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Mary M. Cheh

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## THEORIES OF REPRESENTATION: FOR THE DISTRICT OF COLUMBIA, ONLY STATEHOOD WILL DO

Mary M. Cheh\*

### INTRODUCTION

The District of Columbia suffers uniquely for its position as the seat of the national government. Because it is not a state, it does not qualify for congressional representation and has no vote in the national legislature, even as to matters affecting entirely local interests.<sup>1</sup> Indeed, Article 1, Section 8 of the U.S. Constitution vests Congress with the power to “exercise exclusive legislation in all cases whatsoever” over the District, which permits Congress to pass laws ranging from budget control to street sweeping.<sup>2</sup> The fact that the District exercises any local authority at all arises from permission granted to it by Congress.<sup>3</sup>

Indeed, the District’s uniquely impoverished democracy renders its situation even worse than that of the territories. Like residents of the District, people living in U.S. territories have no right to vote for members of Congress, their laws may be nullified by Congress, and, although they may send a delegate to Congress, the delegate has no vote.<sup>4</sup> But, unlike a territory, the District has no historically settled path to statehood.<sup>5</sup> The District has always been geographically part of the Union, and its citizens previously exercised, but then lost, the right to vote for members of the national

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\* Elyce Zenoff Professor of Law, The George Washington University Law School; Member, Council of the District of Columbia; L.L.M., Harvard University, 1977; J.D., Rutgers University, 1975; B.A., Rutgers University, 1972. The author would like to thank former students Megan Brown, J.D., George Washington University Law School, 2013 and Jonathan Willingham, J.D., George Washington University Law School, 2006.

<sup>1</sup> See generally Peter Raven-Hansen, *Congressional Representation for the District of Columbia: A Constitutional Analysis*, 12 HARV. J. ON LEGIS. 167, 174–79 (1975) [hereinafter Raven-Hansen, *Congressional Representation*] (discussing the disenfranchising effect of the 1801 legislation that provided for the formation of the federal District).

<sup>2</sup> U.S. CONST. art. I, § 8, cl. 17; see, e.g., *Neild v. District of Columbia*, 110 F.2d 246, 250–51 (D.C. Cir. 1940) (finding the District Clause gives Congress broad control over the District’s affairs, allowing it to legislate on an array of issues).

<sup>3</sup> Home Rule Act, Pub. L. No. 93-198, 87 Stat. 774 (1973); see *infra* Part III.C.

<sup>4</sup> 2 U.S.C. § 25a (2012).

<sup>5</sup> See *D.C. Statehood: Hearing on H.R. 51 Before the Subcomm. on Fiscal Affairs & Health of the H. Comm. on the District of Columbia*, 100th Cong. 228 (1987) (statement of Sen. Edward Kennedy) [hereinafter Statement of Sen. Kennedy] (noting the three historically recognized conditions for admission to statehood: “commitment to the principles of democracy, resources and population sufficient to support statehood, and the will of the people for statehood”).

legislature.<sup>6</sup> Residents of the District must pay individual federal income taxes while, broadly speaking, those who reside in a territory are exempt from such taxation.<sup>7</sup> Perhaps most offensive, however, is the propensity of members of Congress to use the District as a political plaything. For example, members have chosen to trumpet their opposition to financing poor women's abortions, needle exchanges, or medical marijuana by prohibiting local initiatives that would support such measures.<sup>8</sup>

This Essay posits that the only complete legal and moral remedy for the District's political subjugation is statehood, and it explains why remedies short of statehood are inadequate. The Essay then identifies the various paths to statehood. Finally, it discusses the strategic dilemma of the District either holding out exclusively for statehood or proceeding in incremental steps on that path.

### I. THE CASE FOR STATEHOOD

The 646,000 residents of the District of Columbia,<sup>9</sup> unlike the residents of any other democratic capital in the world, have no vote in their national legislature.<sup>10</sup> And this legislature, the Congress of the United States, exercises complete dominion over

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<sup>6</sup> See Raven-Hansen, *Congressional Representation*, *supra* note 1, at 174.

<sup>7</sup> *U.S. Insular Areas: Information on Fiscal Relations with the Federal Government: Hearing Before the Subcomm. on Native Am. & Insular Affairs of the H. Comm. on Res.*, 104th Cong. 177–79 (1995) (statement of Natwar M. Gandhi) (noting that residents of the United States' five insular territories do not pay federal income tax on earnings within the territories).

<sup>8</sup> See Ben Pershing, *Budget Deal Reminds D.C. that Congress is in Charge*, WASH. POST, Apr. 10, 2011, at A10, *available at* [http://www.washingtonpost.com/blogs/dc-wire/post/sources-budget-deal-includes-dc-abortion-rider-money-for-school-vouchers/2011/04/08/AF3ET24C\\_blog.html](http://www.washingtonpost.com/blogs/dc-wire/post/sources-budget-deal-includes-dc-abortion-rider-money-for-school-vouchers/2011/04/08/AF3ET24C_blog.html) (describing how Republicans included bans on needle exchange and use of local funds for abortions as part of budget deal to avoid a government shutdown); Phillip Smith, *Medical Marijuana: U.S. House Overturns Barr Amendment, Removes Obstacle to Implementing 1998 D.C. Vote*, STOP DRUG WAR (July 17, 2009, 12:00 AM), [http://stopthedrugwar.org/chronicle/2009/jul/17/medical\\_marijuana\\_us\\_house\\_overt](http://stopthedrugwar.org/chronicle/2009/jul/17/medical_marijuana_us_house_overt) (reporting that because the Barr amendment was overturned, the District has been able to allow for the use of medical marijuana); *see also* Tim Craig, *D.C. Wire: Medical Marijuana Now Legal*, WASH. POST (July 27, 2010, 12:13 AM), [http://voices.washingtonpost.com/dc/2010/07/medical\\_marijuana\\_now\\_legal.html](http://voices.washingtonpost.com/dc/2010/07/medical_marijuana_now_legal.html) (noting that the District's medical marijuana law passed when Congress "declined" to intervene).

<sup>9</sup> Aaron Wiener, *D.C. Population Boom Continued in 2013*, WASH. CITY PAPER (Dec. 30, 2013, 11:21 AM), <http://www.washingtoncitypaper.com/blogs/housingcomplex/2013/12/30/d-c-population-boom-continued-in-2013/>.

<sup>10</sup> See Tim Craig, *Obama to Use D.C. 'Taxation Without Representation' License Plates*, WASH. POST. (Jan. 16, 2013), *available at* [http://www.washingtonpost.com/local/dc-politics/obama-to-use-dc-taxation-without-representation-license-plates/2013/01/15/f91b09ac-5f5b-11e2-9940-6fc488f3fed\\_story.html](http://www.washingtonpost.com/local/dc-politics/obama-to-use-dc-taxation-without-representation-license-plates/2013/01/15/f91b09ac-5f5b-11e2-9940-6fc488f3fed_story.html) ("[A]fter living in the city for four years [President Obama] has 'seen how patently unfair it is for working families in D.C. to work hard, raise children and pay taxes, without having a vote in Congress.'").

District residents.<sup>11</sup> Because of this subordination, the District is sometimes called the “last colony.”<sup>12</sup> This current, abject condition was never envisioned and never intended by the Framers when they drafted the District Clause of the Constitution giving Congress full power “[t]o exercise exclusive legislation in all cases whatsoever”<sup>13</sup> over the District.<sup>14</sup>

### A. History of the District

To understand how this democratic anomaly came to be, we have to return to 1783 and the Confederation Congress. In June of that year, Congress, sitting in Independence Hall in Philadelphia, was besieged by soldiers of the Continental Army demanding back pay.<sup>15</sup> Although the actual danger of the mutiny was likely exaggerated by federalists who sought a strong central government,<sup>16</sup> and “historians do not agree on various details of what happened,”<sup>17</sup> it is clear that Congress asked Pennsylvania for protection<sup>18</sup> and Pennsylvania refused.<sup>19</sup> Faced with the inability to expeditiously protect itself,<sup>20</sup> the Congress adjourned and removed to Princeton, New Jersey.<sup>21</sup> When drafting the Constitution a mere four years later, members of the Constitutional Convention were far more concerned with creating a federal seat that could protect the federal government than considering whether the residents of that seat would be represented in the Congress they were creating.<sup>22</sup>

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<sup>11</sup> See, e.g., Pershing, *supra* note 8 (noting that “Congress is in charge” and that “the District has precious little control over its finances”).

<sup>12</sup> See, e.g., Statement of Sen. Kennedy, *supra* note 5, at 227 (“The time has come in America’s bicentennial year to end the unacceptable status of the District of Columbia as America’s last colony.”).

<sup>13</sup> U.S. CONST. art. I, § 8, cl. 17.

<sup>14</sup> See *infra* notes 124–25 and accompanying text.

<sup>15</sup> KENNETH R. BOWLING, *THE CREATION OF WASHINGTON D.C.: THE IDEA AND LOCATION OF THE AMERICAN CAPITAL* 30–32 (1991) (describing an armed demonstration of more than 250 Continental soldiers seeking back pay from the Pennsylvanian government and surrounding a building full of not only state but federal congressmen).

<sup>16</sup> *Id.* at 34.

<sup>17</sup> Mark S. Scarberry, *Historical Considerations and Congressional Representation for the District of Columbia: Constitutionality of the D.C. House Voting Rights Bill in Light of Section Two of the Fourteenth Amendment and the History of the Creation of the District*, 60 ALA. L. REV. 783, 871 (2009).

<sup>18</sup> BOWLING, *supra* note 15, at 32; see also Raven-Hansen, *Congressional Representation*, *supra* note 1, at 169.

<sup>19</sup> BOWLING, *supra* note 15, at 32.

<sup>20</sup> Although, at one point, Congress considered ordering General George Washington to march troops on the city. *Id.* at 33.

<sup>21</sup> *Id.* at 33–34.

<sup>22</sup> Raven-Hansen, *Congressional Representation*, *supra* note 1, at 171–72, 178.

Lack of concern for the residents of the District was perhaps not a glaring defect at the time. In 1790, the District was little more than a swamp, with significant settlements only at Georgetown and Alexandria.<sup>23</sup> Even in 1800, twelve years after the ratification of the Constitution, the total population of the District had only risen to 14,093.<sup>24</sup> As Representative Randolph of Virginia would note in 1803, “[t]he other states can never be brought to consent that two senators and, at least, three electors of the President, shall be chosen out of this small spot, and by a handful of men.”<sup>25</sup> By 1960, however, when the population of the District had risen to over 760,000,<sup>26</sup> the nation realized that the foundation of that statement had crumbled. This was signified by the ratification of the Twenty-Third Amendment to the Constitution, allowing the District to vote for electors for President of the United States.<sup>27</sup>

The Framers could not have foreseen that the District would grow to a population greater than both Wyoming and Vermont and close to the populations of several other states.<sup>28</sup> They could not have imagined states like Wyoming and Vermont sharing four senators and two representatives between them, while hundreds of thousands of residents of the District remained disenfranchised. And it is incongruous to think that the Framers, having just fought a war to ensure that there would be no taxation without representation, would enshrine in the Constitution that same disability on such a significant population of their own countrymen. Now, in the twenty-first century, to achieve equality and dignity of citizenship for District residents fully on par with all other citizens of the United States, statehood is the only complete and adequate answer.

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<sup>23</sup> See S. REP. NO. 67-507, at 13–14 (1922).

<sup>24</sup> *Id.* at 14, cited in Raven-Hansen, *Congressional Representation*, *supra* note 1, at 177. At the time of the 1800 Census, the population of the District was not counted separately, but rather included in the totals for Maryland and Virginia, respectively, for their ceded land. Although the Virginia data appears to be lost, the Maryland data reflects a population of 8,144 in the 1800 census. U.S. CENSUS BUREAU, TABLE 23. DISTRICT OF COLUMBIA—RACE AND HISPANIC ORIGIN: 1800 TO 1990, available at <http://www.census.gov/population/www/documentation/twps0056/tab23.pdf> (last visited Oct. 23, 2014) [hereinafter RACE AND HISPANIC ORIGIN].

<sup>25</sup> 12 ANNALS OF CONG. 499 (1803), quoted in Raven-Hansen, *Congressional Representation*, *supra* note 1, at 178.

<sup>26</sup> See U.S. CENSUS BUREAU, DISTRICT OF COLUMBIA POPULATION OF COUNTIES BY DECENNIAL CENSUS: 1900 TO 1990, available at <http://www.census.gov/population/cencounts/dc190090.txt> (last visited Oct. 23, 2014).

<sup>27</sup> U.S. CONST. amend. XXIII, § 1.

<sup>28</sup> See Wiener, *supra* note 9. Wyoming has a population of 582,658 people, and Vermont has a population of 626,630 people. *Id.* Alaska and North Dakota have populations of 735,132 people and 723,393 people, respectively. U.S. CENSUS BUREAU, STATE & COUNTY QUICKFACTS: ALASKA, available at <http://quickfacts.census.gov/qfd/states/02000.html> (last visited Oct. 23, 2014); U.S. CENSUS BUREAU, STATE & COUNTY QUICKFACTS: NORTH DAKOTA, available at <http://quickfacts.census.gov/qfd/states/38000.html> (last visited Oct. 23, 2014).

*B. Creating a New State*

When territories are admitted to the Union, they are admitted under the “Equal Footing Doctrine.”<sup>29</sup> That is, a new state acquires the same power, dignity, and authority of every other state, and that equality may not thereafter be compromised.<sup>30</sup> If the District were admitted to the Union as a state, it too would be on equal footing with all other states. Such equality is not conferred for the benefit of the government—it is conferred for the people so that they might exercise the full powers of a local sovereign: the power to pass civil and criminal laws, to tax, to insure the health, safety, and welfare of their residents to the same extent as all other states, and to participate in the national government on equal terms.<sup>31</sup>

The three historically recognized conditions for territories to be admitted to the Union are commitment to democracy, the will of the people, and resources and population sufficient to support statehood.<sup>32</sup> There is no question that the residents of the District are fully committed to democratic governance. They have embraced every Home Rule<sup>33</sup> opportunity (impoverished as it may be), to exercise the right to vote and choose representatives based on democratic principles.<sup>34</sup> And the District’s desire to assume statehood is reflected in the overwhelming support of a referendum seeking entry into the Union.<sup>35</sup> District residents ratified state constitutions in 1982 and 1987 referring to the proposed state of New Columbia.<sup>36</sup> Since 1990, they have also voted for shadow representation in Congress to advance statehood.<sup>37</sup>

Although there is hope for more expansive popular action,<sup>38</sup> such as large demonstrations and protests, there remains a constant undercurrent of agitation for statehood.

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<sup>29</sup> See, e.g., Johnny Barnes, *Towards Equal Footing: Responding to the Perceived Constitutional Legal and Practical Impediments to Statehood for the District of Columbia*, 13 UDC/DCSL L. REV. 1, 4–5 (2010) (describing the components of the Equal Footing Doctrine).

<sup>30</sup> *Coyle v. Smith*, 221 U.S. 559, 567 (1911).

<sup>31</sup> *Van Brocklin v. Tennessee*, 117 U.S. 151, 167–68 (1886).

<sup>32</sup> Statement of Sen. Kennedy, *supra* note 5, at 228.

<sup>33</sup> Pub. L. No. 93-198, 87 Stat. 774; see *infra* Part III.C.

<sup>34</sup> District voters approved the creation of an elected Attorney General position by referendum in 2010. Patrick Madden, *D.C. Council Pushes Back Election of Attorney General to 2018*, WAMU 88.5 (Oct. 2, 2013), [http://wamu.org/news/13/10/02/dc\\_council\\_pushes\\_back\\_election\\_of\\_attorney\\_general\\_to\\_2018](http://wamu.org/news/13/10/02/dc_council_pushes_back_election_of_attorney_general_to_2018).

<sup>35</sup> See Lawrence M. Frankel, *National Representation for the District of Columbia: A Legislative Solution*, 139 U. PA. L. REV. 1659, 1678–79 n.76 (1991) (noting that D.C. residents in 1980 “approved an initiative calling for statehood by a margin of 60% to 40%”).

<sup>36</sup> D.C. CONST. of 1982, pmb1.; D.C. CONST. of 1987, pmb1.

<sup>37</sup> Will Sommer, *Shadow of a Doubt*, WASH. CITY PAPER (Sept. 6, 2013), <http://www.washingtoncitypaper.com/articles/44734/shadow-of-a-doubt-dc-statehood-activists/>.

<sup>38</sup> Jamin B. Raskin, *Domination, Democracy, and the District: The Statehood Position*, 39 CATH. U. L. REV. 417, 417–18 (1990) (proposing a popular movement to accelerate the statehood initiative process “with mass organizing and public protest to dramatize and transform the District’s oppressed condition”).

The current Mayor and Council routinely call for statehood: the Mayor, council members, and a group of citizens were recently arrested protesting Congressional interference in local lawmaking,<sup>39</sup> and there is a steady drumbeat of advocacy by activists and groups in favor of statehood.<sup>40</sup>

But what of the third requirement; does the District have the population and resources to support statehood? As already indicated, the population of the District exceeds the populations of Wyoming and Vermont, and it is growing.<sup>41</sup> Estimates are that the District's population is increasing by approximately 1,000 to 1,200 residents per month, and projections are that it will continue on this trajectory for decades.<sup>42</sup> And contrary to some of the myths propagated about the District, its population is not entirely or even largely made up of transient military personnel or federal workers.<sup>43</sup> Like any other thriving state, the District's population is made up of families, children, singles, young professionals, white- and blue-collar workers, senior citizens, and students.<sup>44</sup> The District is home to distinct and thriving neighborhoods, universities, professional sports teams, small businesses, banks, a growing technology sector, and business headquarters.<sup>45</sup> The robust population of the District

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<sup>39</sup> See *DC Mayor Uses March Rally to Call for DC Statehood*, AP (Aug. 28, 2013), <http://bigstory.ap.org/article/dc-mayor-uses-march-rally-call-dc-statehood>; Ben Pershing, *Mayor, Council Members Are Arrested: DC Rally Protests Budget Bill Riders that Restrict City Spending*, WASH. POST, Apr. 12, 2011, at A1, A11, available at [http://www.washingtonpost.com/local/politics/gray-council-members-arrested-at-protest-of-dc-riders-in-spending-bill/2011/04/11/AFRWPBND\\_story.html](http://www.washingtonpost.com/local/politics/gray-council-members-arrested-at-protest-of-dc-riders-in-spending-bill/2011/04/11/AFRWPBND_story.html).

<sup>40</sup> See generally [www.dcvote.org](http://www.dcvote.org) (a 501(c)(3), web-based organization dedicated to securing voting rights for District residents).

<sup>41</sup> See *supra* note 28 and accompanying text.

<sup>42</sup> See UNITED STATES CENSUS BUREAU, STATE AND COUNTY QUICKFACTS, DISTRICT OF COLUMBIA, available at <http://quickfacts.census.gov/qfd/states/11000.html> (showing a population growth from 601,767 in 2010 to 646,449 in 2013, a growth of approximately 1,240 residents per month); see also DEP'T OF CMTY. PLANNING & SERVS., METRO WASHINGTON COUNCIL OF GOV'TS, PUB. NO. 20138465, ROUND 8.2 COOPERATIVE FORECASTING: POPULATION AND HOUSEHOLD FORECASTS TO 2040 BY TRAFFIC ANALYSIS ZONE v (2013), available at [http://www.mwcog.org/publications/departmental.asp?CLASSIFICATION\\_ID=6&SUBCLASSIFICATION\\_ID=27](http://www.mwcog.org/publications/departmental.asp?CLASSIFICATION_ID=6&SUBCLASSIFICATION_ID=27) (showing an estimated District of Columbia population growth, from 601,720 in 2010 to 771,162 in 2040).

<sup>43</sup> *10 Myths about the District of Columbia*, DC VOTE, <https://www.dcvote.org/inside-dc/10-myths-about-district-columbia> (last visited Oct. 23, 2014) (finding over fifty percent of residents have lived in the District for twenty years or more).

<sup>44</sup> See DISTRICT OF COLUMBIA OFFICE OF PLANNING, DC FACTS 2013, available at <http://planning.dc.gov/DC/Planning/DC+Data+and+Maps/DC+Data/DC+Quick+Facts/DC+Facts+2013> (last visited Oct. 23, 2014).

<sup>45</sup> See, e.g., DC NEIGHBORHOODS, <http://washington.org/topics/neighborhoods> (last visited Oct. 23, 2014) (hosting an interactive website describing the sights and features of the District's various neighborhoods); *2012 Top DC Companies*, WASH. POST, <http://apps.washingtonpost.com/local/top-dc-companies/2012/> (last visited Oct. 23, 2014) (click twice on the "city" columns to see the District's top companies grouped by sector).

includes residents who have served and continue to serve in the Armed Forces,<sup>46</sup> and District residents pay federal income taxes well beyond the average per capita payment of most other states.<sup>47</sup>

Economically, the District is strong. The District's total government budget is over \$12 billion, of which approximately \$7 billion is entirely local funds.<sup>48</sup> Its current general obligation bond credit rating is an A2 from Moody's Investors Service and an A- from both Standard and Poor's and Fitch Ratings.<sup>49</sup> The District's balance sheet, and its ability to meet the needs of its citizens would be even more robust if Congress did not prohibit the District from taxing the income of people who work in the District but do not live there.<sup>50</sup> Every state in the Union can impose a non-resident income tax in such cases. Given that over half of the income earned in the District is earned by non-District residents,<sup>51</sup> this prohibition creates a two billion dollar imbalance,<sup>52</sup> a problem that could be immediately rectified if the District were a state.<sup>53</sup>

Contrary to another myth about the District, the District is not too financially dependent on the federal government and would be able to stand on its own as a

<sup>46</sup> OFFICE OF THE DEPUTY UNDER SECRETARY OF DEFENSE, 2011 DEMOGRAPHICS: PROFILE OF THE MILITARY COMMUNITY 32, 82 (2012), available at [http://www.militaryonesource.mil/12038/MOS/Reports/2011\\_Demographics\\_Report.pdf](http://www.militaryonesource.mil/12038/MOS/Reports/2011_Demographics_Report.pdf).

<sup>47</sup> See Ben Pershing, *Decades-long Effort to Exempt D.C. Residents from U.S. Income Tax Still Simmers*, WASH. POST, Apr. 14, 2013, at C7, available at [http://www.washingtonpost.com/local/dc-politics/decades-long-effort-to-exempt-dc-residents-from-us-income-tax-still-simmers/2013/04/13/2b364794-a3b8-11e2-be47-b44febada3a8\\_story.html](http://www.washingtonpost.com/local/dc-politics/decades-long-effort-to-exempt-dc-residents-from-us-income-tax-still-simmers/2013/04/13/2b364794-a3b8-11e2-be47-b44febada3a8_story.html).

<sup>48</sup> See OFFICE OF THE CHIEF FIN. OFFICER, GOVERNMENT OF THE DISTRICT OF COLUMBIA FY 2014 APPROVED BUDGET GROSS FUNDS 6 (2014), available at [http://cfo.dc.gov/sites/default/files/dc/sites/ocfo/publication/attachments/FY14\\_Approved\\_Budget.pdf](http://cfo.dc.gov/sites/default/files/dc/sites/ocfo/publication/attachments/FY14_Approved_Budget.pdf).

<sup>49</sup> *Debt Management*, OFFICE OF THE CHIEF FIN. OFFICER, [http://app.cfo.dc.gov/info/debt\\_management/index.shtm](http://app.cfo.dc.gov/info/debt_management/index.shtm) (last visited Oct. 23, 2014); Mike Debonis, *D.C. Wins Bond Rating Upgrade from S&P*, WASH. POST (Mar. 21, 2013), <http://www.washingtonpost.com/blogs/mike-debonis/wp/2013/03/21/d-c-wins-bond-rating-upgrade-from-sp/> (quoting S&P as having said that it upgraded the District's ratings in recognition of its "improved financial position that has been strengthened by recent strong revenue performance as well as the rebuilding of reserves in accordance with . . . recently adopted new reserve policies"). It is true that the District suffered financial reverses in the 1990s, but similar difficulties have faced other jurisdictions before and after.

<sup>50</sup> See, e.g., Jenny Reed, *What Would a "Commuter Tax" Mean for DC?*, D.C. FISCAL POL'Y INST. (July 26, 2012), <http://www.dcfpi.org/what-would-a-commuter-tax-mean-for-dc> (last visited Oct. 23, 2014). This is commonly, though mistakenly, referred to as a "commuter tax"—a term which will be used, however reluctantly, in the balance of this Essay.

<sup>51</sup> D.C. OFFICE OF REVENUE ANALYSIS, COMMUTER BITE OUT OF INCOME EARNED IN DC IS THE SMALLEST IN 40 YEARS (2013), available at <http://cfo.dc.gov/sites/default/files/dc/sites/ocfo/publication/attachments/2013-1%20-%20Commuters.pdf>.

<sup>52</sup> Reed, *supra* note 50.

<sup>53</sup> See *id.* (noting that the District's ability to raise revenue is impaired by its ability to impose a "commuter tax").



state. Yes, the District does have an economic advantage in that the seat of the federal government is here, and that provides a certain measure of resiliency in economic downturns; but, this is an advantage also enjoyed by nearby Virginia and Maryland. The federal government is not even the principal employer in the District.<sup>54</sup> As a whole, more District residents are employed in the fields of education, health care, hospitality and tourism, and professional services, even though the federal government remains the single largest employer in the District.<sup>55</sup> Although geographically small, the District's economy has the depth and diversity to justify statehood.

Beyond material conditions, it is important to add the moral imperative for statehood. Residents of the District often observe that the United States government is a champion of democracy and self-determination for countries around the world. Yet, in the shadow of the Capitol, hundreds of thousands of citizens are denied self-government and voting rights equivalent to all others in the country. This condition has been decried in many articles, speeches, and presentations, and its historical roots aside, it can only be seen as a profound injustice.<sup>56</sup>

## II. ALTERNATIVE MODES OF REPRESENTATION AND AUTONOMY

### *A. The District Has a Delegate to the House of Representatives*

Beginning in the 1970s, Congress accorded the District a certain degree of autonomy over its local affairs and a form of representation in the House of Representatives.<sup>57</sup> These actions create an illusion of equal citizenship for District residents; but, because they are neither complete nor permanent forms of relief, they actually serve to perpetuate the District's second class status.<sup>58</sup> These actions have given rise to a variety of

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<sup>54</sup> See DC FACTS 2013, *supra* note 44 (finding only 28.6% of employed D.C. residents were government employees).

<sup>55</sup> D.C. DEPT. OF EMP'T. SERVS., DISTRICT OF COLUMBIA: WAGE AND SALARY EMPLOYMENT BY INDUSTRY AND PLACE OF WORK (2013), *available at* <http://does.dc.gov/sites/default/files/dc/sites/does/publication/attachments/CESdc1Dec13.pdf> (estimating that approximately 373,000 D.C. residents work in non-financial-sector private-employer jobs while approximately 200,000 work for the federal government).

<sup>56</sup> See, e.g., Sen. Orrin G. Hatch, "No Right More Precious in a Free Country: Allowing Americans in the District of Columbia to Participate in National Self-Government," 45 HARV. J. ON LEGIS. 287 (2008) (concluding that the District's disenfranchisement is "an injustice that has lasted far too long"); Raskin, *supra* note 38, at 417 (describing the District as America's "last colony" full of "second-class citizens"); Aaron E. Price, Sr., Comment, *A Representative Democracy: An Unfulfilled Ideal for Citizens of the District of Columbia*, 7 UDC/DCSL L. REV. 77, 78 (2003).

<sup>57</sup> See generally Price, *supra* note 56, at 84–88 (outlining the historical progression of Home Rule and D.C.'s non-voting delegate to the House of Representatives, and arguing that both are insufficient for guarding the District's interests before Congress).

<sup>58</sup> See Raskin, *supra* note 38, at 425–26 (discussing the insufficiency of suffrage solutions

arguments that, in one form or another, posit that District residents are well represented under current arrangements and that statehood is unnecessary. A close look belies that notion.

In 1970, Congress provided the District with a delegate in the House of Representatives, elected every two years by the people of the District.<sup>59</sup> She may participate in debates, but has no vote.<sup>60</sup> At one time, from 1996 to 2007, the House permitted the Delegate to vote in the Committee of the Whole with the proviso that, if the vote were ever decisive, it would not count.<sup>61</sup> The position is held in such low esteem by other House members that, on several occasions, the District's current delegate, Eleanor Holmes Norton, has been denied the opportunity to testify before a House subcommittee on legislation directly affecting the District.<sup>62</sup>

Political theorists argue that representation comes in many forms and that the representative need not be elected or have a vote in a body.<sup>63</sup> This may be the case, for example, where a non-elected person "represents" a national government in a global institution or forum. The delegate's role is to inform the body of the principal's views and to register that information by vote or otherwise.<sup>64</sup> Such representation is authorized, accountable, and deemed adequate to represent another's interests.<sup>65</sup> This theory is fundamentally flawed as a response to the District's current position of subordination. It is true that the people of the District send a delegate to Congress, but that "representation," although certainly not meaningless,<sup>66</sup> is incapable of parrying the

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short of statehood, and noting that District residents "would not endure [such] indignities and injustices [ ] if not for their own 'political impotence'").

<sup>59</sup> 2 U.S.C. § 25a (2012).

<sup>60</sup> *Id.*

<sup>61</sup> *Michel v. Anderson*, 817 F. Supp. 126, 142 (D.D.C. 1993), *aff'd*, 14 F.3d 623 (D.C. Cir. 1994); Arjun Garg, *A Capital Idea: Legislation to Give the District of Columbia a Vote in the House of Representatives*, 41 COLUM. J.L. & SOC. PROBS. 1, 2 n.4 (2007); Ben Pershing, *Norton Fails in Effort to Prevent Loss of Committee of the Whole Vote*, WASH. POST (Jan. 5, 2011), [http://voices.washingtonpost.com/dc/2011/01/norton\\_effort\\_to\\_prevent\\_loss.html](http://voices.washingtonpost.com/dc/2011/01/norton_effort_to_prevent_loss.html).

<sup>62</sup> Perry Stein, *House GOP Again Tries to Restrict Abortion in D.C.*, WASH. CITY PAPER (Jan. 9, 2014), <http://www.washingtoncitypaper.com/blogs/citydesk/2014/01/09/house-gop-again-tries-to-restrict-abortion-in-d-c/>; Quinn Wonderling, *They Did It Again: GOP Refuses to Hear Congresswoman's Testimony on DC Abortion Bill*, MSNBC (Sept. 6, 2013), <http://www.msnbc.com/msnbc/they-did-it-again-gop-refuses-hear-c?lite=>.

<sup>63</sup> See generally, e.g., J. Roland Pennock, *Political Representation: An Overview*, in REPRESENTATION: YEARBOOK OF THE AMERICAN SOCIETY FOR POLITICAL AND LEGAL PHILOSOPHY 8 (J. Roland Pennock & John W. Chapman eds., 1968).

<sup>64</sup> See e.g., DAVID McCULLOUGH, JOHN ADAMS 260–63 (2001) (describing Congress's appointment of five men, including John Jay, to negotiate peace with Great Britain in 1781 in Paris after the Revolutionary War).

<sup>65</sup> See e.g., *id.* at 456–57 (describing how the peace treaty brokered with Great Britain by John Jay went to the Senate in 1795 with George Washington's approval despite its having terms that "would ignite a storm of protest").

<sup>66</sup> For instance, Delegate Eleanor Holmes Norton has worked with Representative Darrell Issa, Chairman of the House Oversight and Government Reform Committee, to bring budget

many ways that Congress can interfere in District affairs—interference that would be impermissible if the District were a state.<sup>67</sup> And even on its own terms, this theory of representation cannot respond to the circumstances of the District: the District's delegate may be authorized in that she is elected, but authorized to do what? She simply does not stand on equal footing with the other representatives and they can, and do, ignore her at will.

Even if the delegate were given the right to vote, the situation would not be much improved. The delegate is only a representative in the House, with one vote. The District would still lack two Senators, and thus lack the influence and power of two votes in that much smaller body. Moreover, what Congress gives, Congress can take away.

*B. The District Is Represented—By All Members of Congress*

The argument here proceeds from the flip side of the principle of political accountability endorsed in *McCulloch v. Maryland*.<sup>68</sup> That is, although the part cannot control the whole, the whole can control the part. In *McCulloch*, the Supreme Court ruled that the state (the part) could not tax instrumentalities of the federal government (the whole).<sup>69</sup> But, conversely, the federal government (the whole) could tax the state (the part).<sup>70</sup> In the same vein, the argument runs, Congress—all of its representatives—can speak for the District, with the many looking out for the few. Although theoretically this could be so, there is no accountability to the few. Congressional representatives need not account for the District's needs or act in its best interests.<sup>71</sup> In fact, the District has sometimes been used by Congress as a kind of petri dish to grow programs not embraced by the District residents.<sup>72</sup> In this

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autonomy to the District. Press Release, Eleanor Holmes Norton, Norton to Continue to Defend Budget Autonomy Referendum, Following GAO Opinion (Jan. 30, 2014), available at <http://norton.house.gov/media-center/press-releases/norton-to-continue-to-defend-budget-autonomy-referendum-following-gao>. Significantly, her advocacy resulted in a shutdown-avoidance provision for the District being included in the fiscal year 2014 omnibus appropriations bill. *Id.*

<sup>67</sup> See generally, e.g., *Printz v. United States*, 521 U.S. 898 (1996); *New York v. United States*, 505 U.S. 144, 174–76, 180 (1992) (holding respectively that Congress can neither enforce federal law against the state's own citizens nor commandeer a state's executive officers).

<sup>68</sup> 17 U.S. 316 (1819).

<sup>69</sup> *Id.* at 360–62, 398.

<sup>70</sup> *Id.*

<sup>71</sup> See, e.g., Raskin, *supra* note 38, at 421 (“Without any meaningful voice in the legislative process . . . the people of the District have no check against legislative tyranny.”).

<sup>72</sup> In the 1990s under then–House Speaker Newt Gingrich, a Republican task force on the District pushed for tax cuts and school voucher programs that were unpopular with District residents. Sommer, *supra* note 37. Such unwanted interference continues to this day with Senator Rand Paul attaching a loosening of the District's gun control laws as an amendment to a budget

regard, former House Speaker Newt Gingrich identified the District as a “laboratory” for the Republican Party’s pet policies such as school vouchers and certain tax policies.<sup>73</sup> More recently, Senator Rand Paul observed that congressional control over the District gave representatives the opportunity to draw attention “to some issues that have national implications.”<sup>74</sup>

The idea that the entire Congress could actually represent District residents perhaps made sense at the beginning of the Republic. In 1800, when District residents were disenfranchised as part of the law transferring full authority from the states ceding land to the federal government to create the District, the assumption was that Congress would care for the residents and that the residents would be able to directly lobby Congress.<sup>75</sup> In 1801, Representative Dennis, remarking on the House floor about District residents, suggested that “[f]rom their contiguity to, and residence among the members of the General Government, they knew, that though they might not be represented in the national body, their voice would be heard.”<sup>76</sup> And this made sense given that the House of Representatives then had scarcely over 100 members<sup>77</sup> and the District a population of fewer than 15,000 residents.<sup>78</sup> Members of Congress apparently envisioned a small, cozy community with residents readily mingling with the national representatives. If that were ever true, it is most surely not true now.

### *C. Representation via Allies in Congress and Political Elites*

One might look at the District and pronounce it “lucky.” The federal government bailed out the District in the 1990s when its bonds were rated below junk and bankruptcy loomed.<sup>79</sup> The federal government took over the District’s pension liabilities at

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autonomy bill. Ben Pershing, *D.C. Budget Autonomy Bill Pulled after Rand Paul Offers Amendments on Guns, Abortion, Unions*, WASH. POST (June 26, 2012), [http://www.washingtonpost.com/blogs/dc-wire/post/rand-paul-seeks-to-change-district-laws-on-guns-abortion-unions/2012/06/26/gJQAOTTf4V\\_blog.html](http://www.washingtonpost.com/blogs/dc-wire/post/rand-paul-seeks-to-change-district-laws-on-guns-abortion-unions/2012/06/26/gJQAOTTf4V_blog.html) [hereinafter Pershing, *Budget Autonomy Bill Pulled*] (noting that Senator Paul is one of many “Republicans eager to change the District’s laws”).

<sup>73</sup> Sommer, *supra* note 37.

<sup>74</sup> Pershing, *Budget Autonomy Bill Pulled*, *supra* note 72.

<sup>75</sup> 10 ANNALS OF CONG. 998 (1801).

<sup>76</sup> *Id.*

<sup>77</sup> The 6th Congress had 106 Representatives. *Congress Profiles: 6th Congress (1799–1801)*, U.S. HOUSE OF REPRESENTATIVES, <http://history.house.gov/Congressional-Overview/Profiles/6th/> (last visited Oct. 23, 2014).

<sup>78</sup> RACE AND HISPANIC ORIGIN, *supra* note 24.

<sup>79</sup> See Lisa Hoffman, *Odd Couple: Barry, Gingrich Find Common Ground*, DALLAS MORN. NEWS, Oct. 15, 1995, at 16A; David A. Vise & Yolanda Woodlee, *\$146.7 Million Loan to D.C. Approved by U.S. Treasury*, WASH. POST, June 23, 1995, at C3.

that time as well.<sup>80</sup> And the federal government continues, to this day, to pay for the court system and its related costs.<sup>81</sup> District residents also enjoy the multiplicity of federal jobs available in the District, although the trend of the federal government employing a significant amount of District residents is on the decline.<sup>82</sup>

In these and other ways, the argument runs, control by Congress has been benign, even beneficial overall.<sup>83</sup> Congress's actions toward the District do not reflect deep-seated prejudices or a desire to harm a politically powerless group.<sup>84</sup> It is this notion that led the D.C. Circuit to evaluate equal protection discrimination claims against Congress vis-à-vis the District by mere rational basis review.<sup>85</sup> In a case involving the automatic commitment to mental institutions of federal criminal defendants charged in the District, *United States v. Cohen*, the D.C. Circuit noted that higher, more rigorous standards of review are reserved for a class that is "more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective."<sup>86</sup> The court, led by now-Justice Scalia, did not find any reason to believe there could be Congressional prejudice against the District's populace.<sup>87</sup> Moreover, then-Judge Scalia could not believe the District to be politically powerless because the District's population included members of the political elite, such as officers of all three branches of the federal government.<sup>88</sup> These political elites would presumably look out for the interests of the District.<sup>89</sup>

This line of thinking mirrors the Supreme Court's approach to discrimination against the mentally disabled. In *Cleburne v. Cleburne Living Center*,<sup>90</sup> the Supreme

<sup>80</sup> Mike Debonis, *D.C.'s Pensions Are Looking Pretty*, WASH. POST (Mar. 11, 2013), <http://www.washingtonpost.com/blogs/mike-debonis/wp/2013/03/11/d-c-s-pensions-are-looking-pretty/>.

<sup>81</sup> Zoe Tillman, *D.C. Courts to Furlough One-Third of Employees During Shutdown*, LEGAL TIMES (Oct. 1, 2013), <http://legaltimes.typepad.com/blt/2013/10/dc-courts-to-furlough-one-third-of-employees-during-shutdown.html>.

<sup>82</sup> Jennifer Liberto, *Washington D.C. Jobs: Ground Zero for Budget Cuts*, CNN MONEY (Feb. 7, 2013), <http://money.cnn.com/2013/02/07/news/economy/washington-dc-jobs-budget/>.

<sup>83</sup> See, e.g., Debonis, *supra* note 80 ("[I]t helps, to a great degree, that the city has the benefit of Congressional oversight. . . ."); John Connor, *House Panel Votes for Unit to Oversee District's Finances*, WALL ST. J., Mar. 31, 1995, at B7 ("Rep. Joe Scarborough (R., Fla.), said Congress is demanding that the city do something the federal government hasn't done in more than 25 years: balance its budget.").

<sup>84</sup> See Hoffman, *supra* note 79 ("Gingrich sees his job is to fix the city, not run roughshod over it.").

<sup>85</sup> *United States v. Cohen*, 733 F.2d 128, 132–36 (D.C. Cir. 1984) (en banc).

<sup>86</sup> *Id.* at 134 (quoting *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982)).

<sup>87</sup> See *id.* at 136 (applying rational basis review to laws affecting District residents).

<sup>88</sup> *Id.* at 135.

<sup>89</sup> *Id.* ("It is, in any event, fanciful to consider as 'politically powerless' a city whose residents include a high proportion of the offices of all three branches of the federal government, and their staffs.").

<sup>90</sup> 473 U.S. 432 (1985).

Court applied rational basis review to laws giving disparate treatment to mentally disabled persons on the theory that most such laws were either helpful or benign and that such persons were not truly powerless.<sup>91</sup> They had proxies such as parents and interest groups who could defend their interests in the political marketplace.<sup>92</sup>

Not only are such arguments inherently demeaning in that they suggest that District residents are not fully capable of representing their own interests, but they mistake the consequences of federal control. It is not always generous or benign. It can, and has been, quite harmful and intrusive. As described above, politicians use the District to test their pet policies and push for their agendas, ignoring the desires of District residents.<sup>93</sup>

Moreover, the idea that District residents are adequately represented by political elites, as then-Judge Scalia contended,<sup>94</sup> is quite naïve. Yes, it is true that some members of the three branches of the federal government live in the District, but they make up only a tiny percentage of the 646,000 residents and their behavior mostly evinces indifference to District issues.<sup>95</sup> This is a jurisdiction in which most residents are ordinary citizens with no professional connection to the federal government.<sup>96</sup>

It is true that the District has been granted “Home Rule” by Congress.<sup>97</sup> Under the Home Rule Act, District residents elect a mayor and a thirteen-member Council.<sup>98</sup> The Act provides the District with legislative powers over District affairs consistent with some of the powers held by the states.<sup>99</sup> Using these powers, in recent years the Council has enacted such progressive legislation as marriage equality, decriminalizing marijuana, creating a right to shelter, and providing driver licenses to undocumented immigrants.<sup>100</sup> Nevertheless, the Home Rule Act reserves a number of important

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<sup>91</sup> *Id.* at 445–46. The rational basis review in *Cleburne* was actually stronger than the rational basis in *Cohen* because it was really what has come to be termed as “rational basis with bite.” See, e.g., Gayle Lynn Pettinga, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L. J. 779, 780–87 (1987) (tracing the evolution of “rational basis with bite” as a fourth standard of review).

<sup>92</sup> *Cleburne*, 473 U.S. at 445 (“[T]he legislative response, which could hardly have occurred and survived without public support, negates any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of the lawmakers.”).

<sup>93</sup> See *supra* Part II.B.

<sup>94</sup> *Cohen*, 733 F.2d at 135.

<sup>95</sup> An observation based on my thirty-plus years in the District and eight years on the Council of the District of Columbia.

<sup>96</sup> See Raskin, *supra* note 38, at 420 n.18.

<sup>97</sup> See generally Home Rule Act, Pub. L. No. 93-198, 87 Stat. 774 (1973).

<sup>98</sup> *Id.* §§ 401–13, 421–23.

<sup>99</sup> *Id.* § 302.

<sup>100</sup> Indeed, the Council’s structure as a unicameral legislative body of only thirteen members may help the District pass such progressive legislation more efficiently than state legislative bodies, which are almost all bicameral. See Mike Debonis, *Is D.C. Overgoverned? Or Undergoverned?*, WASH. POST (Feb. 3, 2011, 9:00 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/03/AR2011020307010.html>.

powers for Congress and the federal government. For instance, judges of District courts are appointed by the President of the United States with the advice and consent of the Senate.<sup>101</sup> Congress also reserves for itself considerable oversight of the District; the Home Rule Act in no way blunts the application of the District Clause in the Constitution.<sup>102</sup> Additionally, Congress delineated several areas over which the Council cannot legislate, including a prohibition on imposing any income tax on non-District residents who work in the District.<sup>103</sup> As welcome as the Home Rule Act may be, the essential defect remains. Anything the District is empowered to do is at the sufferance of Congress. And what District residents have gained under the Home Rule Act, they may lose just as readily, given that the Home Rule Act itself states:

[T]he Congress of the United States reserves the right, at any time, to exercise its constitutional authority as legislature for the District, by enacting legislation for the District on any subject, whether within or without the scope of legislative power granted to the Council by this Act, including legislation to amend or repeal any law in force in the District prior to or after enactment of this Act and any act passed by the Council.<sup>104</sup>

One palliative to this subordinate state of affairs might be found in the view that the District's position with Congress is no better or worse than any local government's relationship to its state government. Under conventional local government theory, towns, cities, and counties are "creatures of the state" and, as such, they may be empowered or abolished or controlled by the state in a variety of ways.<sup>105</sup> One might see an analogy with the District vis-à-vis Congress. Municipalities get to "act like" local governments but only insofar as they are given permission by the superior entity, the state.<sup>106</sup> The District gets to act like a local government under "Home Rule," but only insofar as given permission by Congress.<sup>107</sup> District residents, the notion runs, should consider themselves as a municipality to Congress. However, the essential error in this analogy is that the District is not similarly situated to a local government and its state because the District has no equal vote—indeed no vote at all—in the legislative chamber that controls it.

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<sup>101</sup> Home Rule Act at § 433(a).

<sup>102</sup> See U.S. CONST. art. 1, § 8, cl. 17; Home Rule Act at § 601 (reserving the right for Congress to continue exercising its constitutional authority to legislate for the District).

<sup>103</sup> See Home Rule Act at § 602(a)(5).

<sup>104</sup> *Id.* § 601.

<sup>105</sup> See *Clinton v. Cedar Rapids*, 24 Iowa 455, 475 (1868) ("Municipal corporations . . . are, so to phrase it, the mere tenants at will of the legislature.").

<sup>106</sup> See *id.*

<sup>107</sup> See *supra* notes 101–03 and accompanying text.

## III. GETTING TO STATEHOOD

Because the District's subordination can only be fully cured by joining the ranks of states, the question is how can that be done? Commentators and supporters of statehood have offered several avenues to achieve statehood or, at least, to achieve a close resemblance to statehood. Only two offer the chance for authentic statehood, and all face significant obstacles.

*A. Pseudo or Nominal Statehood*

From early in the Republic's history, there has been debate over whether the District was nominally a state.<sup>108</sup> Proponents of nominal statehood argue that because certain words in the Constitution do not have a rigid, inflexible meaning, use of the word "state" in the Constitution can encompass the District.<sup>109</sup> Although in *Hepburn v. Ellzey*, the Supreme Court initially rejected this idea, holding that "state" has only one meaning,<sup>110</sup> the Court later said, in *Loughborough v. Blake*, that the District could be treated as if it were a state, at least for the purposes of laying taxes pursuant to Article 1, Section 2.<sup>111</sup> The Court later extended this thinking to other clauses,<sup>112</sup> adopting the view that, "[w]hether the District of Columbia constitutes a 'State or Territory' within the meaning of any particular statutory or constitutional provision depends upon the character and aim of the specific provision involved."<sup>113</sup>

Seizing on this approach, Professor Peter Raven-Hansen, among others, argues that the Court should use the theory of nominal statehood to permit the District to be a state for the purposes of securing representation in the House of Representatives pursuant to Article 1, Section 2.<sup>114</sup> But the argument met strong headwinds in the case of *Adams v. Clinton*, in which the D.C. Circuit rejected the idea outright,<sup>115</sup> and the Supreme Court affirmed without an opinion.<sup>116</sup> Moreover, treating the District as a

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<sup>108</sup> This debate reached the level of the Supreme Court with *Hepburn v. Ellzey*, 6 U.S. (1 Cranch) 445 (1805).

<sup>109</sup> Raven-Hansen, *Congressional Representation*, *supra* note 1, at 179.

<sup>110</sup> 6 U.S. (1 Cranch) at 452–53 (1805).

<sup>111</sup> *See* 18 U.S. (1 Wheat.) 317, 318–20, 322–25 (1820).

<sup>112</sup> *See, e.g.*, *Stoutenburgh v. Hennick*, 129 U.S. 141, 147 (1888); *Callan v. Wilson*, 127 U.S. 540, 548–49 (1887).

<sup>113</sup> *District of Columbia v. Carter*, 409 U.S. 418, 420 (1973).

<sup>114</sup> Raven-Hansen, *Congressional Representation*, *supra* note 1, at 184–85. However, an interpretation finding the District a state for purposes of Article 1, Section 2 representation could easily apply to Article 1, Section 3, which provides for two senators from each "state." This would be an even more difficult interpretive case to make.

<sup>115</sup> 90 F. Supp. 2d 35, at 35–36, 55–56, 61–62 (D.D.C. 2000), *aff'd*, 531 U.S. 941 (2000) (also rejecting the plaintiffs' claims for representation under the theories of equal protection, privileges and immunities, due process, and the republican guarantee clause).

<sup>116</sup> 531 U.S. 941 (2000).



state for some clauses of the Constitution is a rule of construction. It would have no effect on Congress's express powers under the District Clause<sup>117</sup> to control District affairs in every particular.<sup>118</sup> Courts have interpreted the District Clause broadly, finding Congress can act as a "legislature of national character" over the District and is not constrained by the limits on state legislatures.<sup>119</sup>

Nevertheless the theory of nominal or pseudo statehood may have utility in pursuing actual statehood. That is, the more occasions there are to think of the District as a state, the more likely the idea of true statehood may take hold.<sup>120</sup>

### *B. Diluted Statehood: Retrocession to Maryland*

An additional way to secure the rights and benefits of statehood for District residents would be to retrocede District land to Maryland. Just as Congress retroceded Arlington and Alexandria back to Virginia in 1846, some commentators advocate for retrocession of the District, save for the National Capital Service Area, to Maryland.<sup>121</sup> This would grant District residents the rights and privileges of living in a state without actually forming a new state.<sup>122</sup> With this plan, Congress would retain dominion over land left as the national capital.<sup>123</sup>

The precedent of retroceding now-Arlington and Alexandria counties to Virginia illustrates how this would be accomplished. The retrocession involved the approval of three parties: the people of Alexandria County, the Commonwealth of Virginia, and the United States Congress.<sup>124</sup> In the 1830s, residents of the land ceded to the

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<sup>117</sup> U.S. CONST. art. 1, § 8, cl. 17.

<sup>118</sup> Under the District Clause, Congress can exploit the District's lack of autonomy for political gain and act contrary to the desires of District residents. For instance, in the 1990s, Congress passed the Barr Amendment, which prohibited the District from spending any funds on marijuana legalization ballot initiatives, preventing District residents from voicing their opinions on the subject at the ballot box. *Turner v. D.C. Bd. of Elections & Ethics*, 77 F. Supp. 2d 25, 27, 30 (D.D.C. 1999) (noting in dicta that Congress's attempt to interfere with District residents' ability to express their legislative preferences through their votes infringed on "the crux of the democratic system"); Bill Miller & Spencer S. Hsu, *Results Are Out: Marijuana Initiative Passes*, WASH. POST, Sept. 21, 1999, at A1.

<sup>119</sup> *Neild v. District of Columbia*, 110 F.2d 246, 250–51 (D.C. Cir. 1940) (noting that while the dormant Commerce Clause constrains the states, it does not limit Congress's ability to legislate for the District); see *Palmore v. United States*, 411 U.S. 389, 397–98 (1973). When Congress treats the District in a discriminatory way, applying standards different from those applied for states, such treatment stands provided it meets a watered-down version of rational basis scrutiny. *United States v. Cohen*, 733 F.2d 128, 132–36 (D.C. Cir. 1984); see *infra* Part III.C.

<sup>120</sup> See *infra* Part V.

<sup>121</sup> Garg, *supra* note 61, at 14.

<sup>122</sup> *Id.*

<sup>123</sup> See *id.*

<sup>124</sup> Barnes, *supra* note 29, at 59.

District from Virginia, then known as Alexandria County, grew increasingly dissatisfied with their situation.<sup>125</sup> They did not perceive themselves as receiving any of the economic benefits the rest of the District residents were receiving, even as they suffered the loss of the privileges of being a citizen of a state.<sup>126</sup> In 1840, Alexandria County voted in favor of retrocession to Virginia,<sup>127</sup> and in 1846, Congress approved retrocession, noting that Virginia had also signaled its willingness to take back the land.<sup>128</sup> In the opening line of Congress's legislation, Congress noted that "no more territory ought to be held under the exclusive legislation given to Congress over the District which is the seat of the General Government than may be necessary and proper for the purposes of such a seat."<sup>129</sup> The Supreme Court approved the retrocession in *Phillips v. Payne* when a resident of that county challenged the assessment of Virginia property taxes against him.<sup>130</sup>

Following the precedent established by the Virginia retrocession, retroceding to Maryland would entail approval of the retrocession by District voters and Maryland voters and an act of Congress.<sup>131</sup> Congress would shrink the national seat of government to a federal enclave comprising the Capitol, the White House, Supreme Court, national monuments, and adjacent federal buildings. The Constitution places a maximum size for the seat of government ("not exceeding ten Miles square"), but it does not place a minimum size on the District.<sup>132</sup> Some critics advance the "fixed form" argument to oppose this reading, arguing that a strict construction of the District Clause means "once the cession was made and this 'district' became the seat of government, the authority of Congress over its size and location seems to have been exhausted."<sup>133</sup> However, the Virginia precedent and the Court's approval of that retrocession in *Phillips* fatally weakens this as a viable argument.

Moreover, the Framers' primary concerns that led to the creation of the District no longer stand. The reason for having a national seat of government under the purview of Congress alone purportedly comes from the Continental Congress's early experience

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<sup>125</sup> *Id.* at 16 (citing Mark David Richards, *The Debates over Retrocession, 1801–2004*, WASH. HIST., Spring/Summer 2004 at 52).

<sup>126</sup> *Id.* (citing Richards, *supra* note 125). At the time the District was created from Virginia and Maryland, the Framers believed the selected site would benefit from \$500,000 being spent there annually.

<sup>127</sup> Barnes, *supra* note 29, at 16 (citing Richards, *supra* note 125, at 67).

<sup>128</sup> An Act to Retrocede the County of Alexandria, in the District of Columbia, to the State of Virginia, ch. 35, 9 Stat. 35 (1846).

<sup>129</sup> *Id.*

<sup>130</sup> 92 U.S. 130 (1875).

<sup>131</sup> See Barnes, *supra* note 29, at 59.

<sup>132</sup> U.S. CONST. art. I, § 8, cl. 17.

<sup>133</sup> U.S. DEP'T. OF JUSTICE, OFFICE OF LEGAL POLICY, REPORT TO THE ATTORNEY GENERAL: THE QUESTION OF STATEHOOD FOR THE DISTRICT OF COLUMBIA 18 (1987); see also Peter Raven-Hansen, *The Constitutionality of D.C. Statehood*, 60 GEO. WASH. L. REV. 160, 167–70 (1991) [hereinafter Raven-Hansen, *Constitutionality of Statehood*].

in Philadelphia.<sup>134</sup> As described above, this experience of a local government being able to hold power over the federal legislature led drafters of the Constitution to desire the nation's seat of government to be a place of exclusive federal jurisdiction.<sup>135</sup> This experience suggests the drafters had the thought of preserving police powers over the District at the forefront of their minds, which explains why they vested broad authority over the District in Congress.<sup>136</sup> But, retroceding this land to Maryland would still leave the federal enclave containing the seat of national government fully under Congress's control.<sup>137</sup>

The Twenty-Third Amendment presents another possible obstacle to retrocession. The Amendment provides for at least three electoral votes for presidential elections for the District.<sup>138</sup> Retroceding this land would make this amendment redundant because Maryland already has its own electoral votes as provided under the Constitution; but the remaining federal enclave, according to critics, would also continue to have its three electoral votes, even though only the First Family would now live in the nation's seat of government.<sup>139</sup> Critics argue that an act of Congress cannot repeal a constitutional amendment.<sup>140</sup> However, Professor Raven-Hansen argues statehood would likely make the Twenty-Third Amendment moot, either by making it no longer applicable to the District or by impliedly repealing it.<sup>141</sup> By effectively divesting the national enclave of any voters, the Twenty-Third Amendment would simply be inapplicable rather than repealed, thus avoiding any constitutional obstacle.<sup>142</sup>

It is unclear whether Maryland would embrace the opportunity to annex the District. Maryland would gain a strong economic center,<sup>143</sup> and retrocession would also minimize the possibility of the District imposing an income tax on Maryland residents working in the District.<sup>144</sup> But, annexation would also bring challenging

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<sup>134</sup> See *supra* Part II.A.

<sup>135</sup> *Id.*

<sup>136</sup> Raven-Hansen, *Congressional Representation*, *supra* note 1, at 170–72, 178 (“[T]he District was created for the relatively narrow purpose of preserving national police authority and jurisdiction at the seat of the government.”). This concern with who had control of security at the seat of government suggests one reason why the drafters did not pay much attention to the representation question of future District residents. *Id.* at 172–73. Another reason why representation received little attention is because the drafters assumed states ceding land to the federal government for the District would make provisions for the representation of District residents in the acts of cession. *Id.* at 172.

<sup>137</sup> Barnes, *supra* note 29, at 24–25, 28.

<sup>138</sup> U.S. CONST. amend. XXIII.

<sup>139</sup> Raven-Hansen, *Constitutionality of Statehood*, *supra* note 133, at 183–84.

<sup>140</sup> *Id.* at 184–86.

<sup>141</sup> *Id.* at 184–89.

<sup>142</sup> *Id.*

<sup>143</sup> See *supra* notes 47–52 and accompanying text.

<sup>144</sup> Philip G. Schrag, *The Future of District of Columbia Home Rule*, 39 CATH. U. L. REV. 311, 321 (1990).

education problems, significant poverty and homelessness rates, and other social ills.<sup>145</sup> And, it is certainly questionable whether annexation is beneficial for or preferred by the District. The District would not enjoy an identity as its own state. Instead, it would be subsumed by Maryland and would have to reorganize itself according to Maryland law. Although the District would finally enjoy congressional representation as part of the Maryland delegation, the District's interests do not always align with Maryland's interests. District residents simply do not identify as Marylanders. Retrocession would require a cultural shift as well as a political shift, and it would dilute the political power and autonomy of the District.<sup>146</sup>

### C. *Authentic Paths to Statehood*

The District can achieve authentic statehood either by an act of Congress or by a constitutional amendment.

#### 1. Creating the State of New Columbia

Besides having the power to grant representation to the District, Congress also has the power to create the state of New Columbia out of District land.<sup>147</sup> Congress could shrink the seat of government to an area containing only the Capitol building, the White House, Supreme Court, national monuments, and adjacent federal buildings.<sup>148</sup> The remaining District land would become the state of New Columbia<sup>149</sup> via Congress's power to admit new states to the Union.<sup>150</sup> The only constitutionally required steps for the process of admitting a new state would be an admission bill passed by Congress and presentment of that bill to the president.<sup>151</sup>

The advantage of this approach is that once a territory, or, in this case the District, becomes a state, its statehood cannot be taken away.<sup>152</sup> Despite the obvious advantages, some commentators question whether creating a new state out of the District "would destroy the original concept of the Seat of Government being independent from any state."<sup>153</sup> But, Congress would still maintain exclusive control of the area designated the capital.<sup>154</sup> Additionally, as described above, there is precedent for shrinking the

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<sup>145</sup> Raven-Hansen, *Constitutionality of Statehood*, *supra* note 133, at 161.

<sup>146</sup> *Id.* at 161–62; Schrag, *supra* note 144, at 321–22 n.58, 322.

<sup>147</sup> Garg, *supra* note 61, at 11.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> U.S. CONST. art. IV, § 3.

<sup>151</sup> *Constitutional and Economic Issues Raised by D.C. Statehood: Hearing on H.R. 325 Before the Subcomm. On Fiscal Affairs and Health of the H. Comm. on the District of Columbia*, 99th Cong. 35 (1986) (statement of Prof. Raven-Hansen).

<sup>152</sup> Barnes, *supra* note 29, at 24.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 24–25, 28.

size of the District.<sup>155</sup> Although the shrunken territory would go to create a new state rather than an existing state, this difference is not problematic. The Framers were concerned about the proximity of any state to the seat of national government; under this logic, it should not matter whether the state is one of the original colonies or a newly created one.

The House introduced a bill to achieve this result in 1993, but it suffered a 277–153 defeat after two days of floor debate.<sup>156</sup> At the time, there were questions of the constitutionality of such legislation because of its possible relationship to the Twenty-Third Amendment.<sup>157</sup> However, just as the Twenty-Third Amendment should not present an obstacle to retrocession, it should not present an obstacle to creating a new state. The creation of New Columbia would make the Twenty-Third Amendment either moot or no longer applicable because there would not be any voters remaining in the federal enclave.<sup>158</sup>

The true obstacle to this approach is political; to pass an enabling act to create the state of New Columbia, the legislation must have bipartisan support. Many Republicans appear unlikely to support legislation creating a new state of a staunchly Democratic area. If the District were able to send two additional Democratic senators to the Senate, it would upset the current political balance, making it more difficult for Republicans to either achieve or maintain a majority. These political calculations make such a bill's passage unlikely. At the moment, the New Columbia Admission Act sits in committees in both the House and the Senate, but prognosticators accord the bills a slim chance of passage.<sup>159</sup> If such a bill could not pass in the 1990s, it is unlikely to pass now when Congress has grown increasingly partisan.

## 2. Passing a Constitutional Amendment for Either Statehood or Representation

Although nothing in the Constitution expressly denies Congress the power to either make the District a state or grant it representation, some believe achieving either of these goals requires a Constitutional amendment.<sup>160</sup> Appealingly, a constitutional amendment would be both legally and politically sound.<sup>161</sup> Unlike a statute granting representation or greater autonomy, a constitutional amendment could not be easily

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<sup>155</sup> See *supra* Part V.B.

<sup>156</sup> Garg, *supra* note 61, at 11–12.

<sup>157</sup> *Id.*

<sup>158</sup> Raven-Hansen, *Constitutionality of Statehood*, *supra* note 133, at 184–89.

<sup>159</sup> *H.R. 292: New Columbia Admission Act*, GOVTRACK, <https://www.govtrack.us/congress/bills/113/hr292> (last visited Oct. 23, 2014) (giving the House bill a seven percent chance of enactment); *S. 132: New Columbia Admission Act*, GOVTRACK, <https://www.govtrack.us/congress/bills/113/s132> (last visited Oct. 23, 2014) (giving the Senate bill a seventeen percent chance of enactment).

<sup>160</sup> See Garg, *supra* note 61, at 24–27 (delineating the various arguments against the constitutionality of a statute granting representation).

<sup>161</sup> *Id.* at 26.

repealed when party power changes in Congress. Nevertheless, passing a constitutional amendment is always an uphill battle. The D.C. Voting Rights Amendment was proposed in Congress in 1978.<sup>162</sup> It would have treated the District as a state, securing for it full Congressional representation, full participation in the Electoral College system, and full participation in the constitutional amendment process.<sup>163</sup> Although it passed both the House and the Senate by supermajorities, it failed to be ratified by a sufficient number of states.<sup>164</sup> Because the bill provided for a seven-year ratification period, the Amendment would once again have to pass the House and Senate if anyone tried to revive it.<sup>165</sup>

The difficulty in ratifying an amendment securing statehood for the District has only increased since the 1970s.<sup>166</sup> First, the 1970s amendment did not secure full statehood for the District.<sup>167</sup> The inability to ratify this amendment by a sufficient number of states suggests that an amendment securing full statehood for the District would have an even smaller chance at ratification. Second, the political landscape in Congress has changed dramatically since the 1970s. The ability to secure enough support to pass an amendment in the House and Senate is greatly diminished, particularly when, as described above, the outcome would dramatically change the political balance in the Senate.

#### IV. ON THE WAY TO STATEHOOD: THE ADVANTAGES AND DISADVANTAGES OF INCREMENTALISM

If the District is to achieve authentic statehood via an act of Congress or a constitutional amendment, the public needs to be educated and engaged in the District's plight, supporters must be persistent in lobbying Congress, and District residents and their local and national allies must pursue a vigorous public campaign akin to civil rights struggles of old. This is likely to be a difficult and long-term project, and in the meantime, the District faces a strategic dilemma: should the residents pursue an incremental approach to gradually achieve greater autonomy and some voting representation in Congress? Or should they hold out for statehood exclusively?

Under an incremental approach, the end goal would remain statehood, but advocates would pursue a step-by-step approach, gradually posturing the District as if it were a state.<sup>168</sup> This has already been happening in actions real and symbolic. The District exercises many powers of a state under the Home Rule Act,<sup>169</sup> and it has voted

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<sup>162</sup> H.R.J. Res. 554, 95th Cong. (1978).

<sup>163</sup> *Id.*

<sup>164</sup> Barnes, *supra* note 29, at 37.

<sup>165</sup> H.R.J. Res. 554, 95th Cong. (1978).

<sup>166</sup> *See id.*

<sup>167</sup> Barnes, *supra* note 29, at 37–38.

<sup>168</sup> *See* Schrag, *supra* note 144, at 322.

<sup>169</sup> *See supra* Part III.C.

to assume autonomy over its local budget.<sup>170</sup> The District's lawyer is no longer referred to as "corporation counsel" but as "attorney general,"<sup>171</sup> and some elected officials have suggested that the Mayor and Council be called the governor and legislature.<sup>172</sup> An entire lobbying effort has coalesced around achieving a vote in Congress for the District's delegate, and one of the most visible and active District groups is DC Vote, which, for years, has made the delegate's vote its main objective.<sup>173</sup> The advantages of incrementalism are that it might positively change public perceptions of the District's ability to govern itself, that Congress would ultimately see statehood as more palatable and less threatening, and that, in the meantime, the residents would, in fact, acquire greater autonomy and control over their local affairs.

But incrementalism carries disadvantages and risks. The first is the frustration that will come if greater autonomy is conferred and then snatched back by a new set of Congressional overseers. Second is the danger of compromises the District may be forced to make for modest and always contingent advances, compromises that themselves cement the District's second class status and teach the wrong lesson about the political maturity of the District. In this regard, consider the legislation proposed in the late 2000s that would have secured a voting representative in the House of Representatives for the District. On April 18, 2007, the House passed the District of Columbia Voting Rights Act of 2007, which would have provided for a single Congressional district for the District of Columbia.<sup>174</sup> To appease those who worried this would throw off the political balance in the House, the bill would have increased the House from 435 to 437 seats, adding an extra seat for Utah as well.<sup>175</sup> Because the District is reliably Democratic and Utah is reliably Republican, this would have preserved the balance. Unfortunately, the Senate version of the bill failed to pass.<sup>176</sup> The bill was

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<sup>170</sup> See Emma Dumain, *Voters Pass D.C.'s Budget Autonomy Referendum, Many Ask "Now What?"*, ROLL CALL (Apr. 24, 2013, 6:17 PM), [http://www.rollcall.com/news/voters\\_pass\\_dc\\_budget\\_autonomy\\_referendum\\_many\\_ask\\_now\\_what-224328-1.html](http://www.rollcall.com/news/voters_pass_dc_budget_autonomy_referendum_many_ask_now_what-224328-1.html).

<sup>171</sup> *Mayor Renames OCC to Office of the Attorney General for DC*, OFFICE OF THE ATTORNEY GEN. (May 26, 2004), <http://oag.dc.gov/release/mayor-renames-occ-office-attorney-general-dc>.

<sup>172</sup> See Mike DeBonis, *Why Does the D.C. Council Have 13 Members?*, WASH. POST (Feb. 7, 2011, 5:58 PM), [http://voices.washingtonpost.com/debonis/2011/02/why\\_does\\_the\\_dc\\_council\\_have\\_1.html](http://voices.washingtonpost.com/debonis/2011/02/why_does_the_dc_council_have_1.html); Lori Montgomery, *Gov. Williams, If You Please*, WASH. POST, Mar. 2, 2006, at B1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/01/AR2006030102320.html>.

<sup>173</sup> *Mission*, DC VOTE, <https://www.dcvote.org/dc-votes-mission-work> (last visited Oct. 23, 2014); see also Sommer, *supra* note 37 (describing efforts of shadow delegation and other individuals outside District government to promote statehood).

<sup>174</sup> H.R. 1905, 110th Cong. § 2 (2007).

<sup>175</sup> *Id.* § 3; Kate Phillips, *Senate Passes D.C. Voting Rights Bill, 61-37*, N.Y. TIMES (Feb. 26, 2009), <http://thecaucus.blogs.nytimes.com/2009/02/26/senate-passes-dc-voting-rights-bill-61-37>.

<sup>176</sup> *S. 1257 (110th): District of Columbia House Voting Rights Act of 2007*, GOVTRACK, <https://www.govtrack.us/congress/bills/110/s1257#overview> (last visited Oct. 23, 2014).

introduced again in the House and Senate in 2009.<sup>177</sup> This time, it passed the Senate.<sup>178</sup> However, it included a hastily added amendment repealing most of the District's gun control laws.<sup>179</sup> Although moderate House Democrats were willing to pass the bill with the amendment, D.C. voting rights advocates demanded a clean bill.<sup>180</sup> Eventually, Delegate Eleanor Holmes Norton, who introduced the bill, agreed with Majority Leader Steny Hoyer to table the bill, finding the amendment to be too difficult to swallow.<sup>181</sup> This experience illustrates the kinds of compromises an incremental approach would force District residents to accept. When the District must give up one form of autonomy to secure another form of autonomy, there is neither a gain for residents nor movement forward.

The final and most worrisome disadvantage of incrementalism is that its success may sap the fervor for statehood and dilute the arguments that may, in purer form, ultimately win. This is particularly true of the effort to secure a vote for the delegate in the House of Representatives. If such a vote were recognized, opponents of statehood could then argue that the District does have a vote and one, in their opinion, more commensurate with the District's geographic size and population. Supporters would lose their greatest rhetorical weapon—taxation without representation. It's much easier to make one's case by saying, "we have no vote in Congress," than it would be to say, "we have a vote but want more votes."

The dilemma of incrementalism may be solved by taking what works to posture the District as a state, such as budget autonomy, but holding out for full and permanent voting rights, which can only be achieved by statehood.

#### CONCLUSION

This Symposium was dedicated to defining and evaluating different aspects of democratic representation, such as expressly adopting a constitutional right to vote. But there is one issue that is unique in this Symposium, and that is the anomalous second class status of the people of Washington, D.C. Although historically explicable, the District's status is no longer politically or morally defensible. But there is a complete remedy: statehood. The District's population, resources, and democratic commitment entitle it to statehood. And for the District, only statehood will do.

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<sup>177</sup> *S. 160 (111th): District of Columbia House Voting Rights Act of 2009*, GOVTRACK, <https://www.govtrack.us/congress/bills/111/s160> (last visited Oct. 23, 2014).

<sup>178</sup> *Id.*

<sup>179</sup> See Phillips, *supra* note 175.

<sup>180</sup> Mary Lu Carnevale, *D.C. Voting Rights Bill is Slowed Over Gun Amendment*, WALL ST. J. (Mar. 4, 2009, 12:49 PM), <http://blogs.wsj.com/washwire/2009/03/04/dc-voting-rights-bill-is-slowed-over-gun-amendment/>.

<sup>181</sup> Mike DeBonis, *Breaking: Norton Kills Voting Rights Bill*, WASH. CITY PAPER (June 9, 2009, 12:58 PM), <http://www.washingtoncitypaper.com/blogs/citydesk/2009/06/09/breaking-norton-kills-voting-rights-bill/>.