A Capital Idea: Legislation to Give the District of Columbia a Vote in the House of Representatives

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Stemming from its unique constitutional status as the seat of federal government, the District of Columbia lacks the voting representation in Congress to which states are entitled. The District of Columbia House Voting Rights Act of 2007, passed by the House of Representatives and pending in the Senate, seeks to address this structural disenfranchisement by providing the District with a voting member in the House. Such unprecedented legislation raises many legal and policy questions. This Note argues that, with one slight modification, the legislation is a sound accommodation in both respects. While federal security interests justify some impositions on the District, withholding legislative representation is not one of them. Because judicial relief is unavailable and other alternatives are politically unviable, the soundest remedy is legislation to provide a House representative. Such legislation is a valid exercise of Congress's authority to legislate for the District and extend the franchise, notwithstanding the Constitution's textual delimitation of House representation to states. A provision of this particular bill limiting the District to a single representative regardless of population must be removed as unconstitutional, however. As a separate matter, ambiguous precedents suggest that standing doctrine may limit judicial review of the legislation's constitutionality. Finally, far from putting Congress on a slippery slope to excessive empowerment of the District and other federal jurisdictions, the legislation creates inherently and uniquely weak representation.

I. INTRODUCTION

Since the District of Columbia became the seat of federal government in 1800, its citizens have lacked voting representation in Congress. District citizens have long protested that this denial of representation violates basic democratic principles, relegating them to second-class status in their own country. Efforts to redress this grievance have achieved the worthwhile but ultimately symbolic advance of securing a non-voting delegate in the House of Representatives, a privilege likewise accorded to four United States territories. Delegates have at times been permitted to vote in the House’s deliberative Committee of the Whole, where most of the debate on and amendments to a legislative item occur before the full House takes a final vote on it. Even this limited concession is toothless, however, because its constitutionality hinges on a “savings clause” providing that for any vote on which a delegate’s vote proves decisive, a re-vote must be taken excluding delegates. As one Congressman put it to delegates, “when your vote counts, it doesn’t count, but when it doesn’t count, it

1. For example, the phrase “taxation without representation” is stamped on the standard District of Columbia license plate “to support D.C.’s quest for full representation in the US Congress.” District of Columbia Department of Motor Vehicles, Taxation without Representation Tags, http://dmv.DC.gov/serv/plates/tax.shtml (last visited Jan. 28, 2007).

2. See, e.g., Editorial, As the Democrats Dither, the District’s Voters Wait, and Wait, . . . , WASH. POST, Jan. 24, 2007, at A22 (calling on new congressional leadership “to explain why citizens of the capital of the free world are disenfranchised in the halls of Congress”).


4. This limited voting power, achieved by amending the House Rules, was granted by a Democratic Congress in 1993, repealed when Republicans took the House in 1996, and granted again in 2007 when Democrats regained control.

5. See Michel, 817 F. Supp. at 130–34 (describing the history and purposes of the Committee of the Whole). Because of the “close operational connection between the Committee of the Whole and the full House,” this provision comes “perilously close . . . to granting delegates a vote in the House.” Michel, 14 F.3d at 632.

Thus impaired, this delegate does not provide the political equality that the District’s 581,530 residents seek.

Recently, an innovative legislative strategy has brought the District the closest it has been to its goal in nearly thirty years. This approach would secure a full vote for the District in the House of Representatives via ordinary congressional legislation. After being introduced repeatedly in recent sessions of Congress, such legislation has finally gained traction. The latest version, the District of Columbia House Voting Rights Act of 2007 ("D.C. Voting Rights Act"), has passed in the House and is pending in the Senate. Crafted as a political accommodation, the legislation has won bipartisan support, but raises difficult constitutional questions.

This Note argues that legislation granting the District of Columbia a House representative is a constitutionally valid exercise of Congress’s power and that standing doctrine may significantly impede judicial review of the law. The Note cautions, however, that Congress must discard an extraneous provision of the D.C. Voting Rights Act as unconstitutional. Part II examines how this particular political accommodation became necessary, placing the problem of District representation in context by describing the District’s unique constitutional status, the normative and policy basis for according the District a vote in Congress, and the options available to the District for pursuing congressional representation. Part III contends that the proposed legislation, by harnessing Congress’s affirmative power to act upon the District, surmounts the constitutional hurdles that have tripped up previous efforts to win House representation. Notwithstanding this general constitutionality, Part III also urges Congress to delete from the D.C. Voting Rights Act a practically trivial but constitutionally fatal provision that limits the District to a single House representative regardless of population. Part IV explains that existing jurisprudence offers unclear guidance on standing to

7. Id. at 142 n.40 (internal citation omitted).
challenge the legislation; depending on how concretely the plaintiff must be injured, standing may be available immediately or might not arise for several years. Part V rebuts the criticism that such legislation puts Congress on a slippery slope to excessively empowering the District and other federal jurisdictions, arguing that in fact it creates uniquely weak House representation.

II. THE PROBLEM OF DEMOCRATIC REPRESENTATION FOR THE DISTRICT OF COLUMBIA

Though it may seem a constitutional and political oddity, the creation of a congressional seat for the District of Columbia by ordinary legislation makes sense when placed in the context of the District's unique situation. This Part describes the peculiar legal status of the District, the normative and policy arguments on providing it congressional representation, and the available political alternatives for pursuing representation. Understood in light of that background, this legislation appears the most realistic means of winning greater congressional representation for the District.

A. THE PECULIAR LEGAL STATUS OF THE DISTRICT OF COLUMBIA

The District of Columbia is a unique entity in the federal structure of the United States. Created with land ceded by Maryland and Virginia in 1790, the District is more than a territory, but less than a state. Consider the factors distinguishing the District from American Samoa, Guam, Puerto Rico, and the Virgin Islands — the territories that also have delegates in the House:

11. District of Columbia v. Carter, 409 U.S. 418, 432 (1973) ("Unlike either the States or Territories, the District is truly sui generis in our governmental structure.").


13. Puerto Rico's official status is a commonwealth, not a territory. For convenience, it is here lumped in under the category of territories.
Historically, the District of Columbia was formerly part of a state (Maryland), rather than foreign terrain conquered by the United States.

Geographically, the District of Columbia is part of the continental United States, not a distant island.

Fiscally, residents of the District of Columbia are subject to federal income taxation, unlike residents of territories (with the partial exception of Puerto Rico).

Temporally, the District's status is permanent, whereas a territory may become a state or an independent nation.

Politically, the District of Columbia is the only non-state jurisdiction accorded the right to vote in presidential elections, perhaps a reflection of the first four factors.

Taking together historical circumstances, political sentiments, and legal relationships, the District is more deeply integrated into the nation and its political system than any territory.

Yet the District is just as surely less than a state. Lacking the residual police power that states enjoy under the Tenth Amendment, the District of Columbia operates under the absolute au-


[In light of the transitory nature of the territorial condition, Congress could reasonably treat the Territories as inchoate States, quite similar in many respects to the States themselves, to whose status they would inevitably ascend. The District of Columbia, on the other hand, is an exceptional community . . . established under the Constitution as the seat of the National Government. Territories that have become states include Alaska and Hawaii; a territory that became independent is the Philippines.


17. Puerto Rico perhaps could claim it is more integrated than the District because Puerto Rico has repeatedly been accorded the opportunity to vote to become a state. Yet Puerto Rico has resisted integration, thrice rejecting statehood in plebiscites held in 1967, 1993, and 1998. George F. Will, Voting Rights Chicanery, WASH. POST, Jan. 28, 2007, at B07.

18. U.S. CONST. amend. X; see also Printz v. United States, 521 U.S. 898, 918–19 (1997) (“It is incontestible that the Constitution established a system of dual sovereignty. Although the States surrendered many of their powers to the new Federal Government,
thority of Congress. Article I, Section 8, Clause 17 of the Constitution (the “District Clause”) empowers Congress “[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 Acceptance of Congress, become the Seat of the Government of the United States . . . .”19 The D.C. Circuit holds that, in managing the District, Congress enjoys “complete legislative control as contrasted with the limited power of a state legislature, on the one hand, and as contrasted with the limited sovereignty which Congress exercises within the boundaries of the states, on the other.”20 Ultimately, “Congress is the District’s government . . . .”21

This is not to say that the District lacks its own government. Responding to persistent pressure,22 Congress granted the District of Columbia limited home rule authority in 1973 with the District of Columbia Self-Government and Governmental Reorganization Act (“Home Rule Act”).23 This delegation of power authorizes the District to elect a mayor and city council with some powers of legislation and finance, similar to an ordinary municipal government.24

The measure of autonomy provided by the Home Rule Act remains overshadowed by congressionally imposed limitations and oversight.25 Certain traditional state subjects — such as the imposition of a commuter tax on non-residents and supervision of federal and local courts — are beyond the District’s regulatory

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22. “[O]ver 40 home rule bills were introduced in Congress between 1874 and 1972.” Clarke v. United States, 886 F.2d 404, 407 (D.C. Cir. 1989) (citation omitted), vacated as moot, 915 F.2d 699 (D.C. Cir. 1990).
24. See Clarke, 886 F.2d at 407.
25. Additionally, what limited home rule was granted in 1973 has been steadily eroded in the ensuing decades. See Michael K. Fauntroy, HOME RULE OR HOUSE RULE? CONGRESS AND THE EROSION OF LOCAL GOVERNANCE IN THE DISTRICT OF COLUMBIA (2003).
domain. Spending is tightly controlled, for “no expenditures may be made by the District — either of funds furnished to the District by the federal Government or of funds raised through the District’s own means of revenue collection — unless approved by act of Congress.” In the same vein, all legislation the District government enacts “must be submitted to Congress, which then has 30 days to disapprove the law by concurrent resolution before the law becomes effective.” Moreover, “Congress expressly reserves the right to enact legislation concerning the District on any subject and to repeal D.C. Council enactments at any time.”

In view of this sweeping congressional control, “it is clear that the ultimate legislature the Constitution envisions for the District is not a city council, but rather Congress itself.”

B. NORMATIVE AND POLICY ARGUMENTS REGARDING CONGRESSIONAL REPRESENTATION

It is widely agreed that denying congressional representation to American citizens in the District of Columbia contradicts the United States’ core democratic principles. This sentiment is long-standing. In the words of President William Henry Harrison in his 1841 inaugural address:

The people of the District of Columbia are not the subjects of the people of the States, but free American citizens. Being in the latter condition when the Constitution was formed, no words used in that instrument could have been intended to deprive them of that character. If there is anything in the great principle of unalienable rights so emphatically insisted upon in our Declaration of Independence, they could neither make nor the United States accept a surrender of

26. Marijuana Policy Project v. United States, 304 F.3d 82, 83 (D.C. Cir. 2002). The constitutionality of prohibiting the District from imposing a commuter tax was upheld in Banner v. United States, 428 F.3d 303, 312 (D.C. Cir. 2005).
27. Clarke, 886 F.2d at 407.
28. Id. at 407 n.2.
29. Marijuana Policy Project, 304 F.3d at 83.
31. While no judicial redress has ever been offered, “many courts have found a contradiction between the democratic ideals upon which this country was founded and the exclusion of District residents from congressional representation.” Id. at 72.
their liberties and become the subjects . . . of their former fellow-citizens.\(^\text{32}\)

Even congressional delegates from other non-voting jurisdictions have recognized that the District holds a stronger claim to getting a vote in Congress than their territories do.\(^\text{33}\)

Nonetheless, there is a sound policy reason for limiting the District’s powers. To prevent disruption of its operations, the federal government undoubtedly has a special interest in the security of the national capital. Locating the national capital in a state — where the federal government has limited authority to intervene\(^\text{34}\) — would jeopardize this interest. This very concern occasioned the creation of the District as a federally chartered, protected, and administered entity after the Continental Congress, sitting in Philadelphia in 1783, was forced to adjourn and relocate to New Jersey when Pennsylvania refused to engage its state militia to disband a protest by unpaid Revolutionary War soldiers.\(^\text{35}\) The Union cannot be beholden to one state in whose domain the capital resides.\(^\text{36}\)

\(^{32}\) President William Henry Harrison, Inaugural Address (Mar. 4, 1841). In the same vein, President Richard Nixon told Congress that, “It should offend the democratic senses of this nation that the 850,000 citizens of its Capital, comprising a population larger than 11 of its states, have no voice in the Congress.” President Richard Nixon, Special Message to the Congress on the District of Columbia (Apr. 28, 1969), http://www.presidency.ucsb.edu/ws/print.php?pid=2022. Today, the District’s population exceeds that of only one state, Wyoming.


\(^{34}\) See New York v. United States, 505 U.S. 144, 162 (1992) (“While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions.”).

\(^{35}\) See Adams v. Clinton, 90 F. Supp. 2d at 50 n.25.

\(^{36}\) This justification has been advanced since the earliest days of the Republic. See THE FEDERALIST NO. 43, at 289 (James Madison) (Jacob E. Cooke ed., 1961):

The indispensable necessity of complete authority at the seat of government, carries its own evidence with it . . . . Without it, not only the public authority might be insulted and its proceedings interrupted with impunity; but a dependence of the members of the general government on the State comprehending the seat of the government, for protection in the exercise of their duty, might bring
Yet this policy rationale does not require depriving the District of congressional representation. First, the concern that a state could or would seriously undermine the operation of the national capital is drastically diminished in the modern era of strong national government and military, relative to the country’s formative years when national unity was still coalescing and the federal government was too weak to defend itself. Since World War II, the headquarters of many federal agencies, most notably the Department of Defense, have been relocated outside the District to neighboring jurisdictions. This trend is clear evidence that states no longer pose the sort of existential threat to federal operations that worried the Framers.

Second, and more importantly, this particular limit bears little relation to promoting the security of federal operations. Even if some accoutrements of statehood — the ability to raise a militia, certain police functions, powers of taxation, and so on — must be limited in the District in deference to federal interests, it is not clear how such limitations are incompatible with congressional representation. A roughly analogous conflict of interest exists between states and state capitals in the United States, but no state resolves that quandary by disenfranchising residents of its capital city. Internationally, six other national capitals also organized as federal districts — Brasilia, Buenos Aires, Canberra, Caracas, Delhi, and Mexico City — are accorded voting representation on the national councils.

37. “[T]he historical rationale for the District Clause — ensuring that Congress would not have to depend upon another sovereign for its protection — would not by itself require the exclusion of District residents from the congressional franchise.” Adams v. Clinton, 90 F. Supp. 2d at 50.


39. See Gerald L. Neuman, Anomalous Zones, 48 STAN. L. REV. 1197, 1222 (1996) (“If such sensitive governmental functions as those carried out by the CIA, the Pentagon, and the Atomic Energy Commission can be safely based in the surrounding states, it is difficult to see why the additional federal power over the District of Columbia is not redundant.”).

40. As President Andrew Jackson argued, “It was doubtless wise in the framers of our Constitution to place the people of this District under the jurisdiction of the General Government, but to accomplish the objects they had in view it is not necessary that this people should be deprived of all the privileges of self-government.” President Andrew Jackson, Third Annual Message (Dec. 6, 1831), http://www.presidency.ucsb.edu/ws/print.php?pid=29473.
To the degree that a capital must be stripped of some ordinary powers of self-government, legislative representation at least affords residents a voice in their own governance. Rather than promoting the federal interest, disenfranchising the national capital de-legitimizes the truly necessary federal impositions.

Beyond the possibility that the Framers did not actually intend what is now a well-entrenched deprivation, the continued disenfranchisement of the District’s citizens may ultimately stem less from any coherent policy rationale than from an unfavorable constitutional presumption embodied in the District Clause. Under the District Clause, the District has no power unless Congress clearly permits it, as opposed to the District having ordinary state powers unless Congress clearly prohibits them. Rather than Congress bearing the ongoing burden of enumerating what the District cannot do, the District must overcome the forces of political inertia to secure enumeration of powers it would otherwise possess by default. More than any policy motivation, it is this inertia that impedes congressional representation for the District.

C. APPROACHES TO ACHIEVING CONGRESSIONAL REPRESENTATION

Since 1800, there have been numerous attempts to secure voting representation in Congress for the District of Columbia, employing a variety of legal and political approaches. This section reviews three of the most noteworthy attempts and then compares approaches that remain potentially viable, demonstrating


42. See Peter Raven-Hansen, Congressional Representation for the District of Columbia: A Constitutional Analysis, 12 HARV. J. ON LEGIS. 167, 172 (1975) (characterizing disenfranchisement as a historical accident founded upon ambiguity and background assumptions in drafting the District Clause). The three-fifths clause, U.S. CONST. art. I, § 2, cl. 3., suggests that when the Framers intended to disenfranchise citizens, they did so explicitly, not by omission.

43. For a categorized history of these efforts, see EUGENE BOYD, CONGRESSIONAL RESEARCH SERVICE, DISTRICT OF COLUMBIA VOTING REPRESENTATION IN CONGRESS: AN ANALYSIS OF LEGISLATIVE PROPOSALS 2–18 (2007).
that the most promising possibility is a statute granting the District a House seat.

1. Previous Efforts

Apart from the legislation this Note focuses upon, there have been three major attempts in the past thirty years to secure greater enfranchisement for the District of Columbia. All three failed.

First, in 1978 a Constitutional amendment was proposed to treat the District as a state for purposes of House and Senate representation, presidential elections, and the constitutional amendment process.\(^\text{44}\) The amendment made significant headway but ultimately fell short, as the House and Senate approved it but only sixteen state legislatures ratified it.\(^\text{45}\) Today, this progress is null because the proposal included a sunset provision stating that it would remain open for ratification for only seven years.\(^\text{46}\) While nothing prevents a fresh attempt at amendment, there is no reason to believe it would fare better.

Second, a 1993 attempt to admit a portion of the District as a state suffered an overwhelming defeat in the House. Following two days of floor debate, the statehood bill\(^\text{47}\) fell by a vote of 277 to 153.\(^\text{48}\) The bill would have turned wide swaths of the city constituting ordinary business and residential areas into the state of New Columbia, with Congress maintaining jurisdiction over only a core enclave consisting of the Capitol, White House, Supreme Court, national monuments, and adjacent federal buildings.\(^\text{49}\) While some commentators argued for the constitutionality of such

\(^{44}\) The District of Columbia Voting Rights Amendment originated in the House as H.R.J. Res. 554, 95th Cong. (1978).

\(^{45}\) Under Article V of the Constitution, an amendment passes when ratified by the legislatures of three-fourths of the states, which currently implies thirty-eight states.

\(^{46}\) For a history of this proposed amendment, see HARRIS, supra note 41, at 206–08.


\(^{49}\) New Columbia Admission Act, H.R. 51, 103d Cong. § 112 (1993). This basic zone is known as the National Capital Service Area (NCSA), whose boundaries are defined in 40 U.S.C. § 8501(a) (Supp. IV 2004). For more on the evolution of the NCSA and its potential as a balance of federal and District interests, see HARRIS, supra note 41, at 15–42.
legislation, it presented the troubling implication of ordinary legislation rendering a constitutional provision — the Twenty-Third Amendment specially granting the District presidential electors — essentially superfluous. Even if such legislation would be constitutional, there is nothing to suggest that another attempt at passing a statehood bill is more likely to succeed than the 1993 effort.

Third, in *Adams v. Clinton*, the Supreme Court affirmed without opinion a district court decision rejecting a legal challenge to the constitutionality of denying the District representation in Congress. In this consolidated action, the District of Columbia and seventy-five residents marshaled an array of arguments for their constitutional right to representation in Congress. The court held that no such right inheres in the Equal Protection Clause, Privileges or Immunities Clause, Due Process Clause, or Guarantee Clause. Moreover, the court rejected two arguments that the District must be treated as a “state” for the


52. Assuming arguendo that statehood legislation would be constitutional, then it is a greater power that buttresses the constitutionality of the lesser power of statutorily providing only House representation. See WALTER SMITH & L. ELISE DIETERICH, *CONGRESS’ AUTHORITY TO PASS LEGISLATION GIVING DISTRICT OF COLUMBIA VOTING REPRESENTATION IN CONGRESS* 7–8 (2002), http://www.dcvote.org/pdfs/smithsimplelegmemo052202.pdf.

53. *Adams v. Clinton*, 90 F. Supp. 2d 27 (D.D.C. 2000), a single judge examined constitutionality as applied to denial of representation in the Senate. While the court dismissed the challenge for lack of standing, *id.* at 31-33, it noted that the Senate claim would fail on the merits based on the same reasoning used to reject the House claim. *Id.* at 30.


57. U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government . . . .”). See 90 F. Supp. 2d at 71.
purpose of apportioning congressional representation. First, while courts have treated the District constructively as a “state” for other purposes, the Constitution accords the District no such right for this purpose, in view of the language of Article I and evidence of historical intent. Second, the District could not avail itself of Maryland’s “state” status on the theory that District residents retain residual citizenship in Maryland. After Adams v. Clinton, securing congressional representation through the courts as a matter of constitutional right appears foreclosed.

2. Remaining Possibilities

Even after these failures, there remain several possible approaches to attaining congressional representation for the District. Such representation could take four possible forms: retrocession to Maryland, House and Senate representation, only Senate representation, and only House representation. Leaving aside the failed tactic of Constitutional amendment, the principal route to all of these possibilities is through ordinary congressional legislation. A comparison of these options shows that legislation for a seat in the House, while perhaps not ideal, is the most politically viable remedy.

58. Article I provides that “[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.” U.S. CONST. art. I, § 2, cl. 1 (emphasis added).
59. 90 F. Supp. 2d at 46–56.
60. Id. at 56–65.
61. Retrocession of course changes far more than representation in Congress. As part of Maryland, the District’s master would change from Congress to the state government.
62. Another statehood solution exists, but may be too politically outlandish to be taken seriously at this time. This proposal would create a new state encompassing the Washington metropolitan region, including the city itself and neighboring counties in Maryland and Virginia. See Schrag, supra note 50, at 321–22. Under the terms of Article IV, Section 3, Clause 1, this creation would require the consent of the Maryland and Virginia legislatures, which are unlikely to yield some of their most economically productive counties. Edward M. Meyers, Public Opinion and the Political Future of the Nation’s Capital 89–90 (1996).
63. Another possible approach not explored in this Note is a claim under the Voting Rights Act of 1965, 42 U.S.C. § 1973 (2000), that denial of congressional representation for the District discriminates against the city’s majority black population. Such a claim would be politically explosive and very complicated to litigate.
a. Retrocession to Maryland

For District residents to gain the rights and privileges of living in a state, the District need not become a state itself. Instead, Congress could carve out a core federal enclave and merge remaining portions of the District with the neighboring state from which it was created, Maryland. Virginia reacquired its portion of the District this way in 1846.64 This solution captures the benefits of the failed statehood bill65 while circumventing a key drawback. Fundamentally, the disenfranchisement of District citizens is a collateral consequence of the District encompassing more territory than necessary to support federal interests. By eliminating this structural over-inclusiveness, Congress would achieve the balanced outcome of giving those residents full political status while also maintaining federal dominion over the national capital. Furthermore, in contrast to statehood, retrocession avoids the perhaps unwarranted creation of two new Senators who would wield power disproportionate to the District’s relatively small population.66 Under retrocession, the impact on Congress of securing full political status for District citizens would be limited to perhaps an additional Maryland seat in the House.

Though one commentator describes retrocession as “a constitutionally elegant solution,”67 its political prospects are weak. Retrocession to Maryland would require both an act of Congress68 and approval by the Maryland state legislature,69 but neither is forthcoming. Token bills regularly introduced in Congress have floundered,70 and retrocession lacks support in the Maryland leg-

64. See supra note 12.
65. See supra Part II.C.1.
66. See infra Part II.C.2.b.
68. This act would be similar to the 1846 act retroceding the Virginia portion of the District. See supra note 12.
69. See Schrag, supra note 50, at 319 & n.51. Some act of reacceptance by Maryland is required because under the terms of the original cession, the land was granted unconditionally to the federal government; therefore, it would not automatically revert to Maryland if Congress abandoned it. Raven-Hansen, supra note 50, at 179–180.
islature, which views the District as an albatross.\textsuperscript{71} Moreover, retrocession rings hollow for District statehood proponents, who fear that it would submerge the District into a larger entity and undercut the unique political and social identity that the District has developed over two centuries.

\textbf{b. Senate Representation}

Senate representation for the District is problematic on legal, policy, and political grounds.\textsuperscript{72} First, in the absence of statehood or a Constitutional amendment, legislation granting Senate representation to the District is arguably unconstitutional. Even if legislation granting House representation to the District is constitutional, Senate-specific constitutional provisions may block a similar accommodation in the Senate. The statement in Article V that “no State, without its Consent, shall be deprived of its equal Suffrage in the Senate” suggests a state veto power over District representation in the Senate that has no analog in the House context. Under this theory, every state would have to consent in order to enable the addition of Senators from the District.\textsuperscript{73} This state control over Senate representation makes some sense in our bicameral system where the Senate is structured as the states’ chamber and the House as the people’s chamber.\textsuperscript{74} Nonetheless, this constitutional question is entirely unsettled.\textsuperscript{75}


\textsuperscript{72} Because statehood would entitle the District to two Senators, these policy and political objections to Senate representation for the District also operate as considerations against statehood.

\textsuperscript{73} See \textit{Best, supra} note 67, at 43–61.

\textsuperscript{74} \textit{Compare} U.S. CONST. amend. XVII (“The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof . . . .”) (emphasis added) \textit{with} U.S. CONST. art. I, § 2, cl. 1 (“The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . .”) (emphasis added).}
Even if legislation creating Senate representation is constitutional, policy and partisan concerns likely scuttle the possibility of passage. It is not clear that the District’s relatively small population — Wyoming is the only state with fewer people — merits the disproportionately powerful political influence of two Senators. Additionally, given the District’s heavily tilted support for the Democratic party, the unbalanced addition to the Senate of two presumed Democrats would upset the status quo balance of power and draw opposition from Republicans.

c. House Representation

Compared to the dim prospects for retrocession and Senate representation, securing House representation for the District is an attractive alternative supported by compelling legal, policy, and political logic. As this Note argues, ordinary legislation to give the District a vote in the House is constitutional. From a policy perspective, a vote in the House — where all revenue bills originate — most directly addresses the District’s “taxation added). The use of “from each state” versus “of the several states” arguably captures the interests of states qua states in the Senate as distinct from the House. 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 13 n.57 (2004), http://www.devote.org/pdfs/congress/vietdinh112004.pdf.

75. EST, supra note 67, at 45 (“On this issue there is literally no law.”) (quoting Congressional testimony of Professor Charles Alan Wright).


77. Possible remedies for the objection of disproportionate influence are to give the District either only one voting Senator or perhaps one or two non-voting delegates to the Senate similar to what currently exists in the House. See Schrag, supra note 50, at 325–26.


79. For this reason, the admission of states into the Union has historically proceeded so as to maintain the partisan political balance in Congress. This tradition was visible in the Missouri Compromise and the paired admission of Alaska and Hawaii.

80. See infra Part III.

without representation” grievance and avoids granting the perhaps disproportionate influence of two Senators. Politically, the concern of upsetting the balance of power between political parties can be mitigated in the House in a way impossible in the Senate. Whereas the Senate’s size is set inflexibly at two Senators per state, the number of House members and the method of apportionment are set by statute at the substantial discretion of Congress. Congress can simply increase the House’s membership by two, creating one seat for the District of Columbia and one seat in whatever state was next in line for apportionment based on population. Based on the 2000 census, this state would be Utah, which happens to be reliably Republican. Therefore, at least until the 2010 census triggers reapportionment in 2012, the partisan balance of power can be maintained by expanding the House to 437 members and offsetting the addition of a presumptively Democratic representative from the District of Columbia by the addition of a presumptively Republican representative from Utah. Built on this political compromise,


83. Democrats might fear that, supposing the courts rule a District seat unconstitutional, the House might retain a new Republican seat while losing the counter-balancing Democratic seat. The D.C. Voting Rights Act anticipates and eliminates this risk with a nonseverability clause. See H.R. 1905, 110th Cong. § 4 (2007); S. 1257, 110th Cong. § 6 (2007). This clause ensures that the statute lives or dies as a whole; if any provision of the legislation is struck down, the entire statute loses force. If the District’s seat is ruled unconstitutional, the House would return to 435 members, with no extra Republican seat.

84. See Lori Montgomery & Elissa Silverman, Plan to Give D.C. a Vote in Congress Advances, WASH. POST, May 11, 2006, at A01. In fact, Utah has argued that the 2000 census undercounted the state’s population and so Utah was anyway entitled to one more seat than was apportioned to it. See Johanna Neuman, Plan Would Give D.C. a House Vote, L.A. TIMES, Nov. 22, 2006, at A12. In that light, this plan may actually redress an injustice done to Utah, although the Supreme Court rejected Utah’s claim. See Utah v. Evans, 536 U.S. 452 (2002).

85. Under the House version of the bill, Utah elects its extra representative from the state at large rather than a customary congressional district. H.R. 1905, 110th Cong. § 3(c)(3)(A) (2007). This at-large seat raises the constitutional concern that each Utah citizen would thus get to elect two representatives, in violation of the “one person, one vote” principle. Editorial, Utah’s 4th Seat: One Quibble Aside, New Bill Would Do the Right Thing, SALT LAKE TRIB., Mar. 13, 2007, at A14; Jonathan Turley, Too Clever by Half: The Unconstitutional D.C. Voting Rights Bill, ROLL CALL, Jan. 25, 2007, at 3. In response to this concern, the Senate version of the bill abandons the at-large seat in favor of a redrawn Utah congressional district map that carves out a fourth, new district. S.
House representation is the District’s most viable option, even if not the most empowering.

III. CONSTITUTIONALITY OF AN ACT OF CONGRESS GIVING THE DISTRICT OF COLUMBIA A VOTE IN THE HOUSE OF REPRESENTATIVES

No court has ruled on the constitutionality of simple legislation granting the District of Columbia a vote in the House. While commentators have sharply disagreed on the question, this Part argues that such legislation generally passes constitutional muster. The District Clause, buttressed by the Ninth Amendment and Section Five of the Fourteenth Amendment, empowers Congress to provide the District a seat in the House as a discretionary privilege. Counter-arguments are unconvincing: Past use of the constitutional amendment process for this and similar purposes does not mean that the legislative approach is invalid. Federalism concerns, though genuine, do not present a constitutional obstacle. Most controversially, Congress may treat the District as a “state” for the apportionment of House representa-

1257, 110th Cong. § 4 (2007); Elizabeth Brotherton, D.C. Bill Drops At-Large Seat, ROLL CALL, May 2, 2007, at 1. The Senate bill also postpones the inception of the District and fourth Utah representatives until the 111th Congress, so that the three existing Utah representatives do not get redistricted mid-cycle and have to face a special election. Id.


88. U.S. CONST. amend. IX.
89. U.S. CONST. amend. IX, § 5.
tives under Article I,\textsuperscript{90} so the District is not ineligible.\textsuperscript{91} Notwithstanding the general constitutionality of legislation granting the District a House vote, the D.C. Voting Rights Act contains an unnecessary and unconstitutional provision limiting the District to a single House representative regardless of population.

\section{A. CONGRESS HAS PLENARY AUTHORITY UNDER THE DISTRICT CLAUSE TO LEGISLATE FOR THE DISTRICT OF COLUMBIA}

The Constitution’s declaration that “[t]he Congress shall have power . . . [t]o exercise exclusive Legislation [over the District] in all Cases whatsoever”\textsuperscript{92} is on its face a robust grant of authority. Courts have described the District Clause as an “extraordinary and plenary power”\textsuperscript{93} that is “sweeping and inclusive in character,”\textsuperscript{94} such that Congress has “full and unlimited jurisdiction to provide for the general welfare of citizens within the District of Columbia by any and every act of legislation which it may deem conducive to that end.”\textsuperscript{95} This power allows Congress to legislate for the District in ways inconceivable for other matters.\textsuperscript{96}

\textsuperscript{90} The Constitution links House representation to the “state” or “states” in Clauses 1 through 4 of Article I, Section 2, as well as Article I, Section 4, Clause 1. Most centrally, “Representatives and direct Taxes shall be apportioned among the several States which may be included in this Union . . . .” U.S. CONST. art. I, § 2, cl. 3 (emphasis added).

\textsuperscript{91} The D.C. Voting Rights Act adds the following subsection to 2 U.S.C. § 2a, the statute that specifies the House apportionment methodology based on the decennial census: “(d) This section shall apply with respect to the District of Columbia in the same manner as this section applies to a State, except that the District of Columbia may not receive more than one Member under any reapportionment of Members.” H.R. 1905, 110th Cong. § 3(b)(1) (2007); S. 1257, 110th Cong. § 2(b)(1) (2007).

\textsuperscript{92} U.S. CONST. art. I, § 8, cl. 17 (emphasis added).


\textsuperscript{94} Neild v. District of Columbia, 110 F.2d 246, 249 (D.C. Cir. 1940).

\textsuperscript{95} Id. at 250. See supra Part II.A for discussion of how pervasively Congress exercises its District Clause authority to regulate District affairs.

\textsuperscript{96} See Palmore, 411 U.S. at 397–398 (citing Gibbons v. District of Columbia, 116 U.S. 404, 408 (1886)).

It is apparent that the power of Congress under [the District Clause] permits it to legislate for the District in a manner with respect to subjects that would ex-
In various instances in which the District or its residents have asserted rights under the Constitution, courts have held that this specific constitutional grant of congressional authority over the District is so strong that it trumps the ordinary application of other constitutional provisions. For instance, in *Palmore v. United States*, the Supreme Court held that the District Clause permits Congress to establish courts in the District pursuant to this Article I power, rather than the Article III courts ordinarily required in a federal jurisdiction. In *Banner v. United States*, the D.C. Circuit held that because of the District Clause, Congress may legislate specific restrictions for the District — in this case prohibiting the District from levying a commuter tax on nonresidents — that it could not force upon individual states. Moreover, Congress could do so without incurring heightened scrutiny under the Fifth Amendment’s equal protection component because the District Clause explicitly sanctions special discrimination against the District’s interests if Congress sees fit.

Such precedents support the constitutionality of legislation granting the District a seat in the House. In holding that the District Clause precludes the District of Columbia and its citizens from asserting their claims as judicially enforceable constitutional rights ordinarily associated with democratic representation and statehood, courts have implicitly affirmed that the District Clause puts it within Congress’s power to grant those claims as privileges. The district court strongly hinted as much in *Adams v. Clinton*:

> [W]e are not blind to the inequity of the situation plaintiffs seek to change. But longstanding judicial precedent, as well as the Constitution’s text and history, persuade us that this court lacks authority to grant plaintiffs the relief they seek.

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98. 428 F.3d 303 (D.C. Cir. 2005).
99. *Id.* at 309.
100. *Id.* at 309–10. The court clarified that although Congress may discriminate against the District generally, “a law employing a suspect classification is hardly immune from close scrutiny because it applies only to the District.” *Id.* at 309.
If they are to obtain it, they must plead their cause in other venues.\footnote{90 F. Supp. 2d 35, 72 (D.D.C.) (emphasis added), aff’d, 531 U.S. 941 (2000).}

Just as the District Clause authorizes Congress to discriminate against the District’s interests, it enables special legislation favoring the District’s interests. As the D.C. Circuit asserted in \textit{Banner}, the “constitutional plan does not require heightened scrutiny of congressional enactments affecting the District. The policy choices are Congress’s to make . . . .”\footnote{428 F.3d at 312.} While the District is not constitutionally entitled to a vote in the House,\footnote{See \textit{Adams v. Clinton}, discussed \textit{supra} Part II.C.1.} Congress may in its wisdom grant that vote.\footnote{The Necessary and Proper Clause, U.S. \textsc{Const.} art. I, § 8, cl. 18, further supports Congress’s ability to push at the boundaries of its District Clause power.}

This argument rests on more than theory; in practice, there is a historical example of Congress granting the District voting representation by statute.\footnote{\textsc{Dinh} & \textsc{Charnes}, \textit{supra} note 74, at 8–9.} Between 1790 and 1800 — after Maryland and Virginia had ceded territory to Congress, but before the federal government assumed jurisdiction over the District — residents in that ceded territory continued to vote in congressional elections in those two states.\footnote{\textit{Adams v. Clinton}, 90 F. Supp. 2d at 58–59, 79 & n.20.} Maryland and Virginia had provided for this interim representation in their cession acts, and Congress enabled the arrangement by its statutory blessing of the continued “operation of the laws” of Maryland and Virginia in the District during this interim period.\footnote{Act of July 16, 1790, ch. 28, 1 Stat. 130.} Thus, the first Congress, consisting of the Framers themselves, legislated to provide congressional representation for citizens of the federal district. If such legislation was within Congress’s power then, it should remain so now.
B. THE NINTH AMENDMENT AND SECTION 5 OF THE
FOURTEENTH AMENDMENT SUPPORT CONGRESS' POWER TO
ENFRANCHISE THE DISTRICT

The Ninth Amendment supports Congress's District Clause power to grant the District a privilege where no independent right exists. As Professor Erwin Chemerinsky states, the Ninth Amendment stands as “a clear and open invitation for government to provide more rights than the Constitution accords,” reminding that “Congress, by statute, can provide rights greater than the Court recognizes in the Constitution.” Among the unenumerated rights that the Ninth Amendment may enable Congress to identify and protect with affirmative legislation, an innocuous one is the right of District residents as taxpaying United States citizens to be represented in the national legislature. In the Supreme Court’s words:

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

While the Constitution contains no affirmative provision for House representation for the District, that silence is not a per se

108. U.S. CONST. amend. IX: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”
109. Erwin Chemerinsky, Real Discrimination?, 16 WASH. U. J.L. & POL’Y 97, 118–19 (2004). See also Gibson v. Matthews, 926 F.2d 532, 537 (6th Cir. 1991) (“The ninth amendment [sic] was added to the Bill of Rights to ensure that the maxim expressio unius est exclusio alterius would not be used at a later time to deny fundamental rights merely because they were not specifically enumerated in the Constitution.”) (internal quotation omitted). The Ninth Amendment is not itself a source of rights, but a rule of interpretation. Froehlich v. Wis. Dept of Corr., 196 F.3d 800, 801 (7th Cir. 1999).
110. See Burdick v. Takushi, 504 U.S. 428, 433 (1992) (“It is beyond cavil that voting is of the most fundamental significance under our constitutional structure.”) (internal quotation omitted); Twining v. New Jersey, 211 U.S. 78, 97 (1908) (“among the rights and privileges of National citizenship” is “the right to vote for National officers”).
Because of voting’s bedrock importance, Congress may act to enfranchise citizens that the Constitution otherwise leaves without a vote. Section 5 of the Fourteenth Amendment, as incorporated into the Fifth Amendment, similarly reinforces Congress’s District Clause power to enfranchise the District. Section 5 grants Congress “the power to enforce, by appropriate legislation, the provisions of [Section 1 of the Fourteenth Amendment].” The Supreme Court holds that this power “includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment’s text.” Thus, even though Adams v. Clinton holds that the District’s citizens have no Fourteenth Amendment right to congressional representation, Congress may promote equal protection of voting rights by legislating to prevent disenfranchisement of District citizens. The exercise of this power must be narrowly tailored because “§ 5 legislation reaching beyond the scope of § 1’s actual guarantees must exhibit congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.” The provision of House representation — which addresses the “taxation without representation” grievance without according the arguably disproportionate influence of two Senators — is congruent and proportional to the problem of District disenfranchisement.

An example exists that supports these theories of Congress’s ability to enfranchise. Congress has long accorded voting privi-

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112. See Martini v. Fed. Nat'l Mortgage Ass'n, 178 F.3d 1336, 1342 (D.C. Cir. 1999) (“A non-binding rule of statutory interpretation, not a binding rule of law, the expressio unius est exclusio alterius maxim is often misused.”) (internal quotation omitted).
113. See Bolling v. Sharpe, 347 U.S. 497 (1954), discussed infra note 166. See also Buckley v. Valeo, 424 U.S. 1, 93 (1976) (“Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.”).
117. See supra Part II.C.1.
118. See San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 34 n.74 (1973) (“The constitutional underpinnings of the right to equal treatment in the voting process can no longer be doubted . . . .”).
leges to certain citizens living overseas in a way that a clause of the Constitution suggests would be impermissible.\textsuperscript{120} Under the Uniformed and Overseas Citizens Absentee Voting Act,\textsuperscript{121} American citizens living in foreign jurisdictions can vote by absentee ballot in their last place of domicile before leaving the United States, even if they would not qualify as citizens of that state because they do not pay taxes there or have a definite plan to return.\textsuperscript{122} The statute allows these overseas citizens to vote in federal elections through their last — but not necessarily continuing — state of domicile even though they might no longer be qualified to vote in that state’s elections. With this legislation, Congress therefore skirts the literal terms of Article I, Section 2, Clause 1, requiring federal voters to possess “the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.” If the Constitution is flexible enough to permit Congress to extend the franchise to overseas voters, then it should also accommodate congressional enfranchisement of District residents.

\textbf{C. COUNTER-ARGUMENTS TO CONGRESS’S POWER IN THIS CONTEXT ARE UNPERSUASIVE}

Though Congress’s District Clause power is mighty, it is not unbridled.\textsuperscript{123} There are four principal grounds to argue that the District Clause does not encompass the particular authority to create a vote in Congress for the District by simple legislation.

\begin{itemize}
\item \textsuperscript{120}See Dinh \& Charnes, \textit{supra} note 74, at 17–18.
\item \textsuperscript{122}See Attorney Gen. of Guam v. United States, 738 F.2d 1017, 1020 (9th Cir. 1984) (explaining statute’s constitutional basis).
\item \textsuperscript{123}See Banner v. United States, 428 F.3d 303, 309 (D.C. Cir. 2005) (noting, after explaining the strength of the District Clause power, that “[o]f course, none of this is to say that Congress can legislate for the District without regard to other constitutional constraints.”). See also O’Donoghue v. United States, 289 U.S. 516, 541 (1933) (quoting Downes v. Bidwell, 182 U.S. 244, 260–61 (1901)):
\end{itemize}

The mere cession of the District of Columbia to the Federal government relinquished the authority of the states, but it did not take it out of the United States or from under the aegis of the Constitution. . . . If, before the District was set off, Congress had passed an unconstitutional act affecting its inhabitants, it would have been void. If done after the District was created, it would have been equally void; in other words, Congress could not do indirectly, by carving out the District, what it could not do directly. The District still remained a part of the United States, protected by the Constitution.
First, if a constitutional amendment was required to provide the District with representation in the electoral college,\textsuperscript{124} then representation in the House can be secured by no lesser means. Second, the previous attempt in 1978 to provide the District with House representation by constitutional amendment\textsuperscript{125} implies an understanding that legislation for this purpose is not constitutionally sufficient. Third, recent Supreme Court jurisprudence on federalism suggests that Congress cannot use its powers to aggrandize its authority relative to that of the states; here, Congress would usurp the states’ customary role in approving structural adjustments to the Union and aggrandize federal interests via legislation under the District Clause. Fourth, notwithstanding Congress’s power under the District Clause, the textual limitation of House representation to “states”\textsuperscript{126} flatly precludes the District’s inclusion. These contentions are ultimately unpersuasive.

1. \textit{The Twenty-Third Amendment Is Inapposite as Precedent}

The Twenty-Third Amendment proves nothing about Congress’s ability to grant the District representation in the House by ordinary legislation. While a constitutional amendment may have been required to provide the District with presidential electors, the provision of House representation for the District is a constitutionally distinguishable measure.\textsuperscript{127} Congress’s authority over the electoral college, an institution rooted in Article II\textsuperscript{128} and the Twelfth Amendment,\textsuperscript{129} extends to nothing more than setting an election day.\textsuperscript{130} Because Congress has no significant power over this institution, simple legislation would have been inadequate to modify the electoral college on behalf of the District, thus necessitating a constitutional amendment.

In contrast to presidential elections, the Constitution locates provisions on House representation squarely within Congress’s
core Article I powers, along with the District Clause. This textual co-commitment suggests that, under the aegis of the District Clause, Congress has much greater license to modify congressional elections than presidential elections.

2. The 1978 Proposed Constitutional Amendment Is Irrelevant

The fact that a constitutional amendment to provide the District with House representation was attempted in 1978 does not necessarily mean that a constitutional amendment was required. That episode lacks precedential force because, as one court has declared, “a failed constitutional amendment does not alter the meaning of the Constitution, and the views of a failed amendment’s congressional supporters have no well-established significance.” Even when the 1978 amendment was under consideration, some thought simple legislation would have been sufficient; the pursuit of an amendment may have reflected merely a strategic decision that a constitutional amendment would be more legally straightforward and politically durable than a statute.

131. See U.S. Const. art. I, § 2, cls. 1-4 (regulating House representation); U.S. Const. art. I, § 3, cl. 1-3 (regulating Senate representation); U.S. Const. art. I, § 4, cl. 1 (regulating House and Senate elections); U.S. Const. art. I, § 5, cl. 1 (“Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members”).

132. See discussion supra Part II.C.1.

133. Moreover, even what is actually achieved by constitutional amendment need not necessarily have been accomplished that way. For example, the Twenty-Fourth Amendment, ratified in 1964, abolished poll taxes as a condition of voting in federal elections; just two years later in Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966), the Supreme Court found poll taxes similarly barred in state elections as a matter of equal protection under the Fourteenth Amendment. Had the Twenty-Fourth Amendment not already resolved the issue, this holding applicable to states almost surely could have been extended to federal elections via the equal protection component of the due process clause of the Fifth Amendment. See Buckley v. Valeo, 424 U.S. 1, 93 (1976) (“Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.”) (citation omitted). Therefore, what was done by constitutional amendment would have been possible by judicial decision.


135. See Bress & Murray, supra note 86, at 13; Smith & Dieterich, supra note 52, at 8-10.

136. Smith & Dieterich, supra note 52, at 8-10.
3. Federalism Concerns Are Not Substantially Implicated

A third argument against the legislation is that it aggrandizes the federal government relative to the states. The primary concern is that Congress would be displacing the power of states to participate in the constitutional amendment process.137 This criticism is especially compelling when one considers that thirty-four out of fifty state legislatures had an opportunity to approve this policy via the 1978 proposed constitutional amendment and declined to do so.138 Under this thesis, Congress would be engaging in a sneaky impropriety, circumventing the states’ disapproval through the backdoor route of legislating under the District Clause.139 Beyond this primary concern, legislation giving the District a House representative aggrandizes the federal government because 1) District residents, uniquely invested in the federal government as an employer, are predisposed to support federal interests; and 2) Congress can bully the District’s representative into supporting federal interests by threatening to repeal the enabling legislation.140

Under an emerging strand of constitutional jurisprudence, Congress’s power under the District Clause might be constrained insofar as it freezes out the states’ role in the constitutional amendment process or adds a House representative biased towards federal interests. In two recent decisions, *City of Boerne v.*

137. In this regard, the words of Justice Kennedy’s majority opinion in *City of Boerne v. Flores*, 521 U.S. 507 (1997), carry special significance because they might apply mutatis mutandis to the District Clause:

> If Congress could define its own powers by altering the Fourteenth Amendment’s meaning, no longer would the Constitution be “superior paramount law, unchangeable by ordinary means.” It would be “on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it.” Under this approach, it is difficult to conceive of a principle that would limit congressional power. Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V.


138. See supra Part II.C.1.

139. The alternative view is that by employing a constitutional amendment in 1978, Congress generously included the states in the decision-making process even though the states’ assent was never required. See supra Part III.C.2 and infra Part III.C.3.

140. See infra text accompanying notes 252–53.
Flores and United States v. Lopez, the Supreme Court has held that the powers of Congress under § 5 of the Fourteenth Amendment and the Commerce Clause are limited when they implicate federalism concerns.

While City of Boerne, Lopez, and their progeny mark a shift towards a constitutional jurisprudence more protective of state powers vis-à-vis the federal government, this protection would not extend so as to limit Congress’s power to enfranchise the District under the District Clause. First, these decisions represent only a trend toward enforcing federalism rather than any hard rule of constitutional law concerning the District Clause. But more importantly, legislation to provide the District a seat in the House is distinguishable from the legislation at issue in City of Boerne and Lopez because it involves no interference with the

Flores, 521 U.S. 507 (1997). In City of Boerne, the Court struck down the Religious Freedom Restoration Act (RFRA) on the grounds that Congress, going beyond its § 5 power to enforce existing rights under the Fourteenth Amendment, expanded those rights in a manner incongruent and disproportionate to the problem sought to be remedied. Id. at 532–35. Evoking federalism concerns, the Court admonished that RFRA’s “sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter. RFRA’s restrictions apply to every agency and official of the Federal, State, and local Governments.” Id. at 532. See also id. at 534 (criticizing “[t]he substantial costs RFRA exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power”).

City of Boerne does not block legislation to enfranchise the District of Columbia because 1) such legislation is congruent and proportional to the problem sought to be remedied, see supra Part III.B; and 2) Section 5 of the Fourteenth Amendment is not the sole basis for this exercise of Congress’s power.

Lopez, the Court declared unconstitutional the Gun-Free School Zones Act of 1990 on the grounds that the targeted criminal activity — the possession of a gun within 1,000 feet of a school — did not substantially affect interstate commerce. Id. at 561. Again raising federalism concerns, the Court emphasized that this federal criminal statute displaced the traditional preeminence of states in regulating criminal activity. Id. at 564 (“Under the theories that the Government presents in support of [the statute], it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign.”); see also id. at 567–68 (Court will not “convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States” so as to destroy the “distinction between what is truly national and what is truly local”).


Moreover, it is an open question how forcefully this trend will continue following the departure of two of the Supreme Court’s staunchest federalism proponents, Chief Justice Rehnquist and Justice O’Connor.
states’ internal police power under the Tenth Amendment. The law at issue in City of Boerne had the effect of “curtailing [the states’] traditional general regulatory power” and the law at issue in Lopez interfered with “areas such as criminal law enforcement or education where States historically have been sovereign.” The District legislation, however, impacts the states only with respect to national-level affairs in the House. With states’ internal governance unaffected, federalism and Tenth Amendment concerns are much less substantially implicated.

It is one thing to say, as Adams v. Clinton holds, that the District has no right to House representation; it is quite another to say that the states have a right to prevent Congress from granting such representation. As Justice Kennedy has stated,

There can be no doubt, if we are to respect the republican origins of the Nation and preserve its federal character, that there exists a federal right of citizenship, a relationship between the people of the Nation and their National Government, with which the States may not interfere.

Congress thus has room to act, with or without the states’ approval.

147. U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).
148. 521 U.S. at 534.

[T]hat federal rights flow to the people of the United States by virtue of national citizenship is beyond dispute. . . . Indeed, as one of the rights of the citizens of this great country, protected by implied guarantees of its Constitution, the Court identified the right to come to the seat of government . . . to share its offices, to engage in administering its functions. . . . [T]he federal right to vote . . . in a congressional election . . . do[es] not derive from the state power in the first instance but . . . belong[s] to the voter in his or her capacity as a citizen of the United States.
151. Id. at 845.
4. The District Can Be Considered a “State” for Apportioning House Representatives

The text of Article I explicitly links House representation to the “state” or “states” in no less than nine instances. Most specifically, “Representatives and direct Taxes shall be apportioned among the several States which may be included in this Union . . . .” Adhering to the plain language of the Constitution, the District would therefore appear ineligible for a voting seat in the House, irrespective of the District Clause power.

Plain language is not dispositive, however, because with respect to the District, “state” is a term of art whose inclusiveness varies depending upon the context. Indeed, there are abundant examples of statutory, treaty, and constitutional provisions that apply to the District notwithstanding their textual delimitation to states. In the constitutional context, courts have treated the District as a “state” under the Commerce Clause, Full Faith

153. U.S. Const. art. I, § 2, cl. 3 (emphasis supplied).
154. See District of Columbia v. Carter, 409 U.S. 418, 420 (1973) (“Whether the District of Columbia constitutes a ‘State or Territory’ within the meaning of any particular statutory or constitutional provision depends upon the character and aim of the specific provision involved.”).
156. The Supreme Court held that even though the text of a treaty between the United States and France limited its scope to “states of the Union,” the instrument was nonetheless binding on territories and the District of Columbia. See de Geofroy v. Riggs, 133 U.S. 258 (1890).
157. See Frankel, supra note 86, at 1679–83; Dinh & Charnes, supra note 74, at 14–17.
158. U.S. Const. art. I, § 8, cl. 3 (“The Congress shall have Power . . . To regulate Commerce . . . among the several States . . . .”) (emphasis added). See Stoutenburgh v. Hennick, 129 U.S. 141 (1889) (holding Congress may regulate commerce across the District’s borders as it could for a state).
and Credit Clause,159 Second Amendment,160 Sixth Amendment,161 Eleventh Amendment,162 Twenty-First Amendment,163 and Article I, Section 2, Clause 3 for apportionment of taxes164 — the very same provision indicating that representatives are to be apportioned among the states. If that clause leaves the District eligible to be taxed by Congress, then it should also render the District eligible to be apportioned a House representative by Congress.165

159. U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.") (emphasis added). See Loughran v. Loughran, 292 U.S. 216, 228 (1934) ("[C]ourts of the District are bound, equally with courts of the States, to observe the command of the full faith and credit clause, wherever applicable.").

160. U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.") (emphasis added). See Parker v. District of Columbia, 478 F.3d 370, 370 (D.C. Cir. 2007) (holding that the Second Amendment applies to District of Columbia because "a free State" refers not to a domestic political entity such as Virginia, but to republican government generally).

161. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .") (emphasis added). See Callan v. Wilson, 127 U.S. 540, 548–49 (1888) (holding that criminal defendants in the District of Columbia are entitled to the ordinary Sixth Amendment right to trial by jury); see also Capital Traction Co. v. Hof, 174 U.S. 1, 5 (1899) ("It is beyond doubt, at the present day, that the provisions of the Constitution of the United States securing the right of trial by jury, whether in civil or in criminal cases, are applicable to the District of Columbia.").

162. U.S. CONST. amend. XI ("The Judicial Power of the United States shall not be construed to extend to any suit . . . against one of the United States . . . .") (emphasis added). See Clarke v. Wash. Metro. Area Transit Auth., 654 F. Supp. 712, 714 n.1 (D.D.C. 1985), aff’d, 808 F.2d 137 (D.C. Cir. 1987) (holding that interstate agency enjoys state sovereign immunity even though one of its constituent jurisdictions is District of Columbia, because Congress declared in compact creating the agency that District be considered a state for agency purposes); see also Morris v. Wash. Metro. Area Transit Auth., 781 F.2d 218 (D.C. Cir. 1986).

163. U.S. CONST. amend. XXI, § 2 ("The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.") (emphasis added). See Milton S. Kronheim & Co. v. District of Columbia, 91 F.3d 193, 201 (D.C. Cir. 1996) ("[W]e will treat the District of Columbia as a state for purposes of Twenty-first Amendment analysis."). Even though the language of the Twenty-First Amendment appears broad enough to include the District without considering it a state, the court equated it with a state analytically.

164. “Representatives and direct Taxes shall be apportioned among the several States which may be included in this Union, according to their respective Numbers . . . .” U.S. CONST. art. I, § 2, cl. 3 (emphasis added). See Loughborough v. Blake, 18 U.S. 317, 319–20 (1820) (Congress may directly tax the District).

165. The Court’s holding in Loughborough v. Blake is not to the contrary. The Court reasoned that this clause does not link taxation to statehood or House representation, but merely offers a standard for taxation proportional to population. Id. at 320. While the Court therefore emphasized that this clause does not “make taxation dependent on [a
A consistent theme across these constitutional precedents is that while the District is neither automatically considered a state\textsuperscript{166} nor rightfully entitled to be considered a state,\textsuperscript{167} constructive treatment as a state is permitted when Congress specifically calls for it. For example, in \textit{District of Columbia v. Carter}, the Supreme Court found that the District was not “a State or Territory” within the meaning of 42 U.S.C. § 1983, a statute rooted in enforcement of the Fourteenth Amendment.\textsuperscript{168} The court noted, however, that Congress could use its District Clause power to apply the statute to the District as it applies to states.\textsuperscript{169} In 1979, Congress amended the statute to do just that,\textsuperscript{170} and the Court has never questioned the constitutionality of that enactment.

A leading case in support of Congress’s ability to treat the District as a state is \textit{National Mutual Insurance Co. v. Tidewater Transfer Co.},\textsuperscript{171} which grew out of Congress’s response to \textit{Hepburn v. Ellzey},\textsuperscript{172} an earlier decision. These cases explore whether the District can be considered a state for purposes of diversity jurisdiction under Article III, Section 2, Clause 1, which provides that the federal judicial power extends to controversies “between citizens of different States.”\textsuperscript{173}

In \textit{Hepburn v. Ellzey}, the Court held that that the District was not a “state” under this clause, so District residents suing outside the District could not remove the suit to federal court based on
diversity jurisdiction. Writing for the Court, Chief Justice Marshall acknowledged the arbitrary inequity of denying diversity jurisdiction to District residents but asserted that “this is a subject for legislative not for judicial consideration.” At the time, the statute enabling diversity jurisdiction was entirely ambiguous as to how the District should be treated, stating simply that federal courts have jurisdiction when “the suit is between the citizen of the State where the suit is brought, and a citizen of another State.” Congress erased this ambiguity in 1940 by enacting a statute expressly authorizing diversity jurisdiction when the suit “[i]s between citizens of different States, or citizens of the District of Columbia . . . .” In 1949, Tidewater upheld this statute notwithstanding the textual limitation to “states” in Article III, Section 2, Clause 1, upon which Hepburn v. Ellzey rested. While declining to declare the District formally a state under Article III, Justice Jackson’s plurality opinion found it within Congress’s District Clause power to treat the District functionally as a state, particularly in light of Chief Justice Marshall’s invitation for legislative consideration.

174. While the case nominally presented a question of statutory interpretation, the Court analyzed the question as constitutional. See Hepburn, 6 U.S. (2 Cranch) at 452: 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.

175. See id. at 453: It is true that as citizens of the United States, and of that particular district which is subject to the jurisdiction of congress, it is extraordinary that the courts of the United States, which are open to aliens, and to the citizens of every state in the union, should be closed upon them.

176. Id. The exhortation in Adams v. Clinton that proponents of District enfranchisement must plead their cause in other venues, see supra text accompanying note 101, echoes Chief Justice Marshall’s invitation for legislative consideration. Concededly, legislative consideration does not necessarily imply enacting a statute; instead, it could refer to a constitutional amendment. See Tidewater, 337 U.S. at 587. However, the result of Tidewater — together with the story of District of Columbia v. Carter — supports the view that a statute is sufficient.

177. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (1789).


179. 337 U.S. at 588–89.
When Congress was silent as to the District’s status, the Court declined to treat the District as a state for constitutional purposes, but when Congress gave an affirmative instruction to treat the District as a state, the Court sanctioned it. This pattern suggests that if Congress enacts a statute proclaiming explicitly that the District shall be treated as a state for the apportionment of a House representative, the Court will defer to Congress’s judgment. This principle finds voice in *Adams v. Clinton*. Even while holding that the District has no independent right to be treated as a state, the court intimated that the District might plead its cause elsewhere, signaling a judicial willingness to endorse a political solution.

Kenneth R. Thomas argues that while the result of *Tidewater* may support this conclusion, the combined reasoning of the various opinions therein does not. *Tidewater* is difficult to parse because there is no majority opinion: Justice Jackson’s plurality opinion garnered three votes, Justice Rutledge’s concurrence had two votes, and four justices dissented. Jackson’s opinion argued that the statute could extend diversity jurisdiction to the District of Columbia because, when “necessary and proper” to the exercise of its Article I powers, Congress can expand the jurisdiction of federal courts beyond what Article III authorizes. Basing his finding on this ground, Justice Jackson explicitly declined to find that the District is a “state” under Article III. Justice Rutledge’s opinion argued exactly the opposite — disagreeing that Congress could expand Article III jurisdiction, but accepting the statute’s constitutionality because Congress can treat the District as a “state” for constitutional purposes. Finally, the two dissenting opinions rejected both propositions and found the statute unconstitutional.

Tallying the seven votes among Justice Jackson’s opinion and the dissents, Thomas contends that *Tidewater* actually rejects the...
constitutionality of treating the District as a “state” for House representation.

This critique should be dismissed because the result of Tidewater — not its internal reasoning — deserves focus. Tidewater does not lend itself to parsing; just as seven justices rejected Justice Rutledge’s theory that the District can be treated as a “state,” six justices also rejected Justice Jackson’s notion that Congress can expand the Article III judicial power. Neither argument supporting the result earned a majority, yet the result speaks for itself in treating the District as functionally equivalent to a state.

Thomas’s critique is tenable only because Justice Jackson’s opinion employs facile reasoning. To avoid directly overruling Chief Justice Marshall’s decision in Hepburn v. Ellzey, Justice Jackson strains not to equate the District with a “state” formally, while in reality permitting just that. Justice Rutledge begins his concurring opinion with this point: “While giving lip service to the venerable decision in [Hepburn v. Ellzey holding that the District is not a state under Article III, Section 2, Clause 1], and purporting to distinguish it, [Justice Jackson’s] opinion . . . [i]n all practical consequence . . . would overrule that decision . . . .” While Jackson may have been swayed by “nothing but naked precedent, the great age of the Hepburn ruling, and the prestige of Marshall’s name,” his conclusion shows that he ultimately assented to Congress’s ability to treat the District as a state for constitutional purposes. Cutting through Justice Jackson’s deference, there was in fact a five-justice majority in Tidewater whose positions permit legislative treatment of the District as a state for the purpose of House representation.

187. See id. at 655 (Frankfurter, J., dissenting) (“A substantial majority of the Court agrees that each of the two grounds urged in support of the attempt by Congress to extend diversity jurisdiction to cases involving citizens of the District of Columbia must be rejected — but not the same majority. And so, conflicting minorities in combination bring to pass a result — paradoxical as it may appear — which differing majorities of the Court find insupportable.”).

188. Id. at 604 (Rutledge, J., concurring).

189. Id. at 617 (Rutledge, J., concurring).

190. Justice Jackson revealed his deferential motive by writing explicitly that he “decline[d] to overrule the opinion of Chief Justice Marshall” in Hepburn v. Ellzey. Id. at 588.
D. THE D.C. VOTING RIGHTS ACT’S ONE-SEAT LIMIT IS UNNECESSARY AND UNCONSTITUTIONAL

Rather than linking the District’s House representation to the city’s population, the D.C. Voting Rights Act limits the District to a single seat.\textsuperscript{191} As a practical matter, this limit is trivial. Under ordinary apportionment, the District’s population would anyhow merit only one representative, and it would have to more than double to warrant a second representative.\textsuperscript{192} Thus, even without a formal cap, it is highly unlikely that the District would ever receive more than one House representative. Yet by incorporating this frivolous limitation, Congress imperils the entire legislation.

The one-seat limit violates the requirement of proportional representation originally established in Article I, Section 2, Clause 3\textsuperscript{193} and modified in Section 2 of the Fourteenth Amendment.\textsuperscript{194} Both provisions state that representatives shall be apportioned among the several states according to their respective numbers. If the District is a “state” under these provisions, then the one-seat limit is clearly unconstitutional, even if it has no practical consequence. As an interpretive matter, it is internally contradictory for Congress to selectively treat the District as a “state” for the apportionment prong — which it clearly must do to make the legislation work — but not for the “according to their respective numbers” prong that directly follows. The one-seat limit is unconstitutional as written, even though it serves no practical function as applied.

A ruling that the one-seat limit is unconstitutional necessarily dooms the statute altogether. The Act’s nonseverability clause,

\begin{footnotesize}
\begin{enumerate}
\item See H.R. 1905, 110th Cong. § 2(b) (2007); S. 1257, 110th Cong. § 2(b) (2007).
\item “Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by 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.” U.S. Const. art. 1, § 2, cl. 3.
\item “Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.” U.S. Const. amend. XIV, § 2.
\end{enumerate}
\end{footnotesize}
E. SUMMARY

Congress’s plenary power under the District Clause enables it to treat the District as a state for the purpose of House representation, granting as a privilege what the District is not entitled to as a right. The Twenty-Third Amendment and the failed attempt at a constitutional amendment have no bearing on the constitutionality of the legislative approach. Federalism concerns are insubstantial, overshadowed by Congress’ power under the District Clause, the Ninth Amendment, and Section 5 of the Fourteenth Amendment to provide the basic right of United States citizens to representation in the national government, in accordance with what Congress may deem to serve the District’s welfare. Finally, the textual limitation of House representation to “states” is not a bar, for “state” is a constitutional term of art that

195. See supra note 83.


197. Though this Note does not analyze the problem in detail, a court might not entertain a challenge to the one-seat limit. Because the District’s population currently does not currently or foreseeably warrant two representatives, the provision causes nobody a direct injury that would create standing. See infra note 207 and accompanying text. The one-seat limit could be challenged only collaterally by a litigant who already has standing to challenge the statute on other grounds (that the District cannot be treated as a “state” for congressional representation). But such a litigant would face prudential standing limits — which the court might relax — in trying additionally to assert this claim. First, the one-seat-limit claim may not be ripe for decision, as the injury remains speculative. See Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967) (“basic rationale” of ripeness doctrine “is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements”). Second, the one-seat-limit claim presents an overbreadth problem, addressing an independent, hypothetical error that does not concretely affect the litigant. See United States v. Raines, 362 U.S. 17, 21–22 (1960) (“[O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. . . . The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined.”). Even if the constitutionality of the one-seat limit would not be judicially reviewed, Congress should nonetheless avoid passing an unconstitutional law. See infra note 198.
can be read to include the District in this context. Yet while the legislation is constitutional in general, the D.C. Voting Rights Act’s one-seat limit for District representation is constitutionally flawed and requires deletion.

IV. POSSIBLY RESTRICTED STANDING FOR A LEGAL CHALLENGE

Would a legal challenge to a statute granting the District House representation be justiciable? While the political question doctrine is unlikely to block judicial review, standing poses a problem for which existing jurisprudence in the Supreme Court and the D.C. Circuit — the presumptive venue for this

198. Even if the statute would not be justiciable, Congress and the President maintain their independent responsibilities to satisfy themselves of its constitutionality. The political branches’ duty to uphold the Constitution goes beyond simply assuming that, because the judiciary will not hear a legal challenge, the legislation is ipso facto constitutional. See Edwin Meese III, The Law of the Constitution, 61 TUL. L. REV. 979, 985–86 (1987):

The Supreme Court, then, is not the only interpreter of the Constitution. Each of the three coordinate branches of government created and empowered by the Constitution — the executive and legislative no less than the judicial — has a duty to interpret the Constitution in the performance of its official functions. In fact, every official takes an oath precisely to that effect.

See also City of Boerne v. Flores, 521 U.S. 507, 535 (1997) (“When Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution.”).


200. Far from employing the political question doctrine to decline jurisdiction over cases under the District Clause, courts have strongly asserted that political question doctrine does not block judicial review in this circumstance. See, e.g., Banner v. United States, 303 F. Supp. 2d 1, 9–10 (D.D.C. 2004) (discussing application of political question doctrine) (internal quotations and citations omitted), aff’d, 428 F.3d 303 (D.C. Cir. 2005):

That Congress’ power is plenary is . . . insufficient to insulate a law from judicial review. Congress can exercise its plenary power over the District only so long as it does not contravene any provision of the Constitution of the United States.

Just as this Court may strike down as unconstitutional legislation enacted by Congress for the entire country, the Court is fully empowered to review legislation for the District of Columbia for constitutional infirmities . . . . Congress’ plenary power to legislate for the District of Columbia in no way strips this Article III court of its authority, and its duty, to consider claims of constitutional violations.

In cases concerning Congress’s regulation of itself, courts have found their jurisdiction restricted not by the political question doctrine, but by the standing doctrine — which, after all, is premised on the same underlying separation-of-powers concerns. See, e.g., Page v. Shelby, 995 F. Supp. 23, 26–29 (D.D.C.), aff’d, 172 F.3d 920 (D.C. Cir. 1998); Skaggs v. Carle, 110 F.3d 831, 835 (D.C. Cir. 1997).
challenge — offers no clear answer. The most directly applicable precedent, *Michel v. Anderson*, suggests that standing would be widely available. However, later decisions, in particular *Raines v. Byrd* and *Page v. Shelby*, cast doubt on the continued validity of *Michel v. Anderson*. To the degree that *Michel v. Anderson* has lost doctrinal force, standing to challenge a statute granting the District House representation may be severely restricted.

A. STANDING DEPENDS ON THE COGNIZABLE INJURY

By limiting the class of eligible plaintiffs, standing doctrine helps ensure that judicial review does not unduly encroach on the autonomy of the political branches. To gain standing, a plaintiff must have sustained a concrete injury in fact that is traceable to the defendant’s conduct and likely redressable by a favorable judicial decision. Generally, standing requirements preclude plaintiffs from asserting third-party claims or generalized grievances.

Applied to the D.C. Voting Rights Act, this framework suggests two possible injuries that might confer standing and two possible types of plaintiffs who might sustain the injury. The

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201. The District of Columbia is the logical venue for this suit because it is the home of Congress and the central beneficiary of the legislation.
202. This Part deals with standing to challenge legislation granting the District House representation generally. See supra note 197 for a discussion of standing to challenge the D.C. Voting Rights Act’s provision limiting the District to one representative regardless of population. See H.R. 1905, 110th Cong. § 2(b) (2007); S. 1257, 110th Cong. § 2(b) (2007).
208. See *Warth*, 422 U.S. at 499 (“[E]ven when the plaintiff has alleged injury sufficient to meet the ‘case or controversy’ requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.”).
209. *Id.* (“[W]hen the asserted harm is a ‘generalized grievance’ shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction.”).
210. A third category of injury and plaintiff exists, but would not create standing to challenge the D.C. Voting Rights Act. With the newly expanded House, the state that
injuries traceable to a District representative are 1) narrowly, being damaged by a statute that would not have passed but for the District representative’s decisive vote,211 and 2) broadly, suffering a dilution of voting power in the House. The two classes of plaintiffs who sustain these injuries are 1) voters212 outside the District and Utah, and 2) House representatives outside the District and Utah. The doctrinal confusion centers on which injuries create standing for each class of plaintiff. These problems can be termed “voter standing” and “legislator standing.”

The availability of judicial review rests heavily on what injuries trigger voter and legislator standing. The narrow injury entails such an exceptional factual situation that it may be years before it occurs in the full House.213 From 1991 to 2006, encompassing the 102nd through the 109th Congress, only eight times did a bill pass the House’s final vote by a margin of one vote.214 Of those eight bills, only four became law.215 Moreover, to create standing, the District representative would have to be on the winning side. In contrast, the broad injury occurs from the day the legislation takes effect.

otherwise would have received the 437th seat could claim that the District has usurped the seat that rightfully belongs to it. No standing results, however, because this grievance is not judicially redressable by a favorable decision. The D.C. Voting Rights Act contains a nonseverability clause mandating that the invalidation of any part of the statute invalidates the entire statute. See supra notes 83, 195–96 and accompanying text. In light of this clause, the House would automatically revert to 435 seats, precluding a court from redressing the usurpation grievance by allotting the 437th seat to that next-in-line state.

211. A weaker alternative is that the plaintiff was injured by the non-passage of a favorable statute that would have passed but for the District representative’s nay vote. This claim suffers a problem of proximate cause, as it is likely impossible to show whether the President would have signed the bill into law if Congress had passed it.

212. Non-voters sustain no injury traceable to the District representative because they have no right to representation in the legislative process.

213. A decisive vote is more likely in a House standing committee, but reliance on that forum attenuates the chain of causation between vote and injury to a perhaps unacceptable degree. Moreover, the D.C. Circuit has entertained, without explicitly approving, the proposition that the vote of delegates in standing committees (as opposed to the Committee of the Whole) is historically accepted as a constitutional practice. See Michel v. Anderson, 14 F.3d 623, 631 (D.C. Cir. 1994). If that is true, then the District representative’s committee vote would not create a cognizable injury for standing purposes.


B. **MICHEL V. ANDERSON MAKES STANDING WIDELY AVAILABLE**

In *Michel v. Anderson*, the D.C. Circuit held that both voters and legislators have standing to challenge a congressional action that causes the broadly conceived injury of vote dilution. The challenge concerned a House rule permitting delegates from the District, American Samoa, Guam, Puerto Rico, and the Virgin Islands to cast votes in the deliberative Committee of the Whole, where much of the House’s legislative process occurs. This case may be doctrinally indistinguishable from the standing problem posed by legislation giving the District a House representative, which similarly dilutes the relative voice of others in the House. *Michel v. Anderson* therefore dictates that 435 out of 437 House representatives and all voters outside the District and Utah would have standing to challenge the D.C. Voting Rights Act.

The court’s decision in *Michel v. Anderson* did not follow inevitably from basic standing doctrine. All three key aspects of the holding are debatable: whether 1) vote dilution is a concrete, particularized injury; 2) voter standing predicated on vote dilution amounts to a generalized, third-party grievance; and 3) legislator standing entangles the court in an intramural legislative dispute where it does not belong. *Michel v. Anderson* rebuffed each of these objections.

First, vote dilution is arguably an abstract, not concrete, injury. The plaintiff does not claim any actual negative impact due to the allegedly illegitimate vote — for instance, the passage of personally damaging legislation that would not have passed but for that vote. Nonetheless, the D.C. Circuit found an injury in fact, asserting that “[t]he Supreme Court has repeatedly held that voters have standing to challenge practices that are claimed to dilute their vote . . . .”

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217. *See supra* note 5 and accompanying text.
218. *Cf. Skaggs v. Carle*, 110 F.3d 831, 834 (D.C. Cir. 1997) (“The lesson of *Michel* is that vote dilution is itself a cognizable injury regardless whether it has yet affected a legislative outcome.”).
219. 14 F.3d at 626. The district court opinion offered a more thorough rationale: The Constitution guarantees the right to proportional representation in the House. . . . The alleged dilution of that representational voting power set forth in the Constitution satisfies the requirement of injury in fact. Although the House majority’s action does not entirely strip Members of that body of their
Second, the voters’ challenge in some sense epitomizes a generalized grievance, as all American citizens outside the beneficiary jurisdictions suffer a dilution of their voice in the House. Furthermore, voters arguably present a derivative claim; it is the member of Congress who directly sustains the injury and raises a grievance specific to rights and privileges as a representative. Rejecting the generalized grievance characterization, the D.C. Circuit reasoned that the fact “[t]hat an injury is widespread . . . does not mean that it cannot form the basis for a case in federal court so long as each person can be said to have suffered a distinct and concrete harm. . . . That all voters in the states suffer this injury, along with the appellants, does not make it an ‘abstract’ one.”

Responding to the third-party standing criticism, the court acknowledged that the voters’ claim may be derivative, but questioned “why that should be of significance” given that the representative is an agent for the voter’s interests.

Third, separate from the Article III standing analysis, but consistent with the underlying separation-of-powers principle, the D.C. Circuit itself has developed a prudential “doctrine of remedial discretion” counseling against judicial interference in internal legislative affairs. A legislator upset with some legislative action affecting the internal processes of the chamber should right to vote, it is claimed to take from them precisely what the Constitution guarantees — votes carrying weight proportional to their States’ population. . . . Members of the House are chosen in proportion to the number of citizens in their respective States, and they are each given a vote as a tool with which to craft legislation. As the pool of possible votes expands, the effectiveness of each individual vote shrinks.


220. 14 F.3d at 626.

221. Id.


With what may be a single exception, the [D.C. Circuit] has consistently instructed over the last decade and more, in addressing lawsuits by legislators complaining of their colleagues’ unconstitutional conduct in doing the work of Congress, that the separation-of-powers principle precludes the courts from reviewing congressional practices and procedures when they primarily and directly affect the way Congress does its legislative business, even when such a disposition would render a constitutional question unreviewable, and when only declarative relief is sought.

seek relief in the legislature, not the courts.\textsuperscript{223} The D.C. Circuit sidestepped this analysis, noting that it was “unnecessary to struggle with the doctrine since, however construed, it has no applicability to private voters,” who were also plaintiffs in \textit{Michel v. Anderson} and had standing to sue.\textsuperscript{224}

C. \textbf{DOES MICHEL V. ANDERSON REMAIN GOOD LAW?}

Notwithstanding the firm conclusions of \textit{Michel v. Anderson}, the debate on these standing issues has been reopened by later decisions of the D.C. Circuit and Supreme Court. In \textit{Page v. Shelby},\textsuperscript{225} the D.C. Circuit backed away from vote dilution as a basis for voter standing. In \textit{Raines v. Byrd},\textsuperscript{226} the Supreme Court rejected vote dilution as a basis for legislator standing. What remains of \textit{Michel v. Anderson} is unclear.

1. \textbf{Voter Standing after Page v. Shelby}

In \textit{Page v. Shelby}, the D.C. Circuit affirmed without opinion a district court decision that denied standing to a voter challenging the Senate’s cloture rule, which enables the body to stop a filibuster only by a three-fifths vote. The voter argued that the resultant super-majority requirement for the Senate to approve legislation diluted the voter’s effective voice in the Senate. In denying standing, the district court opinion facially distinguished \textit{Michel v. Anderson} but may have overruled it \textit{sub silentio}.

The court distinguished the injury in \textit{Page v. Shelby} as lacking the discriminatory impact of the injury in \textit{Michel v. Anderson}.\textsuperscript{227}

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\textsuperscript{223} The “fundamental consideration . . . is one of prudent judicial self-restraint: federal courts should generally refrain, as a matter of policy, from intruding in the name of the Constitution upon the internal affairs of Congress at the behest of lawmakers who have failed to prevail in the political process.” Skaggs, 899 F. Supp. at 2.
\textsuperscript{224} 14 F.3d at 628.
\textsuperscript{225} 995 F. Supp. 23 (D.D.C.), \textit{aff'd without opinion}, 172 F.3d 920 (D.C. Cir. 1998).
\textsuperscript{226} 521 U.S. 811 (1997).
\textsuperscript{227} See \textit{Page v. Shelby}, 995 F. Supp. at 23 n.3.
\end{flushright}

Although [the plaintiff] refers to his alleged injury as dilution of his vote, the vote dilution cases he cites are not applicable in this situation. For example, \textit{[Michel v. Anderson]} is distinguishable because in that case each Representative’s [sic] voting power was clearly diminished when the House conferred voting status on non-members of the House of Representatives. Likewise, \textit{[Vander Jagt v. O'Neill]} is distinguishable because the procedural rules at issue in that case (the House Democratic majority’s method of allocating committee memberships)
The Senate cloture rule equally injures everyone who votes in the Senate, whereas the five House delegates’ votes in the Committee of the Whole specifically injure the 435 votes in the House belonging to representatives. Following this argument, *Michel v. Anderson* still covers legislation giving the District a representative because the statute diminishes the voting power of 435 House representatives by conferring voting status on one non-member. Yet *Page v. Shelby* also contains strong language contradicting the core logic of *Michel v. Anderson*. The opinion stresses the importance of a voter identifying specific injurious legislation rather than asserting a general claim of diluted power:

Of particular importance, to constitute injury in fact, the harm alleged must be actual and imminent, not conjectural and speculative. Assuming *arguendo* that the filibuster remains a viable tool of a minority of Senators bent on blocking all future legislation favored by [the plaintiff], he cannot show that he will suffer any personal harm should this hypothetical legislation not come to a vote. His complaint contains unspecified allegations regarding “legislation he desires” — precisely the kind of vague, conjectural and hypothetical harm which cannot confer standing. By the very nature of his claim, [the plaintiff] does not and cannot name particular bills that will be the subject of future allegedly unconstitutional filibusters.229

Rather than simply defining the injury as vote dilution, as in *Michel v. Anderson*, the court demands that the plaintiff pinpoint a harmful legislative outcome that would not have occurred but for the challenged practice. A voter challenging the D.C. Voting Rights Act based on the vote dilution injury would not satisfy this burden.

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228. It is arguable whether the District’s vote discriminatorily impacts the newly created Utah representative as well, given that the representative would not exist but for the challenged legislation. Regardless, it makes no practical difference whether 435 or 436 representatives suffer vote dilution.

229. *Id.* at 28.
In light of the conflicting signals in *Page v. Shelby*, it is unclear whether vote dilution would enable voter standing to challenge legislation granting the District a House representative. If not, then voters would have standing only in the event that the District representative casts the decisive vote in favor of injurious legislation that then becomes law.

2. Legislator Standing after *Raines v. Byrd*

In *Raines v. Byrd*, the Supreme Court denied standing to members of Congress challenging the constitutionality of the Line Item Veto Act, which allowed the President to strike specific appropriations provisions from legislation when signing it into law.\(^{230}\) A seven-justice majority found that vote dilution is not a cognizable injury for legislator standing. Assessing the “question of legislative standing,” the Court noted that the legislators’ “claim is that the Act causes a type of institutional injury (the diminution of legislative power), which necessarily damages all Members of Congress and both Houses of Congress equally.”\(^{231}\) This injury was inadequate because the legislators had “not alleged that they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated.”\(^{232}\) Instead of abstract dilution, the legislators needed to show a specific instance where the challenged presidential line item veto power had been used to nullify — rather than merely weaken or dilute — their votes.

In reaching this holding, the Court relied heavily on its decision in *Coleman v. Miller*.\(^{233}\) In that case, the Kansas state Senate split evenly on whether to ratify a proposed federal constitutional amendment.\(^{234}\) The tie meant ratification would fail, but the Lieutenant Governor broke the deadlock with a deciding vote for ratification.\(^{235}\) A group of Kansas state legislators challenged the Lieutenant Governor’s right to cast this tie-breaking vote.\(^{236}\) Describing *Coleman v. Miller* as “[t]he one case in which we have

\(^{230}\) 521 U.S. at 829–30.
\(^{231}\) *Id.* at 821.
\(^{232}\) *Id.* at 824.
\(^{233}\) 307 U.S. 433 (1939).
\(^{234}\) *Id.* at 435–36.
\(^{235}\) *Id.* at 436.
\(^{236}\) *Id.*
upheld standing for legislators (albeit state legislators) claiming an institutional injury,” the Raines v. Byrd court noted that Coleman v. Miller involved exactly the exceptional situation where the challenged vote proved singly decisive in passing a damaging piece of legislation. The Court asserted that:

Coleman stands [at most] for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.

Dismissing the plaintiffs’ suggestion of a dilution injury based on diminished “meaning” and “effectiveness” of their votes, the Court demurred that “[t]o uphold standing here would require a drastic extension of Coleman. We are unwilling to take that step.”

This denial of standing stemmed partly from the same hesitance to referee intra-legislative disputes that underpins the D.C. Circuit’s remedial discretion doctrine. The Court would not entertain the legislators’ challenge because:

In the vote on the [Line Item Veto] Act, their votes were given full effect. They simply lost that vote. Nor can they allege that the Act will nullify their votes in the future in the same way that the votes of the Coleman legislators had been nullified. In the future, a majority of Senators and Congressman can pass or reject appropriations bills; the Act has no effect on this process. In addition, a majority of Senators and Congressman can vote to repeal the Act, or to exempt a given appropriations bill (or a given provision in

237. Raines, 521 U.S. at 821.
238. Id. at 823. See also Coleman, 307 U.S. at 441 (“[T]he twenty senators were not only qualified to vote on the question of ratification but their votes, if the Lieutenant Governor were excluded as not being a part of the legislature for that purpose, would have been decisive in defeating the ratifying resolution.”).
239. Raines, 521 U.S. at 823.
240. Id. at 825–26.
an appropriations bill) from the Act; again, the Act has no effect on this process.241

As with the remedial discretion doctrine, the Court intimated that the legislators’ recourse appropriately lies in the legislature, not the courts.

The Raines v. Byrd court’s adherence to Coleman v. Miller in denying legislator standing directly undercuts what the D.C. Circuit considers “[t]he lesson of Michel . . . that vote dilution is itself a cognizable injury regardless whether it has yet affected a legislative outcome.”242 Yet remarkably, Raines v. Byrd does not discuss Michel v. Anderson. Undoubtedly, Raines v. Byrd limits the D.C. Circuit’s approach to legislator standing under Michel v. Anderson,243 but to what extent is not clear. If Michel v. Anderson is abandoned entirely, then legislator standing may arise only from the narrow injury of the District representative casting a deciding vote on some damaging legislation that thereafter becomes law.

Alternatively, Raines v. Byrd leaves open the possibility that Michel v. Anderson remains good law insofar as it applies to injuries that discriminatorily affect certain legislators rather than generally impacting the body as a whole — the same distinction Page v. Shelby draws for voter standing.244 In Raines v. Byrd, the Court noted that the plaintiffs were “unable to show that their vote was denied or nullified in a discriminatory manner (in the sense that their vote was denied its full validity in relation to the votes of their colleagues).”245 Legislators challenging the D.C. Voting Rights Act could make this showing, because the legislation empowers a District representative at the expense of slightly disempowering all other representatives.

241. Id. at 824.
244. See supra note 227 and accompanying text (discussing Page v. Shelby).
245. 521 U.S. at 824 n.7.
3. Summarizing the Doctrinal Uncertainty

The continued force of *Michel v. Anderson*, and therefore the availability of standing to challenge legislation giving the District a House representative, is unclear. Based on distinctions drawn in *Page v. Shelby* and *Raines v. Byrd*, the vote dilution injury may still create voter and legislator standing because the D.C. Voting Rights Act discriminatorily diminishes the votes of 435 of 437 representatives. Under that reading, standing remains widely available. Alternatively, it may be that voter and legislator standing results only from the narrowly defined injury of a decisive District vote passing a bill that becomes a damaging law. That circumstance may take years to arise.

V. LIMITS ON CONGRESS’S LEGISLATIVE POWER TO ENFRANCHISE FEDERAL JURISDICTIONS

Even if legislation to give the District a House representative serves a worthy purpose, employs a politically viable strategy, and is constitutional, the apprehension remains that it pushes Congress down a slippery slope to less acceptable exercises of power. If Congress can grant the District a representative, what prevents Congress from doing the same for territories, or granting two Senators also, or awarding the District or a territory any number of seats — say, ten representatives and six senators? Even accepting *arguendo* that all these feared outcomes are undesirable, each concern is unfounded. Clear boundaries — both legal and political — rationally constrain Congress’s power. Indeed, far from opening the door to excessively empowering a federal jurisdiction, such legislation creates representation that is inherently and uniquely weak.

First, there is little reason to worry that granting the District a seat in the House sets a precedent allowing Congress to provide House representation for other federal jurisdictions, particularly the territories. The District is politically — if not legally —

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246. See Turley, supra note 85.
247. See supra Part II.A.
248. Similar to Congress’s plenary authority under the District Clause, the Constitution grants Congress expansive authority over territories. See U.S. CONST. art. IV, § 3, cl.
distinguishable from the territories in this regard, so that Congress can maintain that the District deserves the special accommodation of a House seat while territories do not. Moreover, the possibility of legislation to grant territories a vote in the House is not worrisome given that Congress has the undisputed authority to grant full statehood to territories. When that greater power already exists, it is unclear why the lesser power it encompasses is considered a threat.

Second, legislation giving the District a seat in the House is distinguishable from legislation giving it seats in the Senate. Politically, the District’s size warrants the political influence of one of 437 House representatives far more clearly than it warrants two of 102 Senators. Legally, the text of Article V of the Constitution suggests that, unlike for the House, every state might need to consent to grant the District — or a territory — Senate representation.

Third, Congress is constrained both as a political norm and a legal principle in the number of representatives and Senators it can grant to the District or a territory. Politically, it is all but inconceivable that members of Congress could either desire or justify over-representation of the District at the expense of their own and their constituents’ influence. Legally, the theory underlying the D.C. Voting Rights Act is not that Congress can empower the District in any way it sees fit, but that Congress can treat citizens of the District as if they were citizens of a state. Consistent with equal protection, this principle draws a clear and rational line circumscribing Congress’s power: Congress may create political privileges for citizens of a federal jurisdiction only to the point of giving those citizens the same franchise as ordinary state citizens. Such privileges may be less than or equal to the rights that state citizens enjoy, but may not exceed those rights. Therefore, Congress may at a maximum grant two Senators and

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2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . .").
249. See U.S. Const. art. IV, § 3, cl. 1 ("New States may be admitted by the Congress into this Union . . . .").
250. See supra Part II.C.2.b. This reasoning may not hold for a territory with a larger population.
251. Id.
a number of representatives proportional to the jurisdiction’s population.

Far from setting a dangerous precedent for excessive political representation, the D.C. Voting Rights Act demonstrates the unique frailty of a legislatively created seat in the House. The District representative — unlike any other member of Congress — would face the constant, debilitating threat of having the District’s seat legislatively revoked. What Congress gave the District, Congress might also take away. In that sense, the District representative — like the District itself — would remain ultimately subservient to congressional control. Other politicians could exploit this vulnerability to discourage the District representative from taking controversial positions or casting decisive votes. This bullying, while a rational political tactic, undermines the very purpose of the District having a vote. Taken to the extreme, such intimidation would produce a grand irony: just like the currently existing District delegate’s vote in the Committee of the Whole, the District’s full representative would still possess nothing more than a vote that counts when it doesn’t count, and doesn’t count when it counts.

Fortunately for the District, its representative would find some protection from this intimidation in the high barrier to repeal of the District’s voting privilege. Repeal legislation would require not only sixty votes in the Senate to block a presumptive Democratic filibuster, but also a President suffering the embarrassment of signing legislation to disenfranchise American citizens. Overriding a likely presidential veto would require a two-thirds vote in each chamber of Congress. Though possible, revoking the District’s seat would be difficult.

252. Also, as a self-imposed restraint, the District representative might strategically avoid casting any decisive vote in order to preclude the conditions enabling standing for a legal challenge. See supra Part IV. It is not inconceivable that this consideration would lead to gamesmanship in the House over putting the District representative in the position where such a decisive vote becomes necessary.

253. See discussion supra note 4.


VI. CONCLUSION

This Note has argued that legislation granting the District of Columbia a House representative is generally constitutional and that standing to challenge it may be restricted. Such legislation is not a slippery slope to excessive empowerment of the District and territories; to the contrary, it provides inherently handicapped representation. To avoid unnecessarily endangering the legislation, Congress should eliminate the one-seat limit from the D.C. Voting Rights Act.

As this Note acknowledges, the D.C. Voting Rights Act is far from a perfect solution for the District. It empowers the District less than other conceivable alternatives, pushes at the boundaries of the Constitution, creates a vulnerable House representative, and requires amendment to eliminate an extraneous unconstitutional provision. Advocates of District empowerment charge that the measure forsakes the cherished goal of statehood for the relative pittance of a House seat. Yet the pursuit of perfection must yield to pragmatic, incremental progress; after all, politics is the art of the possible. After over 200 years without voting representation in Congress, the District of Columbia is now close to attaining a seat in the House. Though not an ideal remedy, the D.C. Voting Rights Act, as amended to eliminate the one-seat limit on District representation, succeeds as a political and constitutional accommodation on behalf of the District.

256. See supra Parts II, III, and V.