In fact, it seems to have been written principally for the purpose of a campaign document, and it had the peculiar quality of suiting all the varying degrees of Republican sentiment.").

314. REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, *supra* note 155, at XIII.

315. *Id.* at XII.

The election, focused on the Fourteenth Amendment, was a “disastrous defeat” for President Johnson and a very substantial victory for the Republicans.<sup>316</sup> Thus, in the 40th Congress the Republicans would have majorities that could easily override presidential vetoes. The 40th Congress would not convene for its first regular session until December 1867, but Republicans in the 39th Congress already “considered themselves ‘masters of the situation.’”<sup>317</sup> On the other hand, the elections in the South—mostly elections organized by the provisional governments of the formerly rebellious states—went heavily against the Republicans.<sup>318</sup> That convinced the Republicans that they had no choice but to affirmatively require enfranchisement of African-American citizens if pro-Union (and Republican) candidates were to have a chance in those states once those states were readmitted to representation in Congress. Republicans also believed the nation had moved toward acceptance of black suffrage,<sup>319</sup> perhaps because of the violent, unjust treatment of the newly freed African-Americans in the South.<sup>320</sup>

*5. The President’s Proposal that the District be Given a Nonvoting Delegate to the House, the Enactment of the District Suffrage Bill Over President Johnson’s Veto, and the Ratification of the Fourteenth Amendment in the Context of that Veto Override*

What would be one of the first signs of this new approach? Not surprisingly, it involved the District, and the action was lightning fast. When the 39th Congress reconvened for its second session on December 3, 1866,<sup>321</sup> Senator Sumner immediately asked for S. 1 to be considered, but a point of order was raised, delaying its consideration.<sup>322</sup> That same day Congress received President Johnson’s State of the Union address, which included the following crucial paragraph:

The District of Columbia, under existing laws, is not entitled to that representation in the national councils which, from our earliest history, has been uniformly accorded to each Territory estab-

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316. FONER, *supra* note 44, at 267–68.

317. *Id.* at 271.

318. *Id.* at 270–71.

319. CONG. GLOBE, 39th Cong., 2d Sess. 42 (Dec. 10, 1866) (statement of Sen. Wilson) (“During the last few months the country has gone an immeasurable distance in the right direction, and I believe to-day that the nation is prepared to demand manhood suffrage.”).

320. See FONER, *supra* note 44, at 199–203, 208–09, 244 (describing Black Codes); *id.* at 261–63 (describing Memphis riot and New Orleans massacre).

321. CONG. GLOBE, 39th Cong., 2d Sess. 1 (Dec. 3, 1866).

322. *Id.* at 2 (reporting that the president *pro tempore* was referred to a precedent interpreting a Senate rule as prohibiting consideration of unfinished business from first session during first six days of second session).

lished from time to time within our limits. It maintains peculiar relations to Congress, to whom the Constitution has granted the power of exercising exclusive legislation over the seat of Government. Our fellow-citizens residing in the District, whose interests are thus confided to the special guardianship of Congress, exceed in number the population of several of our Territories, and no just reason is perceived why a Delegate of their choice should not be admitted to a seat in the House of Representatives. No mode seems so appropriate and effectual of enabling them to make known their peculiar condition and wants, and of securing the local legislation adapted to them. I therefore recommend the passage of a law authorizing the electors of the District of Columbia to choose a Delegate, to be allowed the same rights and privileges as a Delegate representing a Territory. The increasing enterprise and rapid progress of improvement in the District are highly gratifying, and I trust that the efforts of the municipal authorities to promote the prosperity of the national metropolis will receive the efficient and generous cooperation of Congress.<sup>323</sup>

Thus, President Johnson focused Congress's and the nation's attention on the District's lack of representation—even nonvoting representation—in the House, even as the states were considering whether to ratify the Fourteenth Amendment with its crucial Section Two.<sup>324</sup> Section Two of course provided that House seats “shall be apportioned among the several States,” not including the District.<sup>325</sup>

On December 6, 1866, Senator Edmunds presented a resolution from the legislature of Vermont favoring equal suffrage throughout the United States, asking Congress to grant it where it constitutionally could, and particularly asking that it be made the law in the District as soon as possible.<sup>326</sup> On December 10, the Senate turned to the District suffrage bill, S. 1.<sup>327</sup> The lengthy debate—about forty-two pages of dense *Globe* text—once again served as a vehicle for arguments about black suffrage nationally, once again treated the District as a kind of a model, once again prominently featured concerns about taxation without representation, and once again recognized that the people of the District could not vote on anything other

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323. *Id.* app. at 3.

324. As of December 3, 1866, only six states had ratified the Fourteenth Amendment: Connecticut, New Hampshire, Tennessee, New Jersey (which then purported to rescind its ratification), Oregon, and Vermont. *See, e.g.*, U.S. CONST. & ANALYTICAL INDEX, *supra* note 203, at 17.

325. U.S. CONST. amend. XIV, § 2.

326. CONG. GLOBE, 39th Cong., 2d Sess. 26 (1866).

327. *Id.* at 37.

than local matters. The debate also tied the District suffrage bill to Section Two of the Fourteenth Amendment.<sup>328</sup>

Senator Morrill (chairman of the Senate Committee on the District) noted that S. 1 “may be said to be inaugurating a policy not only strictly for the District of Columbia, but in some sense for the country at large,”<sup>329</sup> and argued that what Congress did for the nation’s capital might “have an influence elsewhere for good or for evil.”<sup>330</sup> Morrill also felt it necessary to defend the Senate against “a misapprehension in the public press” that the Senate had delayed acting on District suffrage;<sup>331</sup> it seems that the nation was paying close attention. Morrill used the occasion to argue at length for equal suffrage nationally, for “[t]he American principle [that] favors the right of suffrage for the male citizen of full age.”<sup>332</sup>

Senator Willey then attempted to amend the bill to remove the disfranchisement of those who had assisted the Confederacy. His argument relied on the lack of political power of the people of the District (which made it safe to allow even rebels to vote in the District), and he also brought up the issue of taxation without representation:

The people of the District of Columbia have no political power, they cannot by their votes affect the principles or the foundation of our government, and therefore there will be no danger to the policy, principles, or integrity of our Government by extending to them the right of suffrage. . . .

It seems to me, then, that it would be rather hard to disfranchise even the disloyal portion of the people of the District of Columbia from the exercise of the right of selecting their local officers, who have no political power. They pay taxes, they are subject to taxation, they are under all the local liabilities of any citizens within the District.<sup>333</sup>

After Senator Wilson noted that “[d]uring the last few months the country has gone an immeasurable distance in the right direction” so that he could “believe to-day that the nation is prepared to demand manhood suffrage,”<sup>334</sup> Senator Willey argued for a literacy requirement as “somewhat of an experiment” that Congress “might try . . . in the District of

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328. *Id.* at 103, 107 (Dec. 13, 1866).

329. *Id.* at 38 (Dec. 10, 1866).

330. *Id.* at 39.

331. *Id.* at 38.

332. *Id.* at 40.

333. *Id.* at 41.

334. *Id.* at 42.

Columbia.”<sup>335</sup> Senator Pomeroy considered S. 1 to be “important . . . because it is a sort of model, to be copied and patterned after by the States,” but argued that a literacy requirement would be unfair to blacks who had been prevented from receiving an education.<sup>336</sup>

Senator Cowan, in an attempt to defeat the bill, argued that the bill should grant suffrage to women, in part because “[t]axation and representation ought to go hand in hand,” and thus, “why should they not go hand in hand with regard to the female as well as the male?”<sup>337</sup> Senator Anthony spoke in favor of including women, though he “suppose[d] that the Senator from Pennsylvania [Cowan] introduced this amendment [for female suffrage] rather as a satire upon the bill itself, or . . . to injure the bill.”<sup>338</sup> Anthony argued sincerely that women were being taxed without representation and that they should not have to involuntarily accept being represented by the votes of men. Senator Williams then distinguished the need for blacks to vote nationally from the need for women to vote by noting the dangers faced by blacks: “[T]o extend the right of suffrage to the negroes in this country I think is necessary for their protection . . .”<sup>339</sup>

After another long speech by Senator Cowan, Senator Wade took the floor to argue for an experiment in female suffrage in the District.<sup>340</sup> Senator Yates responded that he supported female suffrage and that it likely would come in time, but that female suffrage “was not the question at the last election,” and that “[t]he country expects the verdict of the people to be sustained by” the Senate: obviously, in Senator Yates’s view, this would be accomplished by following the lead of the House and voting for equal male suffrage in the District.<sup>341</sup> Senator Wilson then explained that the Senate had not completed action on S. 1 during the first session of Congress because it did not seem until late in the session—when there was much else that needed attention—that there were sure to be enough votes to override the expected presidential veto.<sup>342</sup> The bill was held up

by the assent of many of its most earnest friends, in the full conviction that the voice of the country, the growth of public sentiment—which was great every day then, and has increased every day since and will grow stronger in the days to come—would ena-

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335. *Id.* at 43.

336. *Id.*

337. *Id.* at 46; *see id.* at 58 (Dec. 11, 1866) (statement of Sen. Cowan) (again raising issue of taxation without representation).

338. *Id.* at 55.

339. *Id.* at 56.

340. *Id.* at 62–63.

341. *Id.* at 63.

342. *Id.* at 64.

ble us to carry a clean bill for the District early in this session. We were not mistaken in our anticipations.<sup>343</sup>

Discussion of female suffrage continued at length on December 12. Then, Senator Davis took the floor and turned back to the question of black suffrage. He argued that the federal government had no right to assault the “American idea which may be said to have been until recently universal in the United States: that all political sovereignty and powers belong to the white man and are to be exercised by him exclusively.”<sup>344</sup> Davis argued that, under the Constitution, the states retained the sovereign authority to govern themselves subject only to the limited authority granted the federal government by the Constitution, and that the District was the “single exceptional case” in which self-government was not retained.<sup>345</sup> Endorsing a cramped understanding of the purposes of the District Clause, he argued that Congress should not exercise its power except to the extent needed to protect the “personnel of the Government” against assaults.<sup>346</sup> Thus, “it was reasonably concluded [by the Founders] that Congress would at all times concede to this people every power of self-government but such as might be necessary and proper for the protection of the Government and the persons engaged in its administration at its seat.”<sup>347</sup> It was not necessary to the protection of the government to take away the right of the (white) people of the District to govern themselves and to “forc[e] upon the unwilling and defenseless white people of this District negro suffrage, when they have almost unanimously voted to reject it.”<sup>348</sup> Instead, the white people of the District should be allowed to govern themselves (and the blacks of the District).<sup>349</sup>

But, Davis continued, the reason the District suffrage bill “ha[d] awakened so much vehement passion” is that it was, as “ha[d] been declared in this debate[,] . . . but the precursor of a movement to force negro suffrage upon all the States lately in rebellion,” with the District suffrage bill being “fashioned into a model for them.”<sup>350</sup> Davis admitted that “[t]he people of the South made war in a wrong cause,” but “[n]ow, the war is made upon them to deprive them of their right of self-government, of their

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343. *Id.*

344. *Id.* at 78.

345. *Id.*

346. *Id.* (emphasis omitted).

347. *Id.* Davis continued on to express his view that women needed to be denied suffrage to shelter them from the “stern and contaminating and demoralizing duties that devolves [sic] upon the hardier sex, man,” so that women could continue to provide a “benignant and humanizing and important influence . . . upon the whole race of man.” *Id.* at 79. But, although women should not vote, they were much more qualified to do so than blacks according to Davis, who denied the ability of blacks to sustain civilization and argued that the subjection of blacks was divinely ordained. *Id.* at 79–80.

348. *Id.* at 81.

349. *Id.*

350. *Id.*

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fields, of their homes, family altars, of their religious temples” by being “summoned to surrender to the absolute control, by the instrumentality of her own negroes, of her old and inexorable enemies” in the North.<sup>351</sup> He urged the people of the South to “resist this great, this most foul, cruel, and dishonoring enslavement, but peacefully and by every peaceful means which they can command,”<sup>352</sup> at least temporarily. The “[m]en of the South” should

exhaust every peaceful means, [but] when your oppressions become unendurable, and it is demonstrated that there is no other hope, then strike for your liberty, and strike as did your fathers in 1776, and as did the Hollanders and Zealanders . . . to break their chains, forged by the tyrants of Spain.<sup>353</sup>

Presumably the Speech and Debate Clause<sup>354</sup> protected Davis from a charge of treason in this call for (essentially) a new war of secession. But consider how important the issue of the District suffrage bill must have seemed for Davis to make such a statement and how he linked the District suffrage bill to a “war” on the entire South, a war that would that provoke another secession. There was indeed much more at stake than the admittedly important matter of the right of equal suffrage in the District.

Senator Sprague responded that the aristocratic principles of the South and the democratic principles of the North could not coexist. The black citizens of the South, who were willing to “imbib[e] all the liberal sentiments of the [Northern] white masses,” were more intelligent than the whites of the South, who in fact were dangerous.<sup>355</sup> There was a duty to “fashion a government for the South which will leave out the destructive tendencies and teachings of the mass of the white population or neutralize them by an introduction of an element of liberty, justice, [and] equality.”<sup>356</sup> If that were done, “in half a generation, though beginning in hate and menace, you will witness peace and concord.”<sup>357</sup> But “liberty and progress are now jeopardized quite as much, if not more, than when [Confederate General Robert E.] Lee with his murderous engines was in Pennsylvania. . . . Let us, then, press to the vote; one glorious step taken, then we may take others in the same direction.”<sup>358</sup> Again, sight of the District suffrage bill almost was lost in the broader concerns.

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351. *Id.*

352. *Id.*

353. *Id.*

354. U.S. CONST. art. I, § 6, cl. 1.

355. CONG. GLOBE, 39th Cong., 2d Sess. 82 (1866).

356. *Id.*

357. *Id.*

358. *Id.* at 82.

Senator Buckalew then underlined how closely the country was following the debate over the District suffrage bill: “The debates which have been going on for three days in this Chamber will go out to the country. They will constitute an element in the popular discussions of the times and awaken a large amount of public attention.”<sup>359</sup> Buckalew thought a very strong reason for denying an extension of the franchise either to women or to blacks would be needed to prevent it from eventually being done, and he gave what he thought was in fact a very strong reason for denying it: new voters, he argued, are particularly subject to “pecuniary or social influence,” and the result of adding a very large number of new voters would be the breakdown of the electoral system throughout the country.<sup>360</sup> Thus Buckalew also used the debate to go beyond the issue of the District.

The women’s suffrage amendment to the District suffrage bill was defeated,<sup>361</sup> and the debate turned the following day, December 13, 1866, to an amendment requiring District voters to be able to read (and to write their own names), but with a grandfather clause that would exempt those who had voted previously.<sup>362</sup> In opposing the amendment, Senator Frelinghuysen analogized such a literacy requirement to Section Two of the Fourteenth Amendment—each involved the problem of ignorant voters. The Fourteenth Amendment did not require “the disloyal States” to grant suffrage to illiterate voters, including illiterate blacks; but the reduction of representation mandated by Section Two due to such disfranchisement would cause those states to grant suffrage to blacks “as fast probably as the films and scales of ignorance incident to slavery fall away.”<sup>363</sup> Universal male suffrage would similarly provide such states with an incentive to educate the newly freed slaves; it would drive communities “for their own security, for their own protection . . . to establish common schools so that the voter shall become intelligent.”<sup>364</sup> But a literacy requirement should be opposed because it would create the opposite incentive: it would give “communities unfavorable to the right of voting in the colored man” an incentive to keep African-Americans illiterate.<sup>365</sup> Frelinghuysen foresaw a great and worldwide effect if American blacks were enfranchised and educated, starting in the District: “[T]he pulsations of the great American heart would vibrate intelligence and virtue and freedom to all the earth. I believe that this action which is being taken in this District is the beginning of great things.”<sup>366</sup> If so, the Civil War would have resulted in blacks

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359. *Id.* at 82–83.

360. *Id.* at 83.

361. *Id.* at 84.

362. *Id.* at 98.

363. *Id.* at 103.

364. *Id.*

365. *Id.*

366. *Id.*

becoming literate, obtaining the rights of citizens, reading newspapers, and reading the Bible, with the result that “intelligence and virtue, twin sisters heaven-born” would be “enthroned.”<sup>367</sup>

In a very powerful speech, Senator Wilson argued that a literacy requirement, in the District or more generally in the South, would leave blacks “at the mercy of their enemies.”<sup>368</sup> A literacy requirement would intensify racial hostility and lead to disfranchisement of even well-educated African-Americans in the District:

If you put this [literacy] qualification upon him, the bitter hostility to the education of the colored race that has distinguished this city and the government of this city; which has led the government of this city even to violate the express laws of Congress within the last two years,<sup>[369]</sup> will be intensified and increased. The enemies of the colored man may not do here what they are doing in Maryland, in Virginia, in all the rebel States, burn down the school houses for the freedmen; they may not be strong enough to do that here; but they will do nothing to erect school-houses for the education of the freedman; they will do nothing to encourage his education. . . . [F]inding that we will only allow the colored men who can read and write to vote, [they] will see to it that as few colored men shall be qualified as possible. They kept the colored man in ignorance to keep him in slavery; they will continue to keep him in ignorance to prevent his becoming a voter.

. . . Who is to pass upon this qualification of reading and writing? The man who has voted that the black man shall not vote at all? . . . How many of them will be permitted to vote? Possibly there might be a few negroes fit to fill seats in Congress or to sit upon the bench of the Supreme Court who might be permitted to vote. But few, very few of them would be permitted to vote under this amendment. You put it in the power of the enemies of this race to keep them from the ballot-box. By this provision we put the black men at the mercy of his avowed enemies.<sup>370</sup>

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367. *Id.*

368. *Id.* at 103–04.

369. The cities of Georgetown and Washington had withheld tax moneys that should have gone to black public schools. The results of the special census of 1867 finally persuaded Georgetown to pay all and Washington to pay part of what was claimed. *See* 1 GREEN, *supra* note 61, at 307–08.

370. CONG. GLOBE, 39th Cong., 2d Sess. 103 (1866).

The same result would occur in the South were literacy required for voting; by contrast, universal (male) suffrage would lead the South to educate the newly freed slaves:

Apply this same principle in these rebel States. . . . [N]ot one per cent. of those who could read and write would ever be permitted to vote . . . by the men who are determined to keep them from the ballot box. You put the whole of the freedmen at the mercy of their enemies. All over this rebel country the midnight skies are lightened by the burning schoolhouses erected . . . to instruct the darkened intellects of emancipated bondmen. Adopt this provision that they shall be required to read and write, and their enemies who are now burning their school-houses will see to it that the school-houses they have spared are given to the flames. Strike off this qualification, let them vote at any rate [whether literate or not], and these wicked people who are burning their school-houses will cease . . . ; they will then join in building school-houses for their instruction.<sup>371</sup>

According to Wilson, whites were murdering blacks in the South with legal impunity, perhaps by the thousands.<sup>372</sup> Wilson continued: “We want to change all this. I want the ballot in the hands of these [black] men so that their lives, their homes, their school-houses, their churches, their wives, and their children will be safe.”<sup>373</sup>

Senators Hendricks and Lane then engaged in an exchange that emphasized that members of Congress were not elected by the people of the District. Hendricks argued that because they did not elect members of Congress, he considered the people of the District to be a part of his constituency, and thus would not support a bill that they (the whites, at least) voted to oppose.<sup>374</sup> Lane responded that if members of Congress were to exercise their power under the District Clause simply as representatives of the District, then they should have been elected by the people of the District, which of course they were not. Lane argued that blacks had been loyal and thus should be permitted to vote in the District whether or not they were literate. Application of a literacy test to blacks but not to most whites (because of the grandfather clause) made no sense:

For the last two hundred years it has been impossible for these poor slaves to educate themselves. Under the laws of many of the

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371. *Id.* at 103–04.

372. *Id.* at 104.

373. *Id.*

374. *Id.* at 106.

States it has been a penal offense to teach them their letters, and to read the Gospel of eternal truth and to teach them to read it has been a penitentiary offense. These poor people have hitherto had no opportunity of education, no opportunity of learning; and because they cannot read and write now they are to be disfranchised, while white men who have had the advantages of free institutions and of the means of education are to be permitted to vote in ignorance, the result of their own want of attention, perhaps, or want of disposition.<sup>375</sup>

Lane concluded that it was better to allow the four and a half million freed slaves—the freed slaves throughout the former slave states—to protect themselves through the ballot than for Congress to have to continually protect them.<sup>376</sup>

Lane then noted that opposition to the District suffrage bill on the basis that the white people of the District opposed it was like the opposition to abolition of slavery in the District. Abolition in the District had been a “glorious act, that act which flashed like a sunburst of liberty in the darkness of our legislation upon the subject of African slavery in this District and under the shadow of the Capitol.”<sup>377</sup> He stated that he had voted for the Fourteenth Amendment because of its Section Two: “I supposed that in order to retain their political power in the country they themselves [the formerly rebellious states], when remitted to their constitutional relations, would permit the colored people to vote.”<sup>378</sup> Lane still believed that would happen, but argued that if the formerly rebellious states refused to ratify the Fourteenth Amendment, then Congress could take further steps to grant black suffrage in those states, which had forfeited the right held by loyal states to control suffrage.<sup>379</sup>

Senator Sumner then completed the debate on the literacy amendment. Even to the extent that that the bill involved only the voting rights of blacks in the District,

it would be difficult to exaggerate its value; but when it is regarded as an example to the whole country under the sanction of

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375. *Id.* Senator Lane also stated:

[I]n the District of Columbia the colored people subscribe, pay for, and read over five thousand daily newspapers . . . have seven thousand colored children in their own schools . . . [and] have religious, benevolent, and philanthropic associations sustained alone by the colored people of the District. That would argue, to my mind, a state of intelligence far from dangerous to the public liberty of the country.

*Id.*

376. *Id.*

377. *Id.* at 106–07.

378. *Id.* at 107.

379. *Id.*

Congress, its value is infinite. . . . [I]t becomes a pillar of fire to illumine the footsteps of millions. What we do here will be done in the disorganized States. . . . Practically it takes the whole country into its sphere . . . .

Now, to my mind nothing is clearer than the absolute necessity of the suffrage of colored persons in the disorganized States. It will not be enough if you give it to those who read and write; you will not in this way acquire the voting force which you need there for the protection of Unionists, whether white or black. You will not secure the new allies which are essential to the national cause. As you once needed the muskets of the colored persons, so now you need their votes; and you must act now with little reference to theory. You are bound by the necessity of the case. Therefore when I am asked to open the suffrage to women, or when I am asked to establish an educational standard, I cannot on the present bill simply because the controlling necessity under which we act will not allow it. By a singular Providence we are now constrained to this measure of Enfranchisement for the sake of peace, security, and reconciliation, so that loyal persons, white or black, may be protected and that the Republic may live. Here in the District of Columbia we begin the real work of reconstruction by which the Union will be consolidated forever.<sup>380</sup>

After this resounding declaration of the importance of the bill to the Republic's future, the Senate defeated the amendment that would have imposed a literacy requirement.<sup>381</sup>

The Senate then added penalties for the buying or selling of votes, made other minor amendments, and passed the bill.<sup>382</sup> The House passed it without debate the next day, December 14, 1866, after being informed of the Senate's action.<sup>383</sup>

President Johnson's veto of the bill arrived in the Senate on January 7, 1867.<sup>384</sup> The veto message argued that Congress's power over the District was "not without limit, but that Congress [was] bound to observe the letter and spirit of the Constitution, as well in the enactment of local laws for the seat of Government as in legislation common to the entire Union."<sup>385</sup> Johnson argued that Congress's relationship to the District's people was "analogous to that of a Legislature to the people of a State, under their

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380. *Id.*

381. *Id.*

382. *Id.* at 107-09.

383. *Id.* at 138.

384. CONG. GLOBE, 39th Cong., 2d Sess. 303 (1867).

385. *Id.*

own local constitution.”<sup>386</sup> Congress thus should consider the desires of the people of the District:

The spirit of our Constitution and the genius of our Government require that, in regard to any law which is to affect and have a permanent bearing upon a people, their will should exert at least a reasonable influence upon those who are acting in the capacity of their legislators.<sup>387</sup>

Members of Congress from states that did not provide equal suffrage should not force it on the District, even though members of Congress are not “responsible, through the ballot, to the people” of the District.<sup>388</sup> Johnson argued:

The great object of placing the seat of Government under the exclusive jurisdiction of Congress was to secure the entire independence of the General Government from undue State influence, and to enable it to discharge, without danger of interruption or infringement of its authority, the high functions for which it was created by the people. For this important purpose it was ceded to the United States by Maryland and Virginia, and it certainly never could have been contemplated, as one of the objects to be attained by placing it under the exclusive jurisdiction of Congress, that it would afford to propagandists or political parties a place for an experimental test of their principles and theories. *While, indeed, the residents of the seat of Government are not citizens of any State, and are not therefore allowed a voice in the Electoral College or representation in the councils of the nation, they are nevertheless American citizens, entitled as such to every guarantee of the Constitution, to every benefit of the laws, and to every right which pertains to citizens of our common country.*<sup>389</sup>

Johnson recounted that in 1803 the question had arisen whether to re-proceed the District to Virginia and Maryland because the people of the District did not have political rights, but that it had been thought that their lack of political rights “might be remedied by giving them a representation in Congress when the District should become sufficiently populous, and in

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386. *Id.*

387. *Id.*

388. *Id.*

389. *Id.* at 303–04 (emphasis added) (reprinting veto message dated Jan. 5, 1867). Note that the Twenty-Third Amendment, U.S. CONST. amend. XXIII, ratified in 1961, now gives the District three electoral votes. U.S. CONST. & ANALYTICAL INDEX, *supra* note 203, at 23–24.

the meantime a local legislature.”<sup>390</sup> Johnson almost certainly was referring to nonvoting representation in Congress, the same kind that the territories had, and the same kind that both he (in his State of the Union address) and Senator Davis had suggested.<sup>391</sup> He went on to argue that black suffrage in the District would be different from the black suffrage permitted, for example, in Massachusetts, where, according to the 1860 census, there were only “9,602 persons of color” out of a total population of well over a million. By contrast, the District population as of 1867 included approximately 100,000 whites as compared to 30,000 blacks, many of whom had recently been slaves and thus had not, according to Johnson, had an opportunity yet to learn enough to be safely permitted to vote.<sup>392</sup>

Johnson then linked the District suffrage bill to the national issue of black suffrage and argued that it would send a message to the country, a message that Johnson disagreed with: black suffrage was coming nationally and soon. Specifically, he stated that black suffrage

[i]mposed upon an unwilling people [the people of the District] placed by the Constitution under the exclusive legislation of Congress . . . would be viewed as an arbitrary exercise of power, and as an indication by the country of the purpose of Congress to compel the acceptance of negro suffrage by the States. It would engender a feeling of opposition and hatred between the two races, which, becoming deep-rooted and ineradicable, would prevent them from living together in a state of mutual friendliness.<sup>393</sup>

Instead the government should do what it could to promote good race relations, in preparation for the time when the “popular will” would “lead[] the way” to the “gradual and harmonious introduction of this new element [black suffrage] into the political power of the country.”<sup>394</sup> Blacks in the District, according to Johnson, already had equal rights and did not need the vote for their protection.<sup>395</sup> And there could be no presumption that the

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390. CONG. GLOBE, 39th Cong., 2d Sess. 304 (1867) (reprinting veto message dated Jan. 5, 1867). The only reference your author could find in the 1803 debates to representation for the District was a reference by Representative Huger to his hope that increased population and wealth in the District would lead both to representation in Congress and to a territorial legislature for the District. 12 ANNALS OF CONG. 488 (1803). Huger apparently was referring to the nonvoting representation territories had been given in Congress since before ratification of the Constitution. *See, e.g.*, *supra* text accompanying notes 37–39, 138.

391. *See supra* text accompanying notes 37–39, 138, 259–262, 323. For discussions of the attempts to retrocede the District in the early nineteenth century, see BOYD, *supra* note 49, at 7–9; 1 GREEN, *supra* note 61, at 29–30.

392. CONG. GLOBE, 39th Cong., 2d Sess. 304 (1867) (reprinting veto message dated Jan. 5, 1867).

393. *Id.*

394. *Id.*

395. *Id.*

“four million persons”<sup>396</sup> recently freed from generations of slavery were qualified to vote; allowing them to do so would be to risk “fraud and usurpation by the designing, [with] anarchy and despotism inevitably [to] follow.”<sup>397</sup> Finally, Johnson argued that he needed to veto the bill to check Congress; something had to be done or else there “would be a practical concentration of all power in the Congress of the United States—this, in the language of the author of the Declaration of Independence, would be ‘precisely the definition of despotic Government.’”<sup>398</sup>

The veto message was not warmly received. The Senate voted 29–10 to override the veto the same day it arrived, January 7, 1867.<sup>399</sup> The very next day, January 8, 1867, the House received the bill from the Senate and voted 112–38 to override the President’s veto.<sup>400</sup> Thus the District suffrage bill became law.<sup>401</sup>

The House veto override occurred without debate, but the Senate debate is illuminating. Senator Saulsbury’s request for a day’s delay to read and consider the veto message was rejected.<sup>402</sup> Senator Morrill attacked the veto message, arguing that the question of who could vote was a “popular question” that should not be decided only by those who ordinarily were permitted to vote. Thus it did not matter that the whites, to whom voting was restricted, had voted to reject black suffrage.<sup>403</sup> In any event, the question was one for Congress, not for voters in the District:

This District belongs, in the highest sense and the strongest sense, to the people of the United States, and upon all questions of popular rights here the people of the United States, and not the people of the District, are to control . . . . *We are the representatives of this District as we are the representatives of the country at large; and beside us this District has no representative, and by the Constitution was not expected to have.* So in the sense that this question is a question of popular rights, the people of this District have no control over the subject at all. It is a question . . . belonging entirely to the American people.<sup>404</sup>

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396. *Id.*

397. *Id.* at 305.

398. *Id.*

399. *Id.* at 313–14.

400. *Id.* at 341, 344.

401. Act of Jan. 8, 1867, 39th Cong., ch. 6, 14 Stat. 375 (An Act to Regulate the Elective Franchise in the District of Columbia); *see also* FONER, *supra* note 44, at 272.

402. CONG. GLOBE, 39th Cong., 2d Sess. 306 (Jan. 7, 1867).

403. *Cf.* AMAR, *supra* note 31, at 2 (noting that, “[t]aking their cue from the Preamble’s bold ‘We the People’ language, several states waived standard voting restrictions and allowed a uniquely broad class of citizens to vote for ratification-convention delegates” during the process of ratification of the Constitution).

404. CONG. GLOBE, 39th Cong., 2d Sess. 306 (1867) (emphasis added).

Morrill then answered his own question as to whether the people of the District had any right to have a local government: “Certainly not.”<sup>405</sup> The Constitution provided them no such right; otherwise the Constitution would have provided for them to have a “local Legislature,” and “this District would have been provided with representation, either by Representatives, Senators, or Delegates, neither of which is here.”<sup>406</sup> Morrill also rejected Johnson’s other reasons for vetoing the bill, calling Johnson’s assertion that equal suffrage would lead to hostility between the races “a popular delusion” that Morrill had not expected “to be repeated as an argument by the Executive of the nation why justice should not be done to a defenseless race.”<sup>407</sup>

Senator Sherman then pointed out that there was nothing new in the veto message and criticized Johnson for suggesting that the bill was an “abuse of legislative power”:

The President himself admits that Congress has absolute legislative power over this District, as full power as any State Legislature could have, unrestrained by a [state] constitution. The power of Congress over this District is without limit, and therefore in prescribing who shall vote for mayor and city council of this city it cannot be claimed that we usurp power or exercise a doubtful power.<sup>408</sup>

Sherman rejected Johnson’s claim that Congress’s power was dangerous; the state legislatures could replace a third of the Senators each year, and the people directly elected the members of the House.<sup>409</sup> The Fall 1866 elections had shown that the people preferred Congress’s approach to the President’s.<sup>410</sup> The danger was not Congress’s power but the President’s:

For the last twenty or thirty years, and ever since the time of General Jackson, there has been a growing feeling in this country that the danger of an undue increase of executive power was the imminent one . . . . There has been no time in the history of our Government when the executive patronage has been used to a more dangerous extent than . . . within the [previous] six months.<sup>411</sup>

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405. *Id.*

406. *Id.*

407. *Id.*

408. *Id.*

409. *Id.* at 307 (Jan. 7, 1867).

410. *Id.*

411. *Id.*

Sherman then echoed Morrill's point that the question of who should vote was not an ordinary political question. Sherman thought that Congress ought to give the District a legislative assembly for local matters like tax rates, but that who should vote was "peculiarly a question for Congress."<sup>412</sup> Not even the legislature of a state could determine who would have the franchise:

The prescription of who shall vote is the highest act of power in any government. It is an act of the people. After it is once fixed it is only by a change of the Constitution that the subject can be reached. The people themselves, through a convention duly elected, prescribe who shall vote; and even if legislative power should be conferred upon the people of this District no authority would be given to them to say who should vote. That must be fixed by the supreme legislative authority, and in the District it is admitted to be in Congress.<sup>413</sup>

Thus it did not matter that the whites in the District had voted against allowing blacks to vote. Nor was it surprising that they would vote to exclude blacks from voting: "It has been the history in all Governments in all struggles for liberty that the persons in possession of power have always been the last to share it with the others."<sup>414</sup>

After rejecting Johnson's claim that it was dangerous to extend suffrage to blacks,<sup>415</sup> Sherman made two additional points that are important for our purposes. First, he linked the District suffrage bill with Section Two of the Fourteenth Amendment. Second, he stressed that the people of the District were not represented in Congress.<sup>416</sup>

Contrary to Johnson's veto message, this was "precisely the time" to experiment with black suffrage because Congress had passed the Fourteenth Amendment, which (obviously in its Section Two)

endeavored to persuade in a gentle way the people of the southern States to give some degree of political power or political rights to the negroes of the South. Since we have passed that amendment we cannot sit here and refuse to give to the negro population of this District some political power, as we have in a measure by our

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412. *Id.*

413. *Id.*

414. *Id.*

415. *Id.* After all, they made up less than a third of the District's population, while the whites controlled the wealth of the District, controlled every newspaper, and controlled most churches in the District. With regard to intelligence and education, literacy tests were both unjust (because blacks had been "prevented . . . from learning to read and write") and difficult to apply. *Id.*

416. *Id.*

constitutional amendment bribed the people of the southern States to extend some political power to their negroes. It seems to me that now is the time, at the end of this great civil war when general principles are discussed more than ever before, to start out upon correct principles.<sup>417</sup>

Sherman then argued that the District was the right place for an experiment in black suffrage; Congress could always withdraw the right to vote if the experiment went badly, and it seemed that blacks in the District were showing the kind of enterprise and intelligence that would allow it to succeed.<sup>418</sup> But in any event, giving blacks the right to vote in the District could “do no harm. The people in this District vote simply upon municipal questions; they exercise no political power; *they have no voice either in the Senate or the House of Representatives.*”<sup>419</sup>

Senator Cowan then spoke in favor of sustaining the veto, candidly noting that it was “a question of which race shall dominate,” and saying he “would not quarrel with a black community that would exclude the whites from voting,” because otherwise every election would be “a contest of races.”<sup>420</sup> He suggested that “the District of Columbia, being a free community, just like a State, would, if it could, call a convention to settle this matter” by giving the majority race the power.<sup>421</sup> But if Congress imposed black suffrage on the District, “sixty thousand or one hundred thousand negroes standing all around who have no property and no ties to any particular spot [would be] perfectly free-footed to come into the District” and arrange themselves among the wards so as to control the elections. That would lead to “a never-ending feud” between the races.<sup>422</sup> Cowan continued on to argue that the people of the nation did not clearly favor black suffrage, that the President was right that legislative power could be dangerous, that Senators from states that did not allow blacks to vote should not impose black suffrage on the District, and that black suffrage should not be imposed “tyrannically” on the unwilling (white) people of the District.<sup>423</sup>

The debate continued at length, with Senator Williams speaking in favor of overriding the veto,<sup>424</sup> and Senators Johnson<sup>425</sup> and Doolittle<sup>426</sup> speaking in favor of sustaining the veto. For our purposes the important

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417. *Id.* at 307–08.

418. *Id.* at 308.

419. *Id.* (emphasis added).

420. *Id.* at 309.

421. *Id.*

422. *Id.*

423. *Id.* at 309–10.

424. *Id.* at 310–11.

425. *Id.* at 311–13.

426. *Id.* at 313.

points are Senator Johnson's understanding of the scope of the District power<sup>427</sup> and Senator Doolittle's reference to Section Two of the Fourteenth Amendment. Taking the latter first, Doolittle brought in Section Two by arguing that the Republican victory in the Fall 1866 elections (fought, as noted above, largely over the Fourteenth Amendment) did not show that the people supported black suffrage, because "[y]our very constitutional amendment repudiated the idea of universal negro suffrage."<sup>428</sup> The reference apparently is to Section Two's provision reducing representation where suffrage is limited but not requiring that suffrage be extended to blacks.

In Senator Johnson's view, Congress's power under the District Clause was broad:

[E]verything which Congress, from the very nature of our institutions, is not prohibited from doing, Congress can do by legislation with reference to the District of Columbia. The only limitations . . . are to be found in the nature of the government, and the particular individual guarantees to be found in the Constitution.<sup>429</sup>

Thus, Senator Johnson would have preferred that President Johnson's veto message not have raised the issue of congressional usurpation of power: "Congress will be guilty and has been guilty of no usurpation in passing this bill, as I think."<sup>430</sup> But Congress should listen to the people of the District and follow their preferences in local matters "provided they satisfy us that the grounds upon which they appeal to us are well founded."<sup>431</sup> Senator Johnson thought the grounds that the (white) people of the District had for objecting to black suffrage were well-founded, and that Congress therefore should respect their objections.

As noted above, the Senate then voted 29–10 to override the President's veto, and the House followed suit the following day, January 8, 1867, by a vote of 112–38, thus making the District suffrage bill law.<sup>432</sup>

All of this happened while an anxious nation watched,<sup>433</sup> and while states were continuing to consider whether to ratify the Fourteenth Amendment. Eleven of them ratified the Fourteenth Amendment during the three weeks following Congress's override of the veto of the District suffrage bill: New York, Ohio, Illinois, West Virginia, Michigan, Kansas,

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427. Senator Johnson also reminded the Senate that Madison's statement had said Congress would (in Johnson's paraphrase) "give the people of the District a government for themselves." *Id.* at 312.

428. *Id.* at 313.

429. *Id.* at 311.

430. *Id.* at 313.

431. *Id.* at 312.

432. See *supra* text accompanying notes 399–401.

433. See *supra* note 119.

Minnesota, Maine, Nevada, Indiana, and Missouri.<sup>434</sup> Three more states ratified the Fourteenth Amendment the next month, in February 1867: Rhode Island, Pennsylvania, and Wisconsin.<sup>435</sup> None of the ratifiers in any of those states—or for that matter in any state that ratified the Fourteenth Amendment before or after those states—could have been in any doubt: Section Two provided only for representation for states and not for the District.

By early March 1867,<sup>436</sup> Congress had acted to end Presidential Reconstruction, placing the formerly rebellious states (other than Tennessee) under military rule,<sup>437</sup> setting standards for readmission of the formerly rebellious states to representation in Congress,<sup>438</sup> and “authorizing military commanders to register voters and hold elections.”<sup>439</sup> Congress finally proposed the Fifteenth Amendment in February 1869, which would prohibit the federal and state governments (though for many, many years with limited effectiveness) from denying or abridging citizens’ voting rights “on account of race, color, or previous condition of servitude.”<sup>440</sup> The Fourteenth Amendment had become part of the Constitution in July 1868; the Fifteenth Amendment followed in February 1870.<sup>441</sup>

No action was taken, of course, to provide the District any voting representation in Congress. Instead the repeated suggestions that the District should have a nonvoting delegate to the House as part of a territorial-style local government finally bore fruit in 1871, though the experiment only lasted three years.<sup>442</sup>

### III. HISTORICAL EVIDENCE FROM THE TIME OF THE FOUNDING SHOWING THAT THE FAILURE OF ARTICLE I OF THE CONSTITUTION TO PROVIDE REPRESENTATION FOR THE DISTRICT COULD NOT HAVE BEEN INADVERTENT

Evidence from the time of the Founding shows that the failure of the original Constitution to provide representation for the District also could not have been inadvertent. It is easy, though, to misunderstand the background of the provision for the District in the Constitution. It is true that

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434. See, e.g., U.S. CONST. & ANALYTICAL INDEX, *supra* note 203, at 17.

435. See, e.g., *id.*

436. See FONER, *supra* note 44, at 276–77.

437. See *id.* at 273–77.

438. See *id.* at 276 (stating that the conditions were “essentially the writing of new constitutions providing for manhood suffrage, their approval by a majority of registered voters, and ratification of the Fourteenth Amendment”).

439. *Id.* at 277.

440. U.S. CONST. amend. XV, § 1; see U.S. CONST. & ANALYTICAL INDEX, *supra* note 203, at 18 (noting that the Fifteenth Amendment was proposed by Congress on February 26, 1869).

441. See, e.g., U.S. CONST. & ANALYTICAL INDEX, *supra* note 203, at 17, 18.

442. See *supra* note 61.

the June 1783 mutiny of some Continental Army soldiers was “one of the predominant influences on the founding fathers with respect to the need for a separate federal district.”<sup>443</sup> But the focus on that event<sup>444</sup> and on the need for physical security misses much of the point and obscures the tremendous ferment from 1777 to 1790 and beyond over the issue of the seat of government.<sup>445</sup>

The story, as generally told, is that while in session in Philadelphia on June 21, 1783, the Continental Congress was threatened by a group of armed soldiers who wanted to be paid what had been promised for their Revolutionary War service.<sup>446</sup> The state authorities in Pennsylvania failed to call up the state militia to protect Congress. Thus, Congress was forced to flee to Princeton.<sup>447</sup> As a result, there was sentiment in favor of having a seat of government under control of Congress, so that it would be able to provide for its own physical security<sup>448</sup> and otherwise be independent of any state government.<sup>449</sup> No District yet existed when the Constitution was ratified,<sup>450</sup> and it might be thought that the delegates to the Constitutional Convention would have little reason to focus attention on the rights of the people of any District that might be created. Perhaps a District might not be created; after all, there had been no repetition of the June 1783 event, and states might refuse to cede land for a District. There might have been no expectation that such a District, if created, would have a substantial nontransient population that would need or deserve congressional representation.<sup>451</sup> Perhaps the agrarian Virginians (Washington, Jefferson, and Madison) who ultimately succeeded in having the District sited on the Potomac would have wanted an agrarian, noncommercial capital with a small population. Thus, it might be thought, neither the drafters nor the ratifiers of the Constitution had any reason to focus on the failure of the Constitution to provide affirmatively for representation for the people of any future District. Had they focused on that failure, they certainly would have rec-

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443. Frankel, *supra* note 14, at 1683.

444. *See supra* text accompanying note 101–102.

445. *See infra* text accompanying notes 454–467, 475–541.

446. *See, e.g., Equal Representation in Congress, supra* note 2, at 2 (prepared statement of Prof. Viet Dinh); BRESS & MCGILL, *supra* note 92, at 3.

447. *See, e.g., Common Sense Justice, supra* note 49, at 3 (statement of Hon. Kenneth W. Starr); BRESS & MCGILL, *supra* note 92, at 3; Frankel, *supra* note 14, at 1684.

448. *See, e.g., BRESS & MCGILL, supra* note 92, at 3 (“The episode convinced the Framers that the seat of the national government should be under exclusive federal control, for its own protection and the integrity of the capital.”) (footnote omitted).

449. *See, e.g., Raven-Hansen, supra* note 19, at 172.

450. S. REP. NO. 110-123, at 3 (2007) (“However, the District did not exist when these words [from Article I, Section Two, Clause One of the Constitution] were ratified . . .”).

451. *See BRESS & MCGILL, supra* note 92, at 3 (“[I]t is doubtful that many would have adverted to the issue [of representation for the District’s residents], even at the time of the District’s creation, as few could have foreseen that the ten-square-mile home to 10,000 residents would evolve into the vibrant demographic and political entity it is today.”). Note that the ten-mile-square District had an area of one hundred square miles, not ten.

ognized that the people of any future District should be entitled to representation because otherwise the rallying cry of the Revolution—no taxation without representation—would have been betrayed.<sup>452</sup> The failure to provide for representation for the people of a future populous District was thus “an inadvertent omission.”<sup>453</sup>

The first essential error of this story is to treat the District as if it were an afterthought. Nothing could be more wrong. Issues concerning the seat of government were at the center of political discussion from 1777 to 1790 and beyond. Those issues included (1) where Congress would meet (and where other parts of the government would reside), (2) the influence that the location would have on Congress and on the rest of the government, and (3) the influence that a permanent seat of government would have on the area where it might be located. It certainly is true that the major focus of the struggles after 1783 was on location of the capital rather than on the political rights of the capital’s residents, but that was because it had generally been agreed that Congress should have exclusive jurisdiction over the capital.<sup>454</sup> The matter had not been ignored but rather had been settled, with the settlement remaining a prominent feature of the planned seat of government. And location was important in part due to the possibility of political influence on Congress—the same kind of influence that Philadelphia had exerted.

The Continental Congress considered repeatedly whether it should leave Philadelphia: once in 1775–1776,<sup>455</sup> twice in 1777,<sup>456</sup> and again in 1779–1780.<sup>457</sup> In 1783, Congress (now meeting pursuant to the 1781 Articles of Confederation) determined to leave Philadelphia temporarily after the June 1783 event, but was not forced to flee.<sup>458</sup> After reconvening in Princeton, Congress surprisingly chose not to return to Philadelphia. Then Congress resolved to set up a permanent seat of government—a federal town—on the Delaware River near Trenton but was unable to agree on a temporary seat of government pending construction of the federal town. To break the deadlock, the eastern states<sup>459</sup> joined with the southern states in passing a plan to set up two permanent seats of government, one on the Delaware near Trenton and one on the Potomac at or near Georgetown. That allowed agreement to be reached, though not without difficulty, that

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452. See, e.g., *id.* at 3; see also *supra* text accompanying note 98.

453. See, e.g., BRESS & MCGILL, *supra* note 92, at 3.

454. WILHELMUS BOGART BRYAN, 1 A HISTORY OF THE NATIONAL CAPITAL FROM ITS FOUNDATION THROUGH THE PERIOD OF THE ADOPTION OF THE ORGANIC ACT 7–8 (1914). See generally BOWLING, *supra* note 36; GREEN *supra* note 61.

455. See BOWLING, *supra* note 36, at 17; *infra* text accompanying note 479.

456. See *infra* text accompanying note 480.

457. See *infra* text accompanying notes 481–484.

458. See *infra* text accompanying notes 490–501.

459. Writers of that time and current historians variously refer to the northeastern states as either eastern or northern.

the temporary seat of government would rotate between Annapolis and Trenton.<sup>460</sup> In 1784, Congress (sitting in Annapolis) decided to adhere to its decision to rotate temporary locations between Annapolis and Trenton. Congress refused to take steps to ensure that a capital on the Potomac would be built even as it adjourned to Trenton, near the proposed permanent capital on the Delaware.<sup>461</sup> In December 1784, Congress (sitting in Trenton) rescinded the dual permanent capital resolution, resolved that a single capital should be built on the Delaware River, and resolved meanwhile to meet in New York City.<sup>462</sup> In 1785 and 1786, Congress (sitting in New York City) refused to appropriate funds to build the capital on the Delaware and failed to set up the commission and committee that were to coordinate the specifics for doing so.<sup>463</sup> In 1787, Congress debated whether to leave New York City and move to Philadelphia (where the Constitutional Convention was being held) and whether to select Georgetown as the permanent seat of government, but took no action on either matter.<sup>464</sup> In 1788, the Continental Congress considered where it should call for the first meeting to be held of the new Congress under the new Constitution; its consideration of this issue influenced New York's decision to ratify the Constitution and included weeks of bitter debate.<sup>465</sup> Both sessions of the First Congress (1789–1790) struggled to set temporary and permanent locations for the seat of government; these issues, along with the issue of whether the federal government should assume the Revolutionary War debts of the states, nearly split the new nation before being resolved by the Compromise of 1790. George Washington “never forgot that congressional deliberations about the seat of government had so roused sectional interests and state jealousies that the existence of the Union itself had been placed in jeopardy.”<sup>466</sup>

The second essential error is the view that Washington, Jefferson, and Madison—all of whom were fervent supporters of a capital on the Potomac—wanted the capital to be (and expected the capital to be) agrarian, noncommercial, and lightly populated. In fact, all three of those Virginians shared the belief that Virginia desperately needed a commercial city and “hoped for such a city in order to protect their state's commerce not only from Philadelphia but also from rapacious Baltimore, which had invaded Virginia's economy.”<sup>467</sup> All three believed that the furs and agricul-

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460. See *infra* text accompanying notes 502–517. See generally BOWLING, *supra* note 36, at 27–57.

461. See *infra* text accompanying note 518.

462. See *infra* text accompanying note 519.

463. See BOWLING, *supra* note 36, at 68–70; *infra* text accompanying note 520.

464. See BOWLING, *supra* note 36, at 70–73; *infra* text accompanying note 520.

465. See *infra* text accompanying notes 526–529.

466. C.M. Harris, *Washington's Gamble, L'Enfant's Dream: Politics, Design, and the Founding of the National Capital*, 56 WM. & MARY Q., 526, 535 (1999); see also *infra* text accompanying notes 530–541.

467. BOWLING, *supra* note 36, at 113; see also 2 IRVING BRANT, JAMES MADISON: THE

tural products of the inland West could be brought to market by way of the Potomac, with the result that the Potomac ports—Georgetown and Alexandria—could become major commercial centers. A capital placed on the Potomac would stimulate the work needed to open the river to navigation and also would benefit from the massive commerce that would flow from the West. Such a commercial connection also would bind the West to the Atlantic states, helping to prevent an East–West split of the Union.<sup>468</sup>

The third essential error is a failure to understand the broader political considerations that led to the constitutional provisions for the District not to be a part of a state and for the District to be subject to congressional control. Those provisions were not just reactions to the June 1783 event, and they were, as with all aspects of the seat of government issues, carefully considered. They were largely reactions not to concerns about physical security but to concerns about political influence. Those concerns outweighed any concern about taxation without representation. It was understood that residents of the District would have only those political rights that the ceding state (or states) might bargain for them to retain, perhaps such as the right to have a local legislature of some kind; a proposal at the Philadelphia Convention to give District residents voting representation in the House was not accepted.<sup>469</sup>

The most authoritative historical treatment of these issues is Kenneth R. Bowling's 1991 book, *The Creation of Washington, D.C.: The Idea and Location of the American Capital*.<sup>470</sup> A shorter treatment can be found in Chapters VIII and X of a 1989 book by Charlene B. Bickford and Kenneth R. Bowling: *Birth of the Nation: The First Federal Congress, 1789–1791*.<sup>471</sup> Those works provide much of the basis for the following account. It should be noted that the original Act of Congress under which the land making up the District was to be accepted from Maryland and Virginia provided that “all offices attached to the seat of Government of the United States, shall be removed to, and . . . shall remain at the city of Philadelphia” until the first Monday in December 1800, and “[t]hat on the said first Monday in December, in the year one thousand eight hundred, the seat of Government of the United States shall, by virtue of this act, be transferred to” the District.<sup>472</sup> The same Act provided: “That the operation of the laws of the State within such district shall not be affected by this

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NATIONALIST, 1780–1787, at 310–11 (1948).

468. See *infra* text accompanying notes 591–593.

469. See Turley, *supra* note 7, at 335–36 (noting that Alexander Hamilton made such a proposal and that a proposal by Melancton Smith probably also would have given District residents the right to vote for members of Congress).

470. BOWLING, *supra* note 36, at 34.

471. CHARLENE BANGS BICKFORD & KENNETH R. BOWLING, *BIRTH OF THE NATION: THE FIRST FEDERAL CONGRESS, 1789–1791*, at 55–60, 67–76 (1989).

472. Act of July 16, 1790, §§ 5–6, 1 Stat. 130 (An Act for Establishing the Temporary and Permanent Seat of Government of the United States).

acceptance [of the cession], until the time fixed for removal of the Government thereto, and until Congress shall otherwise by law provide.”<sup>473</sup> Maryland and Virginia similarly had provided in the acts of their legislatures offering to cede land for the District that they would retain jurisdiction until Congress provided for governance of the District.<sup>474</sup>

*A. The Centrality of Issues Concerning the Seat of Government from 1775 to 1790*

Putting aside times when the Continental Congress moved or considered moving during the Revolutionary War due to the threat of British troops, the “residence issue” (the location of the seat of government, or at least the place where Congress would meet) was a subject of serious contention in Congress nearly every year from 1775 to 1790.

By 1765, Philadelphia, with more than 25,000 people, was the most populous city in the American colonies and probably the fourth largest city in the British Empire.<sup>475</sup> By 1774, its population had increased to almost 40,000, it had become a transportation hub in the colonies, and it “figured among the most attractive, urbane, populous and religiously diverse cities in the English-speaking world.”<sup>476</sup> In 1800, it was still the largest American city, with a population of almost 68,000.<sup>477</sup>

Philadelphia was chosen in 1774 as the meeting place for the Continental Congress even though George Washington “implied, and may actually have expressed, a fear that Congress could not maintain secrecy and autonomy in a wealthy and socially active commercial colonial capital, where influences of all sorts would affect even the most circumspect delegates.”<sup>478</sup> By late 1775 there were complaints of interference by Philadelphians and consideration of relocating elsewhere.<sup>479</sup> By 1777 the Continental Congress and the Pennsylvania Assembly were at odds, with members of Congress continuing to resent attempts by Philadelphians to influence Congress, and Congress twice considering moving from Philadelphia.<sup>480</sup> In 1778 and 1779, there were continuing jurisdictional disputes, and Phila-

473. *Id.* § 1.

474. *See* Maryland Cession, *supra* note 109; Virginia Cession, *supra* note 109.

475. *See* Theodore Thayer, *Town into City*, in PHILADELPHIA: A 300 YEAR HISTORY 68, 79 (1982).

476. BOWLING, *supra* note 36, at 15.

477. *See* Edgar P. Richardson, *The Athens of America*, in PHILADELPHIA: A 300 YEAR HISTORY, *supra* note 475, at 208, 218. *But see* Campbell Gibson, *Population of the 100 Largest Cities and Other Urban Places in the United States: 1790 to 1990* (U.S. Bureau of the Census, Population Division Working Paper No. 27, 1998), available at <http://www.census.gov/population/www/documentation/twps0027.html> (listing Philadelphia as second in population to New York City as of both the 1790 and 1800 censuses).

478. BOWLING, *supra* note 36, at 15.

479. *Id.* at 17.

480. *Id.* at 18–19.

delphia became “[t]he nearest equivalent in the United States to revolutionary Paris of the 1790s,”<sup>481</sup> including mob violence involving different Pennsylvania political factions<sup>482</sup> and a mob attack on Philadelphia’s Continental Army military commander.<sup>483</sup> Congress resolved to leave Philadelphia but ended up staying because sectional disputes prevented agreement on a new location.<sup>484</sup>

Congress continued to meet in Philadelphia following adoption in 1781 of the Articles of Confederation. By 1783 Philadelphia influence, especially through Congressman and Secretary of Finance Robert Morris, had further alarmed the “decentralists” (whose successors became known as Anti-Federalists).<sup>485</sup> “Decentralists viewed him [Morris] and his centralist [later Federalist] program as the very enemy combated by the Revolution: an overbearing federal government seated at a distant capital. They did not want to exchange the government at London for the government at Philadelphia, nor Lord North for Robert Morris.”<sup>486</sup> Decentralists, and even some centralists like George Washington, suspected Morris and his allies of fomenting trouble in the unpaid Continental Army—including the officers’ revolt known as the Newburgh Conspiracy—in order to obtain approval of a plan for funding the Confederation debt and putting in place a permanent Confederation tax scheme.<sup>487</sup>

In May 1783, a month before the June 1783 event, an important Virginian, Arthur Lee, complained that Congress could not be independent if it stayed in Philadelphia.<sup>488</sup> And “[w]eeks before the [June 1783] mutiny Oliver Ellsworth, delegate from Connecticut, reported that it was ‘general-

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481. *Id.* at 20.

482. *See, e.g.*, Frank G. Cook, *James Wilson*, 64 ATLANTIC MONTHLY 316, 322 (1889), available at <http://books.google.com/books?id=BWcRAAAAMAAJ> (describing armed defense by James Wilson, Robert Morris, and others of mob attack on Wilson’s home); Lewis Burd Walker, *Life of Margaret Shippen, Wife of Benedict Arnold*, 25 PA. MAG. HIST. & BIOGRAPHY 20, 24–27 (1901), available at <http://books.google.com/books?id=Iv07AAAAIAAJ> (same).

483. BOWLING, *supra* note 36, at 21.

484. *Id.*

485. *See, e.g.*, Letter from Samuel Osgood to John Adams (Oct. 1, 1783), in 21 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, at 184, 185 (Paul H. Smith et al. eds., 2001), available at <http://memory.loc.gov/ammem/amlaw/lwdglink.html> (writing after removal of Congress from Philadelphia and stating, “It would not have been possible that Congress should ever have been a free & independent Body in the City of P[hiladelphi]a.”).

486. BOWLING, *supra* note 36, at 27; *see also* Letter from Arthur Lee to St. George Tucker (July 21, 1783), in 20 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, *supra* note 485, at 435, 436 (“The Citizens here [in Philadelphia] are signing an Address intended to effect their [Congress’s] return to this City. As Mr. Robert Morris’s undue & wicked influence depends so much upon the residence here, it is presumed [sic] that he will use his utmost authority for that purpose. But his influence has manifestly diminished since the removal from Philadelphia, & the fixing of Congress in any other place will I hope restrain it within due bounds.”).

487. BOWLING, *supra* note 36, at 28; RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 12–13, 34 (2009); Letter from Arthur Lee to St. George Tucker, *supra* note 486, at 436.

488. BOWLING, *supra* note 36, at 30.

ly agreed that Congress should remove to a place of less expense, less avocation, and less influence than are to be expected in a commercial and opulent city.’”<sup>489</sup>

The June 1783 event involved unpaid soldiers from the Continental Army—all or mostly from Pennsylvania, but nonetheless continental soldiers who already should have been under Confederation control. Historians do not agree on various details of what happened, including whom the soldiers sought to intimidate into paying them: Congress or the Pennsylvania Executive Council.<sup>490</sup> According to Bowling they had already failed to obtain any relief from congressional officials and thus were seeking it from the executive council. Bowling states that Congress was not in session when the soldiers arrived but was called to the state house during the demonstration. According to Bowling, Hamilton arranged for Congress to be called to the state house, probably because “Hamilton and his centralist [later Federalist] allies deemed it inappropriate that continental soldiers be allowed to settle their claims against Congress with a state government.”<sup>491</sup> Members of Congress passed through the soldiers to enter the building, gathered on the first floor, never achieved a quorum, and yet demanded (perhaps after the soldiers “got drunk and pointed their muskets at the first floor windows”) that the executive council call out the local militia to suppress the soldiers’ demonstration.<sup>492</sup> The president of the executive council refused to call out the militia. The council agreed to accept a petition and to meet later with a committee of soldiers—an agreement approved by the President of the Congress. The members of Congress then left the building, after which the soldiers left. “Not a shot had been fired. No one had been injured nor had any property been destroyed.”<sup>493</sup>

That evening Congress reconvened, adopted resolutions stating that it had been in session and had been insulted by Pennsylvania’s lack of action, and decided to adjourn to Trenton or Princeton if Pennsylvania would not give assurances that it would protect and uphold the dignity of the Congress.<sup>494</sup> The next day, the soldiers apologized and the mutiny

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489. Harry M. Tinkcom, *The Revolutionary City*, in PHILADELPHIA: A 300 YEAR HISTORY, *supra* note 475, at 109, 154 (footnote omitted); *see also* Letter from Oliver Ellsworth to Jonathan Trumbull, Sr. (June 4, 1783), in 20 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, *supra* note 485, at 302, 303.

490. *See* BOWLING, *supra* note 36, at 30 (Executive Council); 2 BRANT, *supra* note 467, at 293–94 (apparently Congress); RON CHERNOW, ALEXANDER HAMILTON 180–81 (2004) (apparently Congress); 1 GREEN, *supra* note 61, at 10 (apparently Congress); Tinkcom, *supra* note 489, at 153 (Executive Council).

491. BOWLING, *supra* note 36, at 31. Thus a government debt issue became entwined with the issue of the seat of government; that would happen again, and again centrally involve Hamilton, in the Compromise of 1790. *See infra* text accompanying notes 537–541.

492. BOWLING, *supra* note 36, at 32.

493. *Id.* at 34. For other descriptions of the June 1783 event, *see* 2 BRANT, *supra* note 467, at 293–96; CHERNOW, *supra* note 490, at 180–83; Tinkcom, *supra* note 489, at 153–54.

494. BOWLING, *supra* note 36, at 33.

ended.<sup>495</sup> The president of the executive council refused to exacerbate the situation (or to provide fodder for his political foes in Pennsylvania) by agreeing that he had handled the June 21 event improperly.<sup>496</sup> Congress then adjourned to Princeton. “Decentralists” (as Bowling terms the opponents of those who were to become Federalists) used the event to get Congress away from Philadelphia, “a city they had long considered an unfit seat for a republican government.”<sup>497</sup> Centralists used the event to “assert the authority and dignity of Congress at a moment when the very existence of a meaningful Union stood at stake,”<sup>498</sup> apparently because the end of the war with Britain had made the Union seem less necessary<sup>499</sup> and because of fears that the Continental Army might mutiny en masse and seize power.<sup>500</sup> Hamilton was accused of manipulating events to remove Congress from Philadelphia.<sup>501</sup>

After reconvening in Princeton, Congress surprisingly chose not to return to Philadelphia. Congressmen from New England opposed a return to Philadelphia because they sought “to avoid the vortex of Philadelphia to which they feared Congress would become forever a mere appendage.”<sup>502</sup> Philadelphia tried to influence Congress to return, and most centralist members of Congress wanted to do so because they believed Philadelphia was congenial to a strong central government, but they did not have the votes.<sup>503</sup> In Princeton, away from Philadelphia’s influence, the power in Congress of the decentralists increased.<sup>504</sup>

Even before Congress abandoned Philadelphia, New York had offered a site for a permanent seat of government, as had Maryland (offering its upper-Chesapeake capital, Annapolis, with its state house, governor’s mansion, and “whatever jurisdiction over the town and its inhabitants Congress might find necessary for its ‘honor, dignity, convenience, and safety’”).<sup>505</sup> Virginia hoped to make a joint offer with Maryland of a site

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495. *Id.* at 34.

496. *Id.* at 33–34.

497. *Id.* at 33.

498. *Id.*

499. *Id.* at 31.

500. *Id.* at 32.

501. *Id.* at 36–37 (noting that Madison “did not consider the allegation totally groundless”). *But see* CHERNOW, *supra* note 490, at 182 (arguing that Hamilton was reluctant to have Congress leave Philadelphia).

502. BOWLING, *supra* note 36, at 53.

503. *Id.* at 37–42.

504. *Id.* at 39; Letter from Arthur Lee to St. George Tucker, *supra* note 486; Letter from David Howell to Nicholas Brown (July 30, 1783), in 20 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, *supra* note 485, at 480, 482–83 (“I conceive great hopes that things will take a different turn in Congress now it is removed from the unhealthful & dangerous atmosphere of Philadelphia. It is observed by some Gentlemen that an obvious alteration has taken place in the House on some debates of yesterday & today wherein the office of Finance is concerned . . .”).

505. BOWLING, *supra* note 36, at 43–45.

on the Potomac,<sup>506</sup> but the upper-Chesapeake Marylanders refused; thus Virginia offered Williamsburg, including “as much jurisdiction over a five mile square (twenty-five square miles) district as the residents of the area would yield,” with a similar offer of land on the Potomac if Maryland would join in.<sup>507</sup> The New Jersey Legislature then “promised the federal government whatever jurisdiction it needed over a twenty-square mile district.”<sup>508</sup> Cities were also involved in the competition, including several cities in New Jersey and also Germantown, Pennsylvania (near Philadelphia).<sup>509</sup>

In October 1783, Congress voted to locate the seat of government on the Delaware River near the fall line,<sup>510</sup> but was unable to agree on a temporary location pending preparation of the federal town.<sup>511</sup> Later that month, after acrimonious debate,<sup>512</sup> Congress voted to set up two seats of government,<sup>513</sup> one on the Delaware River near Trenton, and one on the Potomac near Georgetown, Maryland<sup>514</sup> (or somewhat upriver from Georgetown<sup>515</sup>), a “compromise” that “maintained the Union at a critical point.”<sup>516</sup> While buildings were constructed at those locations, Congress was to alternate between Annapolis and Trenton, beginning with Annapolis.<sup>517</sup> Congress met in Annapolis in December 1783, and later adjourned, as planned, to Trenton, but without taking any steps to construct the buildings at either of the chosen seats of government.<sup>518</sup> In December 1784, Congress rescinded the dual seats of government resolution, adopted a resolution for one capital somewhere on the Delaware River (four to nine square miles, to be selected by three commissioners to be elected by Congress), and decided that it would meet in New York City pending construction of the capital.<sup>519</sup>

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506. See 2 BRANT, *supra* note 467, at 300–01.

507. BOWLING, *supra* note 36, at 46.

508. *Id.* at 47.

509. *Id.*

510. 25 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 654–59 (Gaillard Hunt ed., 1922) (debate of Oct. 7, 1783).

511. *Id.* at 664–68 (debate of Oct. 10, 1783), 669–72 (debate of Oct. 11, 1783), 675–76 (debate of Oct. 13, 1783), 706–10 (debate of Oct. 20, 1783).

512. BICKFORD & BOWLING, *supra* note 471, at 55 (“In October 1783 the Confederation Congress voted to locate the federal town near Trenton. The southern congressmen reacted so violently that Congress quickly proposed that the United States have two federal towns: one on the Delaware and another on the Potomac near Georgetown, Maryland. This soothed southerners and provided the needed solution to one of the major sectional threats to the survival of the Union . . .”).

513. 25 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, *supra* note 510, at 711–14 (debate of Oct. 21, 1783).

514. 2 BRANT, *supra* note 467, at 301.

515. BOWLING, *supra* note 36, at 48–55.

516. *Id.* at 73.

517. *Id.* at 54.

518. *Id.* at 57–60.

519. *Id.* at 64–65; BICKFORD & BOWLING, *supra* note 471, at 55–56.

Once in New York, Congress had difficulty implementing the Delaware River decision and finally voted in late 1785 to kill any appropriation of funds for a Delaware River site. The southern states eventually decided that even a temporary capital as far north as New York was unacceptable. In May 1787, during several days of “heated debate,” they almost succeeded in obtaining the seven state votes needed to adjourn to Philadelphia; they did succeed in creating momentum toward a capital on the Potomac, probably at Georgetown.<sup>520</sup>

The Constitutional Convention began that same month, in May 1787. The Constitution produced by the delegates did not provide a specific location for the seat of government, and they did not spend much time on the subject.<sup>521</sup> “Had the delegates somehow been able to agree on a site, they would thereby have threatened the possibilities for ratification of the Constitution in those Middle States which lost the great prize.”<sup>522</sup> Proposals to prohibit any state capital or commercial city from being chosen as the seat of government were withdrawn so as not to alienate New York City and Philadelphia (which could threaten ratification).<sup>523</sup> “The Convention devoted even less debate to the idea of the capital. This was because the issues, other than size, had been resolved during the four preceding years in favor of one permanent residence over which Congress would exercise exclusive jurisdiction.”<sup>524</sup> Constance Green agrees that the notion of exclusive federal jurisdiction over the capital had been well-settled by 1787, or perhaps even earlier.<sup>525</sup>

In 1788, the Continental Congress (still meeting pursuant to the Articles of Confederation) considered where it should call for the new Congress to meet under the new Constitution, which had come into effect having been ratified by ten states, but not yet by New York, North Carolina, or Rhode Island. The Continental Congress delayed setting a place while the New York convention decided whether to ratify the Constitution. “The postponement had the effect of a bribe to the convention.”<sup>526</sup> Predictably, the delay generated substantial pressure from the New York City area in favor of ratification, so that New York City could continue as the temporary seat of government.<sup>527</sup> Yet, after New York ratified the Constitution, the Continental Congress was deadlocked in weeks of bitter debate,<sup>528</sup> with New York City temporarily prevailing over Philadelphia only when it was

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520. BOWLING, *supra* note 36, at 68–73.

521. *See id.* at 75–76; *see also* BEEMAN, *supra* note 487, at 284–86.

522. BOWLING, *supra* note 36, at 75.

523. *Id.*

524. *Id.* at 76.

525. *See* 1 GREEN, *supra* note 61, at 8–9.

526. BOWLING, *supra* note 36, at 87.

527. *Id.* at 87–88.

528. *Id.* at 88–96.

perceived that “the choice, as Madison told Washington, was either yielding to New York or strangling the government at its birth.”<sup>529</sup>

In 1789, the First Congress under the new Constitution postponed the divisive residence issue until the end of its first session, so that the urgent business of setting up a government could proceed.<sup>530</sup> When the issue was taken up in September, “the familiar struggle between North and South reached a new level of intensity . . . split[ing] the Federalist consensus along sectional lines and fir[ing] the opening volley in the battles that led to the Compromise of 1790 and [to] the two nascent sectional political parties . . . .”<sup>531</sup> Consider Bowling’s description of the debate in the House:

One of the great debates of the First Federal Congress and by far the most intense and explosive of the first session, it touched upon such classic themes of American history as immigration, internal improvements, slavery, sectionalism, states’ rights, the rights of the minority, disdain for wilderness, the power of the executive branch, the durability and expansion of the Union and the American mission. During it, several months before the introduction of Alexander Hamilton’s report on the public credit, James Madison used publicly for the first time the argument that overly powerful states were no longer the problem with American federalism. The length and intensity of the debate meant that the House had little time to devote to the Senate bill creating the federal judiciary. Southerners understood the importance of that bill, but most probably agreed with Arthur Lee that the location of the federal seat of government was more so.<sup>532</sup>

When it became clear that the House would approve a site on the Susquehanna River, Arthur Lee argued that the South and the West were being “sacrifice[d]” on the “altar” of the North’s interest, and Madison stated that he “firmly believe[d]” that if Virginians had known of this in advance, Virginia might have refused to join the Union.<sup>533</sup> The Senate

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529. *Id.* at 96.

530. BICKFORD & BOWLING, *supra* note 471, at 56. Madison “feared a long debate that would interfere with more urgent business.” *Id.*

531. BOWLING, *supra* note 36, at 127–28. For other descriptions of the debate see 3 IRVING BRANT, JAMES MADISON: FATHER OF THE CONSTITUTION, 1787–1800, at 276–80 (1950); 12 THE PAPERS OF JAMES MADISON 59–62 (Hobson & Rutland eds., 1979) (editors’ summary).

532. BOWLING, *supra* note 36, at 128.

533. *Id.* at 142, 147; 3 BRANT, *supra* note 531, at 278. Tench Coxe then wrote Madison, expressing concern that “the Union itself may be in danger.” Letter from Tench Coxe to James Madison (Sept. 9, 1789), in 12 THE PAPERS OF JAMES MADISON, *supra* note 531, at 394, 395. Madison responded that the newspapers had “discoloured” his remarks, but that he continued to believe his remarks to be correct, because “every conciliating picture of the probable justice and liberality of the New Government [was] found necessary in the [Virginia] Convention to abate the fears of an over-

changed the location to Germantown and surrounding areas near the Delaware River. The House concurred with the Senate, but Madison managed to have an amendment included so that further Senate action was needed. The Senate postponed further consideration to the second session of Congress.<sup>534</sup> “The South, as in 1783 and 1785, had prevented a northern capital and bought time for the Potomac.”<sup>535</sup>

In 1790, in order to force the residence issue to be considered afresh, the Second Session of the First Congress began by adopting a rule that pending business would not be carried over from one session to another. “The eastern and southern members insisted that everything be treated as new business, and they had the votes. Thus Congress established, and retained for half a century, a joint rule in order to kill a specific bill.”<sup>536</sup> Gridlock followed, with Congress unable to resolve either the residence issue or the assumption issue (involving Hamilton’s plan to have the federal government assume the states’ Revolutionary War debts as part of an overall financial system with a funded debt),<sup>537</sup> and with rising “talk of disunion and even civil war.”<sup>538</sup> Thus “a fundamental compromise of almost constitutional magnitude appeared the only solution.”<sup>539</sup>

Jefferson, Madison, and apparently also Washington considered how such a compromise might be reached. Hamilton agreed, in exchange for support for assumption, to support a temporary residence in Philadelphia followed by a move to a permanent seat of government on the Potomac. This was the Compromise of 1790, a compromise that preserved the Union from possible dissolution.<sup>540</sup> Washington summed up the situation:

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bearing Majority at this [eastern or northern] end of the Union.” Letter from James Madison to Tench Coxe (Sept. 18, 1789), in 12 THE PAPERS OF JAMES MADISON, *supra* note 531, at 409, 409–10. Henry Lee also wrote to Madison expressing fears of disunity should the capital not be placed on the Potomac, Letter from Henry Lee to James Madison (Sept. 8, 1789), in 12 THE PAPERS OF JAMES MADISON, *supra* note 531, at 388, 388–89. But Lee may have been influenced by his financial interests. See *infra* text accompanying note 555. Madison responded that he was concerned that the eastern states might be pleased with a separation of the interior southwest from the Union and that he was “extremely alarmed for the Western Country.” Because the interior southwest probably would be satisfied with a capital on the Susquehanna, it might be necessary to agree to place the capital there “as the least of the evils from which a choice must be made.” Letter from James Madison to Henry Lee (Oct. 4, 1789), in 12 THE PAPERS OF JAMES MADISON, *supra* note 531, at 425, 425–27.

534. BOWLING, *supra* note 36, at 159–60; 3 BRANT, *supra* note 531, at 280–81.

535. BOWLING, *supra* note 36, at 160.

536. *Id.* at 168.

537. *Id.* at 168–81.

538. *Id.* at 173; see also CHERNOW, *supra* note 490, at 336 (“During the spring of 1790, quarrels over assumption and the national capital grew so vitriolic that it didn’t seem far-fetched that the union might break up over the issues.”).

539. BOWLING, *supra* note 36, at 173.

540. See *id.* at x (“Madison and Hamilton, with the backing of Thomas Jefferson and George Washington, struck a compromise by which the North secured southern acquiescence to both financial capitalism and the constitutional doctrine of implied powers. In exchange, the South—after seven frustrating years of defeat—at last gained passage of an act placing the United States capital on the Potomac River.”); see also *id.* at 182–85 (stating that Hamilton’s part in the bargain was to influence the New England members of Congress—who preferred a temporary New York seat of government

The two great questions of funding the debt and fixing the seat of government have been agitated, as was natural, with a good deal of warmth as well as ability. These were always considered by me as questions of the most delicate and interesting nature which could possibly be drawn into discussion. They were more in danger of having convulsed the government itself than any other points. I hope they are now settled in as satisfactory a manner as could have been expected; and that we have a prospect of enjoying peace abroad, with tranquility at home.<sup>541</sup>

*B. The Expectation That the Capital Could Easily Become a Commercial City with a Substantial Population*

There was some sentiment that the permanent capital might turn out to be, or at least should be, a small, agrarian town.<sup>542</sup> But even well before the Constitution was proposed—with its potential for a hundred square mile District—states (and cities and other areas within states) fought to be the site of the capital; it was thought that it “would confer massive wealth, power, and population upon the winning state.”<sup>543</sup> “Because of the political and economic power the capital would bring to whatever locality, and

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and a permanent seat of government north of the Potomac—not to interfere with negotiations between southern members of Congress and the Pennsylvania members of Congress). For other descriptions of the Compromise of 1790, see JOEL ACHENBACH, *THE GRAND IDEA: GEORGE WASHINGTON’S POTOMAC AND THE RACE TO THE WEST 172–73* (2004); BICKFORD & BOWLING, *supra* note 471, at 68–73; 3 BRANT, *supra* note 531, at 314–18; CHERNOW, *supra* note 490, at 327–31; JOSEPH J. ELLIS, *FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION 48–80* (2000); D. Roderick Kiewiet, *Vote Trading in the First Federal Congress? James Madison and the Compromise of 1790*, in JAMES MADISON: THE THEORY AND PRACTICE OF REPUBLICAN GOVERNMENT 264 (Samuel Kernell ed., 2003).

541. BICKFORD & BOWLING, *supra* note 471, at 67 (quoting Washington’s letter of August 10, 1790, to Marquis de la Luzerne, from the George Washington Papers at the Library of Congress).

542. See BOWLING, *supra* note 36, at 10–11 (“Many Americans and their spokesmen in Congress believed the cities, with their commerce, local politics, luxury and mobs, were by definition anti-republican, and insisted that the United States should abandon the European precedent of placing capitals in large cities. The experience of Congress at Philadelphia during the War for Independence confirmed their opinion. Members of the First Federal Congress reported opposition, both within their body and from their constituencies, to fixing the capital at an existing commercial city. Such opposition ignored the reality that undeveloped sites would evolve into cities in time.”) (citations omitted); see also ACHENBACH, *supra* note 540, at 218 (“Madison had made clear over the years that remoteness from big cities would be a crucial attribute of the seat of government.”); *id.* at 183 (remarking that Jefferson “envisioned” a “humble republican village,” as shown by his “sketch for the capital [that] showed a rectangle of city blocks, a town not that much bigger than a neighborhood”); The Federal Farmer: An Additional Number of Letters to the Republican (Letter XVII, May 2, 1788), *reprinted in 17 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 360, 366 (John P. Kaminski & Gaspare J. Saladino eds., 1995) (Letter XVIII dated Jan. 25, 1788) (“If a federal town be necessary for the residence of congress and the public officers, it ought to be a small one . . .”).

543. CHERNOW, *supra* note 490, at 325; see also BOWLING, *supra* note 36, at 3 (reciting ever-increasing estimates from 1783 to 1790 of the value that the capital would bring to the local economy).

particularly whatever section of the country was chosen, the question had plagued the Continental Congress since 1783” and was “one of the major sectional threats to the survival of the Union during the American Revolution.”<sup>544</sup> “Indeed, Americans generally had assumed that wherever Congress chose to locate the federal city, there a great commercial center would arise.”<sup>545</sup> Bowling notes that

[a]t stake was which one of the great, mid-coastal rivers—the Hudson, the Delaware, the Susquehanna, or the Potomac—by the placement of the capital on its banks, would provide Americans with the best access to the wealth of the continent. The sites given the most serious consideration all lay on the latter three rivers . . . .<sup>546</sup>

Green similarly notes that “Southerners were persuaded, Thomas Jefferson perhaps as completely as anyone, that a capital below the Mason–Dixon line would attract ‘foreigners, manufacturers and settlers’ to Virginia and Maryland and thus shift southward the center of both population and power.”<sup>547</sup> Even a more modest appraisal notes that members of Congress in 1791 “assumed that a town, and in time a city, would form about the new public precincts.”<sup>548</sup> In 1788, a “Native of Virginia” wrote that the district might initially have “few or no inhabitants” if Congress purchased land for the capital, but that he had “no doubt but that this district will flourish; that it will increase in population and wealth . . . .”<sup>549</sup>

Madison and many others from the South fought from 1783 to 1790 (and afterward<sup>550</sup>) to bring the capital to the Potomac.<sup>551</sup> George Washing-

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544. BICKFORD & BOWLING, *supra* note 471, at 55.

545. 1 GREEN, *supra* note 61, at 7; *see also* Turley, *supra* note 7, at 333 (“The competition among the states for this designation [as the seat of government] was due in great part to the expectation that it would grow to be the greatest American city. Indeed, some cities vying for the status were already among the largest cities, like Baltimore, Annapolis, and Philadelphia. The new capital city was expected to be grand.”).

546. BOWLING, *supra* note 36, at 12.

547. 1 GREEN, *supra* note 61, at 7 (footnote omitted).

548. Harris, *supra* note 466, at 533.

549. Anonymous, A Native of Virginia: Observations upon the proposed Plan of Federal Government (Apr. 2, 1788), *reprinted in* 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 655, 674–75 (John P. Kaminski, Gaspare J. Saladino & Richard Leffler eds., 1990), *also available in* 1 JAMES MONROE, THE PAPERS OF JAMES MONROE 349, 373 (Stanislaus M. Hamilton ed., 1898) (included as Appendix II). The editorial note in *The Documentary History* states that the author is unknown; Bowling attributes it to James Monroe, *see* BOWLING, *supra* note 36, at 84, 260 n.11, apparently mistakenly. It was attributed to James Monroe until the pamphlet actually written by Monroe was discovered, and thus the editor of Monroe’s papers included it as Appendix II to the first volume of Monroe’s papers, along with the pamphlet actually written by Monroe, which is reproduced as Appendix I. *See* 1 JAMES MONROE, *supra*, at 307 n.\*, 349 n.\*.

550. *See, e.g.*, Editorial Note, Fixing the Seat of Government on the Potomac, 17 THE PAPERS OF THOMAS JEFFERSON 452, 454, 459 (Julian P. Boyd ed., 1965).

551. *See, e.g.*, Letter from Thomas Jefferson to James Madison (Feb. 20, 1784), *in* 6 THE PAPERS

ton led the effort to open the Potomac to navigation so that it could become a channel for the products of the western interior,<sup>552</sup> with Madison playing a key role in the Virginia legislature.<sup>553</sup> Washington had been convinced as early as 1758 that the Potomac should be the route of commerce from the West.<sup>554</sup> Madison participated for a time in Henry Lee's Great Falls Potomac venture after encouragement by Washington, who thought "a tremendous amount of water-borne produce would be funneled through the site."<sup>555</sup> Jefferson—for whom the opening of the Potomac for commerce from the Ohio River was a "subject . . . much at heart"<sup>556</sup>—was confident that the "the Ohio and its branches, which head up against the Patowmac affords the shortest water communication by 500 miles of any which can ever be got between the Western waters and Atlantic, and of course promises us almost a monopoly of the Western and Indian trade."<sup>557</sup> Jefferson also worried that some other water navigation projects would be finished first and steal the commerce that should flow through the Potomac.<sup>558</sup> Though Jefferson idealized the agrarian life,<sup>559</sup> he was realistic about the need for commerce (though not realistic about the navigational problems on the Potomac). In a letter to Washington, Jefferson argued:

All the world is becoming commercial. Was it practical to keep our new empire separated from them we might indulge ourselves in speculating whether commerce contributes to the happiness of mankind. But we cannot separate ourselves from them. Our citizens have had too full a taste of the comforts furnished by the arts and manufactures to be debarred the use of them. We must then in our defence endeavor to share as large a portion as we can of this modern source of wealth and power. That offered to us from the Western country is under a competition between the Hudson, the

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OF THOMAS JEFFERSON 544, 546 (Julian P. Boyd ed., 1952) (discussing strategy for bringing the capital to Georgetown); 2 BRANT, *supra* note 467, at 300; 3 BRANT, *supra* note 531, at 132.

552. ACHENBACH, *supra* note 540; BOWLING, *supra* note 36, at 111–21, 125–27; ELLIS, *supra* note 540, at 71; DOUGLAS SOUTHALL FREEMAN, WASHINGTON 523–24 (Richard Harwell ed., 1968).

553. BOWLING, *supra* note 36, at 113–14; 2 BRANT, *supra* note 467, at 365–69.

554. ACHENBACH, *supra* note 540, at 38–39; *see also* Letter from George Washington to Thomas Jefferson (Mar. 29, 1784), in 7 THE PAPERS OF THOMAS JEFFERSON 49, 50 (Julian P. Boyd ed., 1953) (noting that "[m]ore than ten years" before 1784, Washington "was struck with the importance" of opening up the Potomac to navigation).

555. ACHENBACH, *supra* note 540, at 168–69; *see* 2 BRANT, *supra* note 467, at 373–74.

556. Letter from Thomas Jefferson to George Washington (Mar. 6, 1784), in 7 THE PAPERS OF THOMAS JEFFERSON, *supra* note 554, at 15, 16.

557. ACHENBACH, *supra* note 540, at 34 (quoting Letter from Thomas Jefferson to James Madison (Feb. 20, 1784), in 6 THE PAPERS OF THOMAS JEFFERSON, *supra* note 551, at 546, 548).

558. *Id.*

559. *See, e.g.*, ACHENBACH, *supra* note 540, at 45; JOSEPH J. ELLIS, AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON 136–37, 141–42, 258–59 (1996) (noting disconnect between Jefferson's agrarian ideals and the reality of Jefferson's life).

Patowmac and the Missisipi itself. . . . Nature then has declared in favor of the Patowmac [over the Hudson], and through that channel offers to pour into our lap the whole commerce of the Western world. But unfortunately the channel by the Hudson is already open and known in practice; ours is still to be opened. This is the moment in which the trade of the West will begin to get into motion and to take it's direction. It behoves us then to open our doors to it.<sup>560</sup>

Washington responded, "My opinion coincides perfectly with yours respecting the practicability of an easy and short communication between the waters of the Ohio and Potomack, of the advantages of that communication and the preference it has over *all* others," and that "not a moment ought to be lost" in opening up the Potomac, though Washington thought the work would have to be privately financed.<sup>561</sup> A year later Washington asked Jefferson to inquire whether European financing might be available, since "friends of the measure are better stocked with good wishes than money, the former of which unfortunately, goes but a little way in works where the latter is necessary, and is not to be had."<sup>562</sup> But if potential investors understood the project, money would be forthcoming, as Washington thought,

for certain I am, there is no speculation of which I have an idea, that will ensure such *certain* and *ample* returns of the money advanced, with a great, and encreasing interest, as the tolls arising from these navigations; the accomplishment of which, if funds can be obtained, admits of no more doubt in my mind, under proper direction, than that a ship of skilful mariners can be carried hence to Europe.<sup>563</sup>

Several months later Jefferson wrote from Paris to say that completion of a particular canal would "infallibly turn thro the Patowmack all the commerce of Lake Erie and the country West of that, except what may pass down the Missisipi."<sup>564</sup>

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560. Letter from Thomas Jefferson to George Washington (Mar. 15, 1784), in 7 THE PAPERS OF THOMAS JEFFERSON, *supra* note 554, at 25, 26–27 (partially quoted in ACHENBACH, *supra* note 540, at 35).

561. Letter from George Washington to Thomas Jefferson (Mar. 29, 1784), in 7 THE PAPERS OF THOMAS JEFFERSON, *supra* note 554, at 49, 49–50.

562. Letter from George Washington to Thomas Jefferson (Feb. 25 1785), in 8 THE PAPERS OF THOMAS JEFFERSON 3, 4 (Julian P. Boyd ed., 1953).

563. *Id.*

564. Letter from Thomas Jefferson to George Washington (May 2, 1788), in 13 THE PAPERS OF THOMAS JEFFERSON 124, 124 (Julian P. Boyd ed., 1956).

According to Joel Achenbach, Washington thought Georgetown had the potential to become a great city because it was a nexus of transportation near the fall line of the Potomac.<sup>565</sup> Of course Washington ultimately included both Georgetown and Alexandria in the District. Both were already commercial towns.<sup>566</sup> In a report to Washington, Jefferson suggested twice as much waterfront in the capital for commercial activities as for governmental activities.<sup>567</sup> It is clear that Washington saw great things ahead for Alexandria: as of about 1786, “Washington continued to harbor his longstanding belief that navigation improvements on the upper reaches of the Potomac would provide the best access to the river networks of the Ohio Valley, eventually linking the Chesapeake Bay with the Mississippi and making Alexandria the commercial capital of the nation.”<sup>568</sup> Washington even took time during the Constitutional Convention to write Jefferson in Paris that it was obvious that Alexandria, due to its natural advantages, should handle the western fur trade.<sup>569</sup> Washington’s focus on the benefits of improving the navigation of the Potomac is illustrated by his letter to Jefferson of February 13, 1789, in which he discusses the matter and refers by date to six prior letters to Jefferson on the subject, from 1784 to 1787, and in which he notes that both Georgetown and Alexandria “will participate largely and happily in the great emoluments to be derived from [the trade in fur and in] other valuable articles, through the inland navigation of the upper and Western country.”<sup>570</sup> His view that the Potomac would become a great commercial channel held steady; at the end of August 1788 he wrote to Jefferson, “There remains now no doubt of the practicability of the plan, or that, upon the ulterior operations being performed, this will become the great avenue into the Western Country . . . .”<sup>571</sup>

Bowling notes that Pennsylvania Senator William Maclay, an agrarian, “hope[d] that the [1790] decision to go the Potomac might give a preponderance to agriculture in the dire contest he foresaw between the two economic philosophies,” agrarianism and commercial capitalism.<sup>572</sup> Bowling continues:

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565. ACHENBACH, *supra* note 540, at 177.

566. Editorial Note, 17 THE PAPERS OF THOMAS JEFFERSON, *supra* note 550, at 452, 454.

567. Jefferson’s Report to Washington on Meeting Held at Georgetown, Sept. 14, 1790, 17 THE PAPERS OF THOMAS JEFFERSON, *supra* note 550, at 461, 463.

568. JOSEPH J. ELLIS, HIS EXCELLENCY: GEORGE WASHINGTON 155 (2004).

569. ACHENBACH, *supra* note 540, at 155; Letter from George Washington to Thomas Jefferson (May 30, 1787), in 11 THE PAPERS OF THOMAS JEFFERSON 385, 385 (Julian P. Boyd ed., 1955).

570. Letter from George Washington to Thomas Jefferson (Feb. 13, 1789), in 14 THE PAPERS OF THOMAS JEFFERSON 546, 546–49 (Julian P. Boyd ed., 1958).

571. Letter from George Washington to Thomas Jefferson (Aug. 31, 1788), in 13 THE PAPERS OF THOMAS JEFFERSON, *supra* note 564, at 554, 554–55.

572. BOWLING, *supra* note 36, at x.

Maclay, however, failed to appreciate an important fact about Madison, Jefferson, and Washington. Although Virginians, particularly those associated with the economic promotion of the Potomac River, often spoke for the South in Congress, they were not typically southern. Strongly influenced by the commercial ethos of the Middle States, particularly the Chesapeake world, they did not oppose commercial capitalism. They opposed its profits going north. Consequently, they dreamt of a Potomac capital which would not only strengthen southern political power, but also establish Virginia as a commercial state perhaps without rival in the Union. The capital they envisioned would serve the American Empire as both its preeminent political and commercial center as it spread westward to the Pacific. For this dream of uniting the Hague and Amsterdam into one city, promoters of a Potomac capital abandoned agrarianism and even strict construction of the Constitution.<sup>573</sup>

Bowling describes Jefferson as “blinded by his commitment to a commercial capital on the Potomac.”<sup>574</sup>

Competition for the permanent and temporary seats of government became even fiercer under the new Constitution,<sup>575</sup> which provided for a more lucrative potential prize: a larger central government and a seat of government up to 100 square miles in area (“ten Miles square”).<sup>576</sup> “By 1789 some Americans expected their capital to become a new Rome, ‘the mistress of the western world, the patroness of science and of arts . . .’ or

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573. BOWLING, *supra* note 36, at x-xi. The alleged abandonment of strict constitutional construction was the assumption by the federal government of the Revolutionary War debts of the states.

574. *Id.* at 7.

575. See BICKFORD & BOWLING, *supra* note 471, at 56-57.

576. The benefits were such that there was intense competition even for the honor of temporarily hosting the seat of government, including competition between New York City and Philadelphia. See CHERNOW, *supra* note 490, at 325-30. Philadelphians hoped that a temporary return of the capital to Philadelphia might turn out to be permanent, or that the permanent capital might be located near Philadelphia. See Richard G. Miller, *The Federal City, in PHILADELPHIA: A 300 YEAR HISTORY*, *supra* note 475, at 155, 171. Even after the Compromise of 1790 (which provided for Philadelphia to serve as the seat of government until 1800, when the seat of government was to be moved to the new District on the Potomac), it was not clear that the government would ever leave Philadelphia. See Editorial Note, 17 THE PAPERS OF THOMAS JEFFERSON, *supra* note 550, at 452-60 (noting that the “mere enactment of the Residence Act was by no means a guarantee that the permanent seat of government would ever come to the Potomac,” and discussing efforts made by Jefferson and others to ensure that the capital would in fact be moved there). As noted above, while New York debated ratification of the Constitution, the Continental Congress postponed action on a resolution setting the location for the first session of Congress under the new Constitution. When the decision went against New York City in 1790, New Yorkers felt betrayed. The prospect of retaining the temporary capital in New York City had been a key factor in ratification of the Constitution by the State of New York, and New Yorkers thought they had implicitly been promised the temporary capital by the Continental Congress. See BOWLING, *supra* note 36, at 191, 193; see also *supra* text accompanying notes 526-529.

‘the seat of science manufactures and commerce for ages yet to come.’<sup>577</sup> Antifederalists argued that “difficulties and dangers” would result from “so large a federal city”; that it would be a “federal, or rather a national city, ten miles square, containing a hundred square miles, . . . about four times as large as London”; and that it “must soon become the great, the visible, and dazzling centre, the mistress of fashions, and the fountain of politics.”<sup>578</sup> They complained that the “ten miles square” would become a “great and magnificent capital,” that its residents would cause it to be “aggrandized” the same as the capitals of other nations,<sup>579</sup> that there would be “enormous expenditures” within the capital,<sup>580</sup> and that “there will always be a desire of the government to increase the trade of the capital.”<sup>581</sup> They claimed that the residents of the capital, having no political rights, would be “numerous and wealthy slaves” who would be “infallibly devoted to the views of their masters”—Congress.<sup>582</sup> Patrick Henry suggested that at least one state was so taken with the hope of obtaining the capital that it ratified the Constitution “without taking time to reflect,” and sarcastically commented: “We are told that numerous advantages will result from the concentration of the wealth and grandeur of the United States in one happy little spot; to those who will reside in or near it.”<sup>583</sup> Some thought Pennsylvania was destined to receive the capital; they warned that “the wealth of the Continent will be collected in Pennsylvania, where the Seat of the fœderal Government is proposed to be,”<sup>584</sup> and observed that Pennsylvania “has raised expectations of being made the seat of government which [will] naturally throw into it the riches and wealth of all the states in the Union . . . .”<sup>585</sup> Antifederalists argued that the one hundred

577. BOWLING, *supra* note 36, at 4 (footnote omitted).

578. The Federal Farmer: An Additional Number of Letters to the Republican (Letter XVIII, Jan. 25, 1788), *reprinted in* 17 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 542, at 360, 366–70.

579. William Grayson, Virginia Constitutional Convention Debate (June 16, 1788), *in* 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1319 (John P. Kaminski & Gaspare J. Saladino eds., 1993).

580. *Candidus II*, INDEP. CHRON., Dec. 20, 1787, *reprinted in* 4 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 493, 497 (John P. Kaminski & Gaspare J. Saladino eds., 1997), *available at* <http://www.wisconsinhistory.org/ratification/digital/index.asp>.

581. *Agrippa III*, MASS. GAZETTE, Nov. 30, 1787, *reprinted in* 4 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 580, at 342.

582. Letter from Caleb Wallace to William Fleming (May 3, 1788), *in* 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 549, at 782 (letter to Virginia Ratifying Convention delegate).

583. Virginia Constitutional Convention Debate (June 9, 1788), *in* 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 549, at 1056–57.

584. Letter from Elbridge Gerry to James Warren (Oct. 18, 1787), *in* 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 407 (John P. Kaminski & Gaspare J. Saladino eds., 1981).

585. Letter from Benjamin Gale to the Printers of the Connecticut Journal (Oct. 1787), *in* 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 397 (Merrill Jensen ed., 1978) (also complaining about the haste with which the Pennsylvania legislature called for a convention to

square mile District would not be a federal town but rather a huge federal city, perhaps with a population in the millions, and “larger and potentially more corrupt than Philadelphia or even London.”<sup>586</sup> Bowling notes:

One hundred square miles was an enormous area to an agrarian people whose largest city, thirty-six square mile Philadelphia, had a settled area of less than two square miles . . . . Federalists . . . recognized that empires were symbolized by the grandeur of their capitals, and they did not deny the Antifederalist claim that the ten mile square might become the focus of American politics, wealth, and society.<sup>587</sup>

“A large Federal City, not just a few buildings, was to be created.”<sup>588</sup> In fact the plans of the man Washington chose to lay out the city, Pierre L’Enfant, “called for a city of 6,110.94 acres, dwarfing Philadelphia, New York, and Boston. It would become the largest city in North America, L’Enfant thought—a metropolis of 800,000 people.”<sup>589</sup> “The commissioners appointed to select a site after the cessions by Maryland and Virginia were actuated very largely by the dream of making the Federal capital a great commercial center . . . .”<sup>590</sup>

No doubt those who fought to have the capital located in their region sought not just financial gain but also the honor of hosting the federal capital and the prospect of having special influence on the federal government to further regional interests (such as furthering of agricultural or manufacturing interests and, unfortunately, in the case of the South, protection of the institution of slavery). But there was an additional reason to seek to place the capital on a river that could become a channel of commerce to bring the products of the interior West to market. How Western produce was to be taken to market was a key issue for the unity of the new nation. If that produce reached market by way of the Mississippi, through Spanish New Orleans, the allegiance of Westerners—many of whom were immi-

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ratify the Constitution).

586. BOWLING, *supra* note 36, at 81.

587. *Id.* at 81–83.

588. Frederick Gutheim, *Foreword* to BOWLING, *supra* note 36, at vii, vii.

589. ACHENBACH, *supra* note 540, at 183; H.R. REP. NO. 110-123, at 26 (2007) (additional views of Senators Coburn and Stevens). It should be noted, though, that once it came time to build the federal city on the Potomac, Washington and Jefferson seemed to have quite different views of the scale of the enterprise. *See* Harris, *supra* note 466, at 529. *But see* Editorial Note, 17 THE PAPERS OF THOMAS JEFFERSON, *supra* note 550, at 452, 455 (After Congress’s second session ended in the summer of 1790, “the basic assumptions concerning the capital had become clearly established in [Jefferson’s] mind: . . . there would be a new city laid out and planned so as to be worthy of the rising empire” in line with “his conception from the beginning of a spacious capital city . . . .”).

590. Carroll D. Wright, *The Economic Development of the District of Columbia*, 1 PROCEEDINGS OF THE WASHINGTON ACADEMY OF SCIENCES 161, 163 (1899), *available at* <http://books.google.com/books?id=vNYAAAAAYAAJ>.

grants—might drift away from the United States, with the result that the nation might suffer an East–West split. A capital located, for example, on the Potomac, could stimulate the opening of the Potomac as an East–West channel of commerce that would bind the nation together.<sup>591</sup> Thus, Washington and others did not want the Mississippi to be open to Western commerce until the West had become indissolubly united to the rest of the nation.<sup>592</sup> Of course, if a capital on the Potomac caused substantial commerce to flow on the Potomac, the capital would likely benefit from that commerce and become a substantial commercial city.<sup>593</sup>

*C. The Importance of Avoiding Undue Influence from the Location Where the Capital Was Sited*

The evidence discussed above shows that the seat of government issues with which the nation struggled included important matters of political and economic influence, not just issues of physical security of the government. If the Framers sought primarily physical security for the new federal government, a ten-mile square District may not have been a particularly good way of obtaining it. They should have understood that if there was a mutiny of a substantial portion of a future federal army (perhaps a larger reprise of the 1783 Philadelphia mutiny), the militia that could be raised from the District would likely not be sufficient to deal with it.<sup>594</sup> The same would be true if a major nearby state's militia—drawn from an entire state rather than a ten-mile square District—attacked the federal government. If the regular army or a neighboring state's militia ignored the President's constitutional power to command the army and to command any state militia called into federal service, there would be little that a District militia could do.<sup>595</sup>

The Continental Congress had struggled to be independent in the midst of the political influences in Philadelphia.<sup>596</sup> The great struggle over where the capital would be located reflected to some degree a desire of various

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591. See Letter from Henry Lee to Thomas Jefferson (Mar. 6, 1789), in 14 THE PAPERS OF THOMAS JEFFERSON, *supra* note 570, at 619, 620 (promoting his Great Falls project and arguing that “the benefits resulting from the improved navigation of the potomac will be brought into operation immediately, or agriculture will flourish and the easy intercourse which this channel of communication affords between the atlantic, and our growing settlements in the west, will cement the union of our confederated republick, and preserve the entirety of the U. States.”)

592. See ACHENBACH, *supra* note 540, at 92, 123–27, 193–94; BOWLING, *supra* note 36, at 121; THOMAS P. SLAUGHTER, THE WHISKEY REBELLION: FRONTIER EPILOGUE TO THE AMERICAN REVOLUTION 86–89 (1988).

593. ACHENBACH, *supra* note 540, at 170–71.

594. *Diplomatic Correspondence*, 39 NORTH AM. REV. 302, 308 (1834), available at <http://books.google.com/books?id=lm0LJ348GDQC> (reviewing a seven volume set of diplomatic correspondence).

595. *Id.*

596. See *supra* text accompanying notes 478–488, 502–504.

states and areas to influence the Congress. It seems likely, therefore, that the political insulation provided by placing the capital in a District controlled by Congress rather than a state was a very important concern. If so, it is easy to understand how the Framers might have wanted to provide for a politically neutral District, especially if they believed, as some of them certainly did, that the capital would become a great commercial city. If residents of the District were permitted to vote for members of Congress from the District itself, this neutrality might be very difficult to maintain. But if residents did not vote for members of Congress, or even if, due to conditions placed on the cession of land for the District, the residents helped to elect members of Congress from the ceding states rather than from the District itself, neutrality might be easier to maintain. Thus the failure of the Constitution to provide for members of Congress to be elected from the future District by the District's residents makes a degree of sense, unjust though it is under current circumstances.

Given the intensity of the struggles from 1779 on with regard to the location of the capital, it seems unlikely that any aspect of the matter, including means for creating a politically insulated environment, would not have been carefully considered. Given that the location of the capital would have a great deal to do with the political influence that could be brought to bear on the national government—just as occurred in Philadelphia—the struggle over location was in part a continuing struggle over what those influences would be. The earlier settlement of the issue of jurisdiction—the consensus that Congress should have exclusive jurisdiction—remained a prominent feature of the plan for a seat of government.<sup>597</sup>

#### IV. CONCLUSION

The only possibly plausible argument that the District Clause gives Congress power by a simple statute to give the District a voting member in the House is the argument from inadvertence: the argument that the failure of the Constitution to provide for such representation was inadvertent.<sup>598</sup> The evidence with regard to Section Two of the Fourteenth Amendment overwhelmingly shows that there was no such inadvertence either on the part of the 39th Congress or on the part of the states that ratified the Fourteenth Amendment.<sup>599</sup> The evidence is not quite as clear with respect to the original text of the Constitution, but it is difficult to believe that provisions for the future District and provisions determining which entities should be represented in Congress were not carefully considered, given that the struggle over the seat of government very nearly caused the new nation to

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597. See *supra* notes 524–525 and accompanying text.

598. See *supra* notes 8–27, 81–100.

599. See *supra* notes 118–435.

break apart, given the difficulties with the political influence of Philadelphia on the Continental Congress, and given the need for clarity in the crucial Great Compromise over the composition of Congress.<sup>600</sup>

The key place held by the District in the debates of the 39th Congress—and in the corresponding national dialogue—makes it amply clear that the failure to provide congressional representation for the District in Section Two of the Fourteenth Amendment was not inadvertent.<sup>601</sup> The first bill introduced in each house during the 39th Congress dealt with African-American suffrage in the District.<sup>602</sup> Congress considered the District suffrage bills, when and how to readmit the formerly rebellious states to congressional representation, and the proposals for constitutional amendment that became the Fourteenth Amendment. These deeply interwoven issues highlighted the very limited nature of suffrage for District residents and the District's lack of representation in Congress.<sup>603</sup> The nation carefully followed this drama,<sup>604</sup> in which Congress simultaneously considered equal suffrage in the District,<sup>605</sup> broader questions of black suffrage (in part by way of the debate over District suffrage),<sup>606</sup> entitlement to representation in Congress of entities (the formerly rebellious states) claiming to be "States" entitled under the Constitution to representation,<sup>607</sup> and how to apportion seats in the House so as to encourage black suffrage, to prevent votes of formerly rebellious southerners from counting heavier than votes of citizens from other states, and to preserve the gains won at such terrible cost in the Civil War.<sup>608</sup>

The same concerns that make House representation for the District a matter of justice—including the principles of consent of the governed and of no taxation without representation—were raised loudly and repeatedly,<sup>609</sup> both at the federal level with respect to the unrepresented formerly rebellious states and at the state level with respect to the newly freed slaves, who were being denied voting rights by the provisional governments in the South.

The District was used to pioneer voting rights for African-Americans, with the debates over the District suffrage bills becoming debates over African-American suffrage generally. The District suffrage bills thus were

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600. See *supra* notes 28–35, 445–597 and accompanying text.

601. See *supra* notes 118–140, and accompanying text.

602. See *supra* notes 60, 118–119, 206–208 and accompanying text.

603. See *supra* notes 118–138 and accompanying text.

604. See *supra* text accompanying note 119.

605. See *supra* notes 60–61, 118–21, 172, 204–96, 321–432 and accompanying text.

606. See *supra* notes 62–63, 146, 204, 208–11, 214–47, 253, 263–64, 266–73, 288–93, 326–36, 350, 359–81, 393–97, 416–18 and accompanying text.

607. See *supra* notes 64, 155–84 and accompanying text.

608. See *supra* notes 66, 131–34, 139, 143–51, 183–84, 211–13, 267–316 and accompanying text.

609. See *supra* notes 67, 155–71, 259–60, 294–308, 315, 327–28, 333, 337–39, 387 and accompanying text.

closely linked to the resolutions that became Section Two of the Fourteenth Amendment, which was designed in part to encourage or coerce the formerly rebellious states to enfranchise African-Americans. As historian George P. Smith notes, Section Two and the District suffrage bills were inextricably intertwined.<sup>610</sup>

As if that were not enough, members of the 39th Congress repeatedly pointed out that the District was not represented in Congress, that District residents were permitted to vote only in local elections, and that the scheme of the Constitution subjected District residents to taxation without representation.<sup>611</sup> There were even suggestions that the District should be permitted to send a nonvoting delegate to the House, just as territories had done from the time of the Founding.<sup>612</sup> It had been settled by the Supreme Court for more than sixty years that the District was not a “State” as that term is used in Article I, Section Two of the Constitution.<sup>613</sup> Yet the Fourteenth Amendment echoed that language: Congress proposed and the states ratified the Fourteenth Amendment, with its repetition of language from Article I, Section Two, providing only for House seats to be apportioned among the “States.”

It would be difficult to make up a story that would show more clearly that Congress proposed the Fourteenth Amendment and the states ratified it with eyes wide open to the fact that it provided for representation in the House only for states and not for the District. It is simply beyond belief that the Fourteenth Amendment’s failure to provide House representation for the District was inadvertent.

Historical evidence of that clarity is seldom available, and thus the evidence is not quite as clear with respect to the Founding period. Nevertheless, there is ample evidence that there was no inadvertence with respect to the original text of Article I: it was understood at the Founding that House seats would be apportioned only to states, not including the District that would be formed to be the seat of government.<sup>614</sup>

Given the centrality of the Great Compromise to the success of the Philadelphia Convention, it is hard to believe that the Constitution could have been intended by its drafters or understood by its ratifiers to leave open-ended in any way the composition of the Congress.<sup>615</sup> Further, the struggle concerning the seat of government was at the center of political discussion from 1777 to 1790 and beyond.<sup>616</sup> It seems highly unlikely that

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610. See *supra* note 60.

611. See *supra* text accompanying notes 118, 135–36, 205, 238–40, 246, 251, 291, 315, 323, 333, 374, 389, 404–06, 416, 419, 431.

612. See *supra* text accompanying notes 259–61, 323, 390–91.

613. See *supra* note 72 and accompanying text.

614. See *supra* text accompanying notes 454–597.

615. See *supra* notes 28–35 and accompanying text.

616. See *supra* text accompanying notes 445, 475–541.

the provisions of the Constitution dealing with the seat of government would have escaped very careful consideration. Twice, the struggle nearly destroyed the new nation.<sup>617</sup> The major focus of the struggle after 1783 was on the location of the capital rather than on the political rights of the capital's residents, but that was because the need for Congress to have exclusive jurisdiction (largely to minimize any state's political influence) was settled early on.<sup>618</sup> The location was important in part due to the possibility of political influence on Congress—the kind of influence that Philadelphia had exerted and that had been a major reason for the more than decade-long struggle over the location of the seat of government.<sup>619</sup> There certainly was no consensus that the seat of government would be a rural place with few people and thus little need for representation. If anything, the consensus was to the contrary, that if the capital were not located initially in a large city it would act as a magnet for wealth and population and become a major city. In fact, far from seeking an agrarian capital, the Virginians—Washington, Jefferson, and Madison—who fought for so long to bring the capital to the Potomac envisioned the capital becoming a major commercial city through which the wealth of the West would reach the Atlantic, to the financial benefit of Virginia and with the result that the West would be strongly tied to the eastern seaboard states.<sup>620</sup>

The lack of representation for a future District was understood at the Philadelphia Convention; thus at least one suggestion was made to provide for such representation. But the suggestion was not accepted; the District was not to have a seat in Congress.<sup>621</sup> It is true that residents of the area that was becoming the District continued to vote for members of the House from Virginia and Maryland through 1799, but it is very clear that they did so as citizens of Virginia and Maryland—not losing that status before 1800—and that the members of Congress they helped to elect were members from Virginia and Maryland, not from the District. This history provides no support for the notion that the District itself could have a House seat apportioned to it.

Thus, there was no inadvertence at the Founding. And the evidence is perfectly clear that there was no inadvertence when Congress proposed and the states ratified the Fourteenth Amendment, with its Section Two providing for apportionment of House seats only to states. The conclusion is inescapable: the D.C. House Voting Rights Act is unconstitutional; members of Congress have a duty under their oaths to vote against it, and the President will have a duty to veto it should it reach his desk.

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617. See *supra* text accompanying notes 445, 466, 516, 540–41.

618. See *supra* text accompanying notes 454, 524–25.

619. See *supra* text accompanying notes 468, 478–89, 502–04, 594–97.

620. See *supra* text accompanying notes 467–68, 542–93.

621. See *supra* note 469 and accompanying text.

It is unjust, in your author's opinion, that the residents of the District do not have voting representation in the House. But there is a clearly constitutional remedy for that injustice: amendment of the Constitution. It seems highly likely that a constitutional amendment providing for the District to have voting representation in the House could be adopted in fairly short order. All or nearly all of the opposition to the D.C. House Voting Rights Bill is based on its unconstitutionality, with nearly unanimous agreement that the District should have voting representation in the House. Political leaders who have so agreed would find it very difficult to oppose a simple constitutional amendment granting the District representation in the House.

Should a statutory route be preferred, however, it might be possible to give District residents voting representation in Congress by statute in a way that does not violate the Constitution. As others have noted,<sup>622</sup> the drafters and ratifiers of the Constitution may have contemplated that a state could bargain, as part of an agreement of cession, to provide a continuing right of residents in the District to vote in congressional elections in the ceding state.

James Madison argued in the Virginia ratifying convention "that there must be a cession, by particular states, of the district to Congress, and that the states may settle the terms of the cession. The states may make what stipulation they please in it . . . ."<sup>623</sup> Madison also argued in *The Federalist No. 43* that creation of a future District would require "consent of the State ceding it" and that "the State will no doubt provide in the compact for the rights and the consent of the citizens inhabiting it."<sup>624</sup> Thus Madison thought the ceding state could bargain to protect the rights of the residents in the area to be ceded.<sup>625</sup> In the North Carolina ratifying convention, James Iredell argued:

They [Congress] are to have exclusive power of legislation,—  
but how? Wherever they may have this district, they must possess  
it from the authority of the state within which it lies; and that state

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622. See, e.g., DINH & CHARNES, *supra* note 12, at 7–8; Raven-Hansen, *supra* note 19, at 172; Orrin G. Hatch, "No Right Is More Precious in a Free Country": Allowing Americans in the District of Columbia to Participate in National Self-Government, 45 HARV. J. ON LEGIS. 287, 289–90 (2008).

623. 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 433 (2d ed. 1836) [hereinafter ELLIOT'S DEBATES].

624. THE FEDERALIST NO. 43, at 272 (James Madison) (Clinton Rossiter ed., 1961).

625. Madison goes on in the same sentence to say that the residents of the District will be permitted to elect "a municipal legislature for local purposes," but he says nothing about residents being permitted to vote for members of Congress. See *id.* at 272–73. That may suggest that he did not think the bargain could extend to allowing the residents to continue to vote in the ceding state's House elections.

may stipulate the conditions of the cession. Will not such state take care of the liberties of its own people?<sup>626</sup>

The way the cession of the District actually took place illustrates the understanding that a state could bargain for protection of the residents. Both Maryland and Virginia provided in their offers of cession that their laws would continue in effect until Congress exercised its legislative authority.<sup>627</sup> That would prevent District residents from falling into a legal limbo. The 1790 Act of Congress that began the process of accepting the cession similarly provided that “the operation of the laws of the state within such district shall not be affected by this acceptance [of the cession of the district], until the time fixed for the removal of the government thereto, and until Congress shall otherwise by law provide.”<sup>628</sup> The cession apparently was completed in 1800 with the “removal” of the government to the District, and Congress shortly afterward exercised its legislative authority over the District by passing the Organic Act of 1801.<sup>629</sup> The result was that District residents never again voted in congressional elections. But if Congress had not exercised its legislative authority, it is possible that the agreed-upon continued effectiveness of the laws of Maryland and Virginia might have allowed the residents to continue to vote as if they still were Marylanders or Virginians.

In effect, the cession would have been left in a less than legally complete status, perhaps leaving in place some political rights for the residents of the ceded areas pursuant to agreement. If it is thought (incorrectly) that the cession of the District was completed before 1800 such that District residents lost their state citizenship,<sup>630</sup> such a theory would make perfect sense of the continued voting by District residents in Virginia and Maryland congressional elections through 1799. But the agreement made by Maryland and Virginia with the United States did not provide for residents to continue to have a right to vote in congressional elections in those states after Congress exercised its power.<sup>631</sup>

It might not be too late for Maryland and the United States to make such an agreement now. The terms of the cession could be renegotiated to include such a right on the part of the residents of the District. It is possible that such an agreement could have been made originally, and there is

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626. 4 ELLIOT'S DEBATES, *supra* note 623, at 219.

627. *See supra* text accompanying note 474.

628. Act of July 16, 1790, § 1, 1 Stat. 130 (An Act for Establishing the Temporary and Permanent Seat of the Government of the United States); *see also supra* note 109 and accompanying text.

629. *See supra* text accompanying notes 18–23, 109–14.

630. *See supra* text accompanying notes 108–113.

631. Thus, after 1799, the residents of the portion of the District ceded by Maryland never again voted in congressional elections. Residents of the portion ceded by Virginia of course once again voted in Virginia congressional elections after retrocession of that portion back to Virginia in 1846.

of course precedent for retrocession. Thus a partial cession back to Maryland of a degree of political linkage with the residents of the District so that they could vote in elections for one or more Maryland House seats (and be counted as part of Maryland's population for purposes of apportionment of House seats) might be constitutional.<sup>632</sup> It is possible—assuming Maryland assents—that such a theory could provide the constitutional basis for legislation like that introduced by Representative Dana Rohrabacher entitling District residents to vote in Maryland elections for members of the House of Representatives and to be counted as Marylanders for purposes of apportionment of House seats.<sup>633</sup>

On the other hand, it is not likely that either at the time of the Founding or at the time of adoption of the Fourteenth Amendment any such agreement could have provided District residents a voice in selection of Maryland's Senators. Of course, senators at that time were chosen by state legislatures, and thus District residents could only have had a voice in such a choice by being able to vote for Maryland state legislators. It appears that such a relationship between District residents and state legislators would have been inconsistent with the provision of the District Clause calling for Congress to have the exclusive right to legislate for the District.

Finally, a statute allowing the District's population to be included in Maryland's count for House apportionment purposes would likely give Maryland an extra House seat and thus an extra electoral vote. That would result in double counting of District residents' votes for president, which likely would conflict with the Twenty-Third Amendment, and which might conflict with other constitutional principles. Representative Rohrabacher's bill thus provides that no presidential electors will be appointed for the District. But it seems unlikely that the power of Congress under the Twenty-Third Amendment to determine the manner in which electors from the District are chosen includes a power to, in effect, repeal the Amendment.<sup>634</sup>

A better solution would be for the Maryland legislature, as part of a renegotiated cession agreement, to enact legislation that would preclude appointment of any such extra presidential elector. A renegotiated cession agreement could provide that the right of District residents to vote in Mar-

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632. See BOYD, *supra* note 49 (discussing similar concept of "semi-retrocession").

633. See District of Columbia Voting Rights Restoration Act of 2009, H.R. 665, 111th Cong. (2009) (proposed legislation). For a further discussion of this approach, which has been called semi-retrocession, see BOYD, *supra* note 49, at 11–14; Philip G. Schrag, *The Future of District of Columbia Home Rule*, 39 CATH. U. L. REV. 311, 326–27 (1990). Note that H.R. 665 provides for District residents to vote as Marylanders in Senate elections and in presidential elections, as well as in elections for the House of Representatives.

634. See Peter Raven-Hansen, *The Constitutionality of D.C. Statehood*, 60 GEO. WASH. L. REV. 160, 187–88 (1991) (discussing arguments for and against Congress having such power).

yl and congressional elections—and their inclusion in Maryland’s population for House apportionment purposes—would terminate immediately should any such legislation ever be repealed or circumvented. Congress could also provide by law that, in counting electoral votes,<sup>635</sup> it would not count any extra Maryland elector should Maryland appoint one. Such mechanisms might allow District residents to be included in Maryland elections for the House of Representatives while avoiding electoral college complications.

Of course, if Maryland were to receive an extra representative, due to inclusion of the District’s population as part of Maryland’s for purposes of apportionment of House seats, and if the size of the House were kept at 435, another state would have to lose a seat that it otherwise would have received. Political concerns then might suggest that a renegotiation of the cession so as to allow District residents to vote in Maryland elections for the House of Representatives ought to be combined with an increase in the size of the House. So that the number of House seats would remain odd (to minimize the chances of a tie vote), it could make sense to add two seats, thus raising the size of the House permanently to 437, as would be done under the D.C. House Voting Rights Bill. That aspect of the bill (though criticized by Professor Turley as unwise<sup>636</sup>) is surely constitutional. And given Utah’s complaints about the result of the last apportionment of House seats, it could help to make such a plan politically feasible, at least if it is implemented quickly. As the 2010 census and the reapportionment of the House pursuant to it come inexorably nearer, the political opening created by Utah’s census complaints may close.

It certainly is not clear that this statutory approach to granting District residents the right to vote as Marylanders in House elections is constitutional. A constitutional amendment granting the District a House seat would be a better approach. But an approach that would allow District residents to vote as Marylanders would be much more defensible than the D.C. House Voting Rights Act, an Act so clearly unconstitutional that members of Congress have a duty under their oaths to vote against it, and so clearly unconstitutional that the President will have a duty under his oath to veto it should it reach his desk.<sup>637</sup>

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635. See U.S. CONST. amend. XII; 3 U.S.C. § 15 (2006) (providing rules for Congress’s counting of electoral votes).

636. Turley, *supra* note 7, at 309–10 n.10, 362.

637. Another statutory approach that could give the District representation would be for Congress, by statute, to admit the District to statehood. Of course, if the District became a state, it would receive voting representation in both the House and the Senate. For a discussion of potential constitutional problems with granting statehood to the District, see, for example, MARKMAN, *supra* note 29; RAVENHANSSEN, *supra* note 634.

The argument has been made that if Congress could, by statute, admit the District as a state, thus giving the District voting representation in both the House and Senate, Congress should be able, by statute, to grant the District voting representation in the House, on the theory that the greater power

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includes the lesser power. *See Ending Taxation Without Representation, supra* note 5, at 3 (statement of Senator Leahy referring to testimony to be given by retired Chief Judge Patricia Wald); *id.* at 251, 255 (written testimony of Judge Wald). Thus the greater power to grant statehood is thought to imply the existence of the lesser power to grant voting representation in the House. Such a theory proves too much. Congress could admit Puerto Rico, Guam, or even China as a state. Could Congress therefore instead grant each of those entities voting representation in the House without admitting them as states? Further, such a greater includes the lesser argument would give Congress the power to create two-tier statehood. Congress could admit new pseudo-states, giving them representation in the House, but not in the Senate, with even their statutory entitlement to representation in the House being revocable by Congress. That would violate the constitutional principle that states are to be on an equal footing, and in particular, the constitutional provision for equality of states in the Senate—a provision that is entrenched in the Constitution. *See U.S. CONST. art. V; AMAR, supra* note 31, at 85–87, 273–275, 293–294.