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Cover Page Footnote
B.S. Brigham Young University (1959); LL.B. University of Pittsburgh School of Law (1962). Member of the Pennsylvania and Utah Bars. Senator Hatch is a former senior partner of the firm of Hatch and Plumb, Salt Lake City, Utah. In 1976, he was elected to the United States Senate from the State of Utah. Senator Hatch is the ranking minority member of the Subcommittee on the Constitution of the Senate Committee on the Judiciary. In addition to being a member of the Senate Committee on the Judiciary, Senator Hatch is also a member of the Senate Committee on the Budget and the Senate Committee on Human Resources.
SHOULD THE CAPITAL VOTE IN CONGRESS? A CRITICAL ANALYSIS OF THE PROPOSED D.C. REPRESENTATION AMENDMENT

U.S. Senator Orrin G. Hatch*

I. Introduction

It has been widely maintained that opposition to full voting representation in Congress for the District of Columbia is grounded in the fear that the District is "too liberal, too urban, too black, and too Democratic." In the words of Senator Edward M. Kennedy of Massachusetts, a leading advocate of congressional representation for the capital, "[b]ecause opposition arguments are so unconvincing, most of us who favor D.C. representation dismiss these arguments as a cover for partisan politics or worse as a cover for racism." The widespread mobilization of civil rights groups in behalf of voting representation during the recent congressional debates has lent credence to these allegations. According to the Leadership Confer-

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The racial allegations are not new. During debates on whether to terminate the experiment in territorial government, Senator Lot Morrill of Maine remarked:

"The idea is that we are about to crucify suffrage here in the District of Columbia, because . . . there happen to be a few coloured people here. This idea would never have occurred if there had been no coloured people here . . . . What is the ratio of coloured people here compared with the whites? About one in three; and now it is said that if we do not confer upon these white people and these coloured people the right of the elective franchise it will go all over this country and be taken for granted that we have declared in the Congress of the United States against negro suffrage everywhere. . . . For one I desire to disclaim it. . . . When it comes to this, that under the exclusive authority given in the Constitution of the United States we cannot legislate impartially as well for white men as for black men, then I shall be in favor of a new order of things.

3 Cong. Rec. 1104-05 (1875).
ence on Civil Rights, "full representation for D.C. is the Civil Rights Act of 1978." This view was echoed by the three black candidates for the District of Columbia mayoralty, whose heated campaign approximated in time the campaign for D.C. representation in Congress.\(^5\)

This line of argument has enjoyed some tactical success. Its transformation from a constitutional issue to one of civil rights has won the cause of D.C. representation unlikely adherents in both houses of Congress. Proponents managed to secure two-thirds of the memberships of both for a cause which, despite years of persistent effort, had never before achieved victory in either house. Even though successful, the civil rights line of argument does not accurately reflect the motivation of most opponents of the D.C. Amendment. In fact, opposition to the D.C. Amendment and to House Joint Resolution 554, its legislative vehicle, is prompted by substantial constitutional and policy concerns not at all related to race, party, or narrow ideology. The author, as well as other Members of Congress who worked in opposition to the D.C. Amendment, did not do so out of opposition to providing the citizens of the District with a direct voice in the affairs of the national government. It was simply considered that there were alternatives to the resolution under consideration which could achieve this goal while avoiding at least some of the objections to the resolution.\(^4\)

This Article will describe the proposed D.C. Amendment, and give a brief historical overview of the District and its efforts to gain

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\(^1\) This is not to say, however, that race has never intruded into the District representation debate, sometimes in the ugliest manner. See, e.g., Hearings on National Representation and Suffrage for the Residents of the District of Columbia Before the House Comm. on the Judiciary, 75th Cong., 3d Sess. 82, 90 (1938). See generally C. M. Green, The Secret City: A History of Race Relations in the Nation's Capital (1967).


\(^5\) See pt. VII infra.
national representation. In addition, it will present a critical analysis of the case for District representation, including a summary of the arguments made in favor of the proposed amendment, as well as the constitutional and policy objections to the D.C. Amendment. Finally, it will offer a brief analysis of some suggested alternatives.

II. H.J. Res. 554

A proposal to provide full congressional representation for the District emerged in the form of a House Joint Resolution (H.J. Res. 554) during the 1977 session of the 95th Congress. Introduced by Representative Don Edwards of California, chairman of the House Judiciary Subcommittee on Civil and Constitutional Rights, H.J. Res. 554 represented the most far-reaching initiative on District representation that had ever been introduced. It proposed an amendment to the Constitution which would achieve the following objectives:

(1) The District would be entitled to a full complement of Representatives in the House of Representatives. For purposes of representation in Congress, the District would be treated "as though it

7. H.J. Res. 554 was introduced by Chairman Edwards on July 25, 1977. It reads:
That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislature of three-fourths of the several States within seven years from the date of its submission by the Congress:

Article

Sec. 1. For purposes of representation in the Congress, election of the President and Vice President, and article V of this Constitution, the District constituting the seat of government of the United States shall be treated as though it were a State.

Sec. 2. The exercise of the rights and powers conferred under this article shall be by the people of the District constituting the seat of government, and as shall be provided by the Congress.

Sec. 3. The twenty-third article of amendment to the Constitution of the United States is hereby repealed.

Sec. 4. This article shall be inoperative, unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.


Following five days of hearings, it was approved by the Subcommittee on Civil and Constitutional rights on Oct. 30, 1977, and by the full House Judiciary Committee on Feb. 16, 1978. On June 21, 1977, Senator Kennedy had introduced a resolution, S.J. Res. 65, identical to one introduced earlier by Walter Fauntroy, the non-voting Delegate of the District of Columbia in Congress. While similar to H.J. Res. 554, Senator Kennedy's resolution would not have allowed the District to participate in the constitutional amendment process under Article V. Three days of hearings were held by the Senate Judiciary Subcommittee on the Constitution in April of 1978, but no further action was taken on S.J. Res. 65 by the subcommittee.
were a State." On the basis of its present population, this would likely mean a single representative although, had the Amendment been in effect following the 1970 census, the District likely would have been entitled to two House Members. Whether this would result in an increase in the aggregate size of the House, or simply in the reallocation of other States' representatives to the District, would remain a decision for Congress at the time of the Amendment's ratification.

(2) The District, for purposes of United States Senate representation, would also be treated "as though it were a State," and thus be entitled to two Senators. This would raise the total size of the United States Senate from 100 to 102.

(3) The District would have the same rights as the states to participate in the constitutional amendment process under article V. With 51 entities involved in the ratification process, the assent of 39 of these (instead of the present 38) would be required for ratification, while the number necessary to propose amendments through the State convention procedure would remain at 34.

(4) The twenty-third amendment to the Constitution, ratified in

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9. The 1970 census counted a population of 756,510 in the District, approximately the same as the states of Idaho and New Hampshire which are currently entitled to two representatives. NEWSPAPER ENTERPRISE ASS'N INC., THE WORLD ALMANAC: 1978 at 191. The most recent census figures, however, estimate the July 1, 1978 population of the District at only 674,000, approximately the same as Nevada, South Dakota, and North Dakota, all states currently entitled to only a single representative. U.S. BUREAU OF THE CENSUS, POPULATION ESTIMATES AND PROJECTIONS 2 (table I) (December 1978).
10. Until the reapportionment accompanying the 1910 census, every apportionment except that in 1840 resulted in an increase in the size of the Congress. Members were added whenever new states were admitted into the Union. The present number of representatives has been maintained since the admission of New Mexico and Arizona into the Union in 1912. While the statehood legislation for both Alaska and Hawaii provided for a temporary increase in the total size of the House membership from 435 to 437, the lower size was restored following the 1960 census.

According to a study done by the Library of Congress, Illinois is, at present, the state most likely to lose a representative if the District is provided voting representation and there is no increase in the size of the House. Illinois and Pennsylvania will likely be deprived of a representative if the District is provided with two Representatives. D.C. HUCKABEE, DISTRICT OF COLUMBIA REPRESENTATION IN CONGRESS: REAPPORTIONMENT AND REDISTRICTING OPTIONS 7 (1978).
11. These computations might not be as obvious as they seem. See Hearings on Representation for the District of Columbia Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 133-34, 139-42 (1977) (remarks of D.C. Delegate Walter Fauntroy and Professor Arthur S. Miller of George Washington University).
1961, would be repealed. Repeal of the amendment would permit the District to participate in the electoral college to the full extent of its population, instead of the extent of the least populated state. So long as the District remains entitled to only a single Representative in Congress, this change is meaningless. Should the District become entitled to more Representatives, and thus more electoral votes, the same decision with respect to the size of the electoral college would have to be made as with respect to the size of the House of Representatives. In the event of an electoral college deadlock, the District would apparently participate in the deliberations of the House and Senate pursuant to the twelfth amendment "as though it were a State."

Section 4 of the D.C. Amendment requires that ratification of the necessary three-fourths of the states must occur within seven years of the date of its submission to the states. The inclusion of this provision within the body of the resolution will avoid a similar controversy to that which has arisen with respect to the time limit for ratification of the proposed "Equal Rights Amendment."

H.J. Res. 554 was approved by the House of Representatives on March 2, 1978, by a margin of 289-127. This was eleven votes more than the requisite two-thirds and represented a gain of sixty votes from the previous Congress. During consideration of the resolution, a motion was rejected by a voice vote which would have recommitted (killed) the resolution to the Judiciary Committee with instructions that it consider instead a resolution to return, or "retrocede" the populated areas of the District to the State of Maryland. Another amendment offered earlier would have retained the twenty-third amendment and given the District representation only in the

12. See note 76 infra.
13. But see S.J. Res. 65 and H.J. Res 139, supra note 7 (elected representatives from District would participate in presidential selection process under twelfth amendment).
14. The House of Representatives, on Aug. 15, 1978, and the Senate, on Oct. 6, 1978, approved H.J. Res. 638 extending the ratification deadline for the Equal Rights Amendment from March 22, 1979 to June 30, 1982. 124 Cong. Rec. H8607; id. at S17319. In doing so, Congress relied heavily upon the fact that the initial seven year ratification limitation was contained, not in the body of the proposed amendment, but in the proposing resolution. Substantial controversy continues to surround this action. Resolutions have been introduced in a number of state legislatures to declare the extension "null and void" or challenge it in some other manner. See, e.g., INDIANA S.J. RES. 23 (1979); MONTANA S.J. RES. 12 (1979); SOUTH DAKOTA S.J. RES. 2 (1979).
House of Representatives. That amendment, defeated in committee, was not offered to the full House.

H.J. Res. 554 was placed immediately upon the calendar of the Senate, in circumvention of the normal committee processes, by means of a highly unusual expediting procedure invoked by the Senate Majority Leader, Senator Robert Byrd of West Virginia. This occurred despite the fact that the Senator Judiciary Committee had earlier held three days of hearings on its own measure, S.J. Res. 65, introduced by Senator Edward Kennedy. Following extensive debate, and the rejection by the Senate of fourteen separate amendments to the House resolution, the measure was approved by a 67-32 vote on August 22, 1978, a narrow one vote margin over the number needed for victory. Consequently, only the task of ratification by thirty-eight States before August 22, 1985, need be completed for the Amendment to become part of the Constitution.

III. The Historical Background

A. The History of the District

Article I, section 8, clause 17 of the United States Constitution provides that Congress shall have the power “[t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the acceptance of Congress, become the Seat of the Government of the United States . . . . ”

The inclusion of this provision stemmed from the concern of the Founding Fathers that the national capital be free from both the disproportionate influence of any single state, and the influence of the states generally. In the words of one commentator, “[t]he

16. Senator Byrd was apparently concerned about the prospects of passage of S.J. Res. 65 in the Judiciary Subcommittee on the Constitution. He resorted to the unusual invocation of Rule 14.4 of the Standing Rules of the Senate with respect to H.J. Res 554, the House version of the bill. This rule enables a member to bypass the committee process and place legislation directly on the calendar of the Senate. 124 CONG. REC. S3004 (daily ed. March 4, 1978); id. at S6098 (daily ed. April 24, 1978).


18. For a discussion on the development of the “exclusive Legislation” clause, see
exclusive jurisdiction vested in Congress was designed to eliminate a competing sovereign." Difficult as it may be to envision today, it was the fear of many of these individuals that a weak federal government might be permanently subordinated to the several states.


20. In particular, an incident occurring in the summer of 1783, during a meeting of the United States in Congress Assembled (the Confederation), served to impress the drafters of the Constitution with the need to establish a truly independent federal entity. See generally 5 J. Elliot, Debates in the Congress of the Confederacy 92-93 (1901); Report of the Interdepartmental Comm. for Study of Jurisdiction over Federal Areas within States, pt. II, at 15-27 (1957). Several hundred mutinous Revolutionary Army troops, not yet fully deactivated, converged in Philadelphia, the site of the legislature, to demand backpay to which they felt entitled. Surrounding Independence Hall, their leaders threatened to "let in those injured soldiers upon you, and abide by the consequences." James Madison writes of the soldiers "wontonly pointing their Muskets to the Windows of the Halls of Congress." G. Hunt, ed., 1 The Writings of James Madison 481 (1900).

The legislative body was able to proceed with its business and adjourn several days later without incidents of actual violence, although calls for police assistance went unheeded by the official authorities of both the Commonwealth of Pennsylvania and the City of Philadelphia. Protection was denied on the grounds that the troops "would probably not be willing to take arms before their resentments should be provoked by some actual outrage... It would hazard the authority of government to make the attempt." H. P. Caemmerer, Washington: The National Capital, S. Doc. No. 332, 71st Cong., 2d Sess. 5 (1932) [hereinafter cited as Caemmerer].

Upon adjournment, the Congress removed itself permanently from Philadelphia. See 24 Journals of the Continental Congress 410 (June 21, 1783). This was done despite the pleas and petitions of a significant segment of the city, and the Congress relocated at Nassau Hall in Princeton, New Jersey, where local authorities had promised protection. In his Commentaries, Justice Story was later to refer to this incident as the "degrading spectacle of a fugitive Congress. 3 J. Story, Commentaries on the Constitution of the United States § 1214, at 98 (1st ed. 1833) [hereinafter cited as Story]. He observed that the incident impressed upon the Founding Fathers that "it could never be safe to leave in the possession of any state the exclusive power to decide whether the functionaries of the national government should have the moral or physical power to perform their duties." Id. § 1213, at 97.

The matter of an independent and secure meeting place for the national legislature free from the capriciousness of local politics became of paramount concern to the national govern-
Although there was virtually no debate in the federal convention on this provision of the Constitution, George Mason of Virginia expressed the views of the great majority of the delegates that the location of the national legislature within a state would tend to produce disputes concerning jurisdiction, while "giving a provincial tincture to ye National deliberations."\(^{21}\)

It was not until the Constitution had been textually completed that a determination of the site of the national capital was made. Despite some pressure from northern states to select a site along the Delaware River north of Trenton, New Jersey, a site further south along the "Potowmack" River at Georgetown was finally selected. This resulted, in part, from some old-fashioned logrolling among Jefferson, Hamilton, and Washington.\(^{22}\) The southern-favored Georgetown site was agreed to in return for southern support of a northern proposal to have the new federal government assume the heavy Revolutionary War debts that had been incurred by the states, primarily the northern states. The District-to-be, described as a "swamp sandwich," was narrowly confined between the "urban" corridors of Alexandria and Georgetown.\(^{23}\)

By 1790, Maryland and Virginia had agreed to cede to the United States the lands owned by them on either side of the Potomac which would comprise the District.\(^{24}\)

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 government, for the protection in the exercise of their duty might bring on the national councils an imputation of awe or influence, equally dishonorable to the government and dissatisfactory to the other members of the Confederacy.

The Federalist Papers #43, at 272 (Mentor ed. 1961) \([\text{hereinafter cited as Federalist}].\]


24. An Act for the Cession of Ten Square Miles, 13 Va. Stat. at Large 43 (1789); An Act to Cede to Congress a District of Ten Miles Square in this State for the Seat of Government of the United States, 2 Kilty Laws of Md. ch. 46 (1788). These cessions were subsequently accepted by Congress. Act of July 16, 1790, 1 Stat. 139; Act of March 3, 1791, id. at 214.
accepted by the first Congress in that year, it was agreed, as a further concession to the North, that the seat should be situated in Philadelphia until surveying could be completed and a suitable home for the new government erected. It was expected that these arrangements would be completed by 1800.

By the express terms of the acts of cession Maryland and Virginia, and the act of acceptance of Congress, the jurisdiction of state laws in the ceded territories would not "cease or determine until Congress should accept the cession and should by law provide for the government thereof." As a result, the laws of these states remained in full force during the last decade of the 18th century upon the citizens and lands of the ceded areas. The residents of the District retained their state citizenships during this period and exercised the full panoply of rights to which such status entitled them, including full rights of suffrage in local, state, and national elections. The seat of the national government, over which Congress was constitutionally entitled to "exclusive Legislation," did not come into being in the District until 1800.

Supporters of District representation in Congress have frequently cited the fact that citizens living within the boundaries of the District during this period retained their vote. The implication has been that this represented the true intent of the Founding Fathers and that the subsequent deprivation of suffrage after 1800 resulted from mere oversight. However, Congress in its earlier acceptance of the lands that would comprise the District contemplated that it would not be until 1800 that District residents would actually forfeit their state citizenship.

25. Act of July 16, 1790, 1 Stat. 130. This was not the last evidence of sectional rivalry in the formation of the District. In her authoritative history, Constance McLaughlin Green suggests that the defeat of an effort in 1803 to retrocede some of the lands given by Maryland and Virginia to the federal government was prompted by southern concern that this represented an initial effort to relocate the national capital in a northern state. 1 C. M. GREEN, WASHINGTON: VILLAGE AND CAPITAL: 1800-78, at 30 (1962).

26. Section 2 of the Maryland Act of cession (see note 24 supra) provides in part "that the laws of this state, over the persons and property of individuals residing within the limits of the cession aforesaid shall not cease or determine until Congress shall by law provide for the government thereof, under their jurisdiction. . . ." See also United States v. Hammond, 26 F. Cas. 96 (C.C.D.C. 1801)(No. 15,293)(exclusive jurisdiction granted to Congress by Constitution did not become effective until District actually became seat of national government).

27. See, e.g., COALITION FOR SELF-DETERMINATION FOR D.C., A SIMPLE CASE OF DEMOCRACY DENIED 8 (1978) [hereinafter cited as DEMOCRACY DENIED].
The election of 1800 marked the last opportunity that District residents had to elect voting members of either house of Congress. As a result of legislation enacted shortly thereafter, District residents were effectively disenfranchised, as all state authority over the ceded areas was terminated. Other than the states, there existed no other locus for suffrage. Many of the state laws then applicable to the District, however, were maintained intact. Congress waited until 1802 to substitute a more permanent apparatus for governing the affairs of the District.

It has been suggested that the loss of suffrage occasioned by the termination of state citizenship was purely inadvertent or, alternatively, that it was contemplated that corrective action would be initiated shortly by Congress. In support of the former contention, it is argued that a denial of such a basic right, one which had played so integral a part in the then-recent Revolution, could not have been intended, at least not in the absence of far more studious debate than that which had occurred.

While it is true that there was very little debate on D.C. suffrage, this is probably attributable to congressional indifference rather than congressional oversight. The second United States census, in 1800, showed only 14,093 residents in the District, including more than 4000 Negroes, virtually all of whom were slaves. This was less than one-quarter of the population of Delaware, the least populated state in the Union, and less than one-third of the 50,000 population that had been required by the Ordinance of 1787 for the admission of new states into the Union from the lands of the Northwest Territory. Although Presidents Washington and Adams both foresaw the emergence of the District as a major center of culture and com-

29. See 10 ANNALS OF CONG. 824 (1800).
33. According to a memorandum prepared by the Counsel for the Senate Judiciary Committee, "until the census of 1880, the population of the District was inadequate under the apportionment of representation accorded a State." Hearings on Enfranchisement of the District of Columbia Before the Senate Comm. on the Judiciary, 86th Cong., 1st Sess. 2 (1959).
merce, the inaction of Congress regarding the matter of D.C. suffrage is, at least in part, attributable to the sparseness of the District’s population.

Beyond this, however, it cannot be said that the architects of the District’s disenfranchisement were oblivious to what they were doing. A highly publicized series of articles appearing in the District’s National Intelligencer under the pen-named Epaminondas called attention to the pending threat to the suffrage of D.C. residents. In addition, the suffrage question was the subject of legislative debate on several occasions. Representative John Dennis of Maryland, for instance, suggested that as a result of their physical proximity to the seat of government, District residents “knew that though they might not be represented in the national body, their voice would be heard.” Taking a contrary view, Representative John Smilie of Pennsylvania argued that, by the passage of the 1801 Act, “the people of the District will be reduced to the state of subjects and deprived of their political rights.” It is clear that they, and most other members of Congress, were appreciative of the impact of the 1801 legislation upon the D.C. franchise.

It is more accurate to suggest that the Founding Fathers themselves were not fully aware that District residents would be deprived of voting representation in Congress as a result of their constitutional design. The topic was not mentioned at the federal convention nor, to any substantial extent, at state ratifying conventions. One commentator has observed that what little debate transpired on this matter “centered . . . on the possible privileges and advan-


36. See, e.g., 10 Annals of Cong. 869 (1800)(remarks of Senator Wilson Nicholas of Virginia); id. at 872 (1800)(remarks of Representative Robert Harper of South Carolina); id. at 992 (1801) (remarks of Representative John Rutledge of South Carolina).

37. 10 Annals of Cong. 998 (1801)(remarks of Representative John Dennis of Maryland). “The citizens of the District may justly boast that they live under a paternal government, attentive to their wants and zealous for their welfare.” 3 Story, supra note 20, § 1218, at 100.

38. 10 Annals of Cong. 992 (1801).
tages which District residents might gain by virtue of their special status."

Rather than being a matter of oversight, this is more likely explained by the fact that the District was not a state, and therefore could not be entitled to representation in a legislature which employed statehood as a basis for representation. Further, as observed by a former ranking member of the House Judiciary Committee: "Had the thought of representation in Congress from the District occurred to the framers of the Constitution, it is likely that they would have rejected it, fearing that such recognition might seed the very sort of local influence and control they sought to avoid in the Federal city." The absence of extended discussion by either the Founding Fathers or the drafters of the 1801 Act on the matter of D.C. suffrage, rather than bolstering the case that disenfranchisement was never the primary object of these individuals, it was considered necessary to "the peculiar plan" which separated the national capital from the states.

In support of the contention that national representation for the District, while perhaps not initially intended, was clearly contemplated and anticipated by the Founders, reference is frequently made to Madison's remarks in the Federalist #43:

The extent of this federal district is sufficiently circumscribed to satisfy every jealousy of an opposite nature. And as it is to be appropriated to this use with the consent of the State ceding it; as the State will no doubt provide in the compact for the rights and the consent of the citizens inhabiting it; as the


41. "The general principle of representation [in the United States] is suspended in the District of Columbia because the nature of the District requires it to be ruled for and in the interests of all the people of the country." Committee on the District of Columbia, Establishing a Study Commission on the District of Columbia Government and Providing a Non-Voting Delegate to the House of Representatives, H.R. Rep. No. 1385, 91st Cong., 2d Sess. 15 (1970). "[T]he denial of self-government] in the District . . . 'it was intended to have the representatives of all the people of the country control this one city, and to prevent its being controlled by the parochial spirit that would necessarily govern men who did not look beyond the city to the grandeur of the nation. . . .'" The Constitutional Status of the District of Columbia, S. Doc. No. 653, 61st Cong., 2d Sess. 1 (1910)(remarks of President Taft).

42. Federalist, *supra* note 20, #43 at 272.
inhabitants will find sufficient inducements of interest to become willing parties to the cession; as they will have had their voice in the election of the government which is to exercise authority over them; as a municipal legislature for local purposes, derived from their own suffrages, will of course be allowed them; and as the authority of the legislature of the State, and of the inhabitants of the ceded part of it, to concur in the cession will be derived from the whole people of the State in their adoption of the Constitution, every imaginable objection seems to be obviated.

A number of distinct arguments have been drawn from this statement in behalf of representation for the District. First, it has been suggested that Madison assumed that the ceding states would protect the franchise of the individuals being transferred from their jurisdiction. Such states would not tolerate denial of suffrage to their former citizens. What Madison specifically stated, however, was that the ceding states would provide for the “rights and the consent” of the citizens of the District. This was done. The decision to cede the lands of the District was made in both Maryland and Virginia with the “consent” of the legislators from the affected area, including the express consent of every landowner within at least the Virginia area. The ceding states also protected the “rights” of the District’s inhabitants by retaining jurisdiction over them until Congress “should by law provide for the government thereof.” There is no implication that representation in Congress was one of these “rights.” Representation was denied at the time, as it is today, to United States citizens other than those who are also citizens of the states and who meet certain other qualifications. It is not likely that Madison implied more than this as there is no record of his objection to the terms of the Maryland or Virginia cessions, nor any record of action taken in his eight years as President to restore the franchise to District residents.

Secondly, proponents of D.C. representation allude to Madison’s conclusion that “every imaginable objection seems to be obviated,” and submit that the Founding Fathers could hardly have imagined this to be the case if a citizenry, once possessed of a voice in Congress, were to have been forever deprived of this voice. However,

43. See note 31 supra (remarks of Mayor Washington at 135).
44. TINDALL, supra note 22, at 85.
45. DEMOCRACY DENIED, supra note 27, at 8.
read in the proper context, Madison is stating that any perceived injustice being done to the citizens of the District was minimized by the confluence of circumstances to which he had just referred. These circumstances are the consent of the people to the cession by their states, the clear "inducements of interest" to these people for residence within the seat of government, and the participation in the original creation of the government through their involvement in the constitutional ratification process. Madison's beliefs were later echoed by Chief Justice Marshall, who stated that the District had "voluntarily relinquished the right of representation, and [had] adopted the whole body of congress for its legitimate government. . . ." 48

Finally, proponents of District representation have misread Madison's language in citing him for the proposition that "they will have their voice in the election of government," in the process substituting the future tense for the future perfect tense "they will have had their voice . . . ." 47 Some form of "home rule" may be implied from Madison's reference to a "municipal legislature" in the succeeding clause of his statement, 48 but it is tenuous to summon support for national representation in Congress from Madison's words. Legislation in 1802 established a mayoral form of government for the District with a bicameral, twelve-member City Council. 49 The Council was to be popularly elected, and the Mayor appointed by the President, each to serve a one-year term. 50 While changes were effected in 1812 and 1820, 51 this remained the broad framework of government in the District until the 1870s.

In 1846, the thirty-one square miles of the District that had been ceded by Virginia were retroceded to the State, reducing the area
of the District from 100 square miles, the constitutional limit, to its current area of sixty-nine square miles. While the inhabitants of the Virginia cession cited among their objections to their status in the District their "political disenfranchisement" and lack of "self-government," they were also quick to state that\(^\text{52}\)

\[\text{[notwithstanding these disadvantages] our condition is essentially different from and far worse than that of our neighbors on the northern side of the Potomac. They are citizens of the metropolis of a great and noble republic, and wherever they go there cluster about them all those glorious associations connected with the progress and fame of their country. They are in some measure compensated for the loss of their political rights by benefits resulting from the large expenditure of public money among them, and by daily intercourse and association with the various officers of the government, and particularly with the members of Congress.}\]

The federal government had never found it necessary to use any of the land which had been ceded by Virginia.\(^\text{53}\) Immediately upon the acceptance of the retrocession by both the state and the federal government, the inhabitants of the retroceded area were once again entitled to exercise their rights of suffrage in Virginia elections.\(^\text{54}\)

In response to the needs of a rapidly growing population in the District and the inability of Congress to devote sufficient attention to the administration of affairs there, Congress experimented with a territorial form of government for the District from 1871 to 1874. This government was comprised of Governor, who was appointed by the House, and a bicameral legislature, which was popularly elected.\(^\text{55}\) This occurred at a time when the autonomy of the separate local governments within the District had been largely eliminated. Congress was concerned with "rationalizing" the organization of District government in order to meet new needs for public works and services and to moderate newly emergent racial antagonisms.\(^\text{56}\) The

\[\text{\underline{52}}\]. Tindall, supra note 22, at 86. This was contained in a proposal submitted by a committee from the city of Alexandria to the U.S. House of Representatives in 1846. Id.

\[\text{\underline{53}}\]. For a further history of the Virginia retrocession, see Franchino, supra note 19, pt. II at 378-88; Senate District of Columbia Committee, Retrocession Act of 1846, S. Doc. No. 286, 61st Cong., 2d Sess. (1910).

\[\text{\underline{54}}\]. Act of July 9, 1846, Ch. 35, § 3, 9 Stat. 35; Virginia Act of February 3, 1847, ch. 64, § 2; Va. Code ch. 6, § 3 (1849); Va. Const. art. 3, § 14 (1849).

\[\text{\underline{55}}\]. Act of February 21, 1871, 16 Stat. 419. See also Act of July 27, 1861, 12 Stat. 320 (consolidating many services provided by individual jurisdictions within District of Columbia).

\[\text{\underline{56}}\]. For a description of District affairs during this experiment, see J. Whyte, The Uncivil War: Washington During the Reconstruction (1968) [hereinafter cited as Uncivil War];
black population of the District had more than tripled in the decade which encompassed the Civil War, and comprised approximately one-third of its total population by 1870.57

As a result of serious fiscal mismanagement by the territorial government which nearly bankrupted the District,58 the short-lived experiment was replaced with a three-man Board of Commissioners appointed by the President.59 The termination of this modest effort at "home rule" was greatly favored by the black community in the District, which felt more comfortable as wards of Congress and the federal government than as a one-third electoral minority.60 The three-commissioner form of government lasted well into the 20th century, replaced in 1967 by a presidentially appointed Mayor-Council form of government.61

In 1973, the measure of self-rule that had been enjoyed only prior to the commencement of the territorial government was reinstated.62 The District of Columbia Self-Government and Governmental Reorganization Act63 provided for a popularly-elected mayor and thirteen-member city council.64 The District was invested with substantial legislative authority over its own affairs,65 although Con-

C.M. Green, The Secret City: A History of Race Relations in the Nation's Capital (1967). Negro suffrage in the District had only been recently approved over the veto of President Andrew Johnson. Act of January 8, 1867, 14 Stat. 375.


58. In undertaking a number of ambitious public improvement projects, the new government spent at least three times what had originally been estimated by Congress. See House District of Columbia Committee, Affairs in the District of Columbia, Part II, H. Rep. No. 72, 42d Cong., 2d Sess. (1872). Among the primary opponents of the territorial government were the taxpayers who had to bear the burdens of its profligacy. It was their successful petition effort that aroused Congress to abolish the government. Act of June 20, 1874, 18 Stat. 116.


61. Reorganization Plan No. 3 of 1967, 81 Stat. 948. The plan provided for a presidentially appointed Commissioner and a nine member presidentially appointed city council. Congressional authority remained necessary for local revenue raising and budgeting. Id.


64. Id. §§ 421, 401.

65. Id. § 404; D.C. Code § 1-144 (Supp. 1978); cf. 1973 Act, § 601 ("Notwithstanding any
gress retained, pursuant to its constitutional mandate of "exclusive Legislation" over the District, extensive veto authority. In a number of important areas such as organization and jurisdiction of District courts, and city planning, Congress reserved near-plenary authority for itself. The brief history of District affairs since 1973 has been witness to a narrowing of federal oversight opportunities.

B. History of the D.C. National Representation Issue

The District, while granted varying amounts of local self-government throughout the years, has never been afforded voting representation in the national legislature. While the absence of national representation has been the subject of controversy since the broadsides of Epaminondas in the early 19th century, the debate has intensified on three occasions. More than 150 constitutional resolutions have been introduced to provide representation for the District since the termination of the territorial government, with full-scale congressional hearings on more than twenty occasions.

other provision of this Act, the 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."

67. For example, the District is prohibited from imposing a commuter tax, taxing properties of the United States or the states, and altering building height limitations in the District. Id. § 602. In addition, final approval of the District's budget is also reserved to Congress. Id. §§ 446, 603.

The President of the United States is authorized by the Act to appoint local judges, assume command of the Metropolitan police during an emergency, and sustain a veto of an act of the City Council passed over the Mayor's veto. Id. §§ 404, 434.

68. Augustus Woodward ("Epaminondas") proposed the following amendment to the Constitution in his series of newspaper articles: "The Territory of Columbia shall be entitled to one Senator in the Senate of the United States; and to a number of members in the House of Representatives proportionate to its population." An unsuccessful attempt to retrocede some of the lands of the District to Maryland and Virginia was made in 1803. See C.M. Green, 1 Washington: Capital and Village, 1800-1878 at 30 n.24 (1962) [hereinafter cited as Capital and Village].

The first proposal for congressional representation to be given serious consideration was introduced in 1888.\textsuperscript{70} This proposal would

\textsuperscript{70} S.J. Res. 82, 47th Cong., 2d Sess. (1882). One earlier resolution was reported unfavorably without a vote by the House Committee on Privileges and Elections. H.R. 57, 44th Cong., 1st Sess. (1877). The bill would have granted the District and the territories one member in the House of Representatives.

have provided the District with one Senator, a number of Representatives based upon its population, and participation in the electoral college to the extent of its representation in Congress. The resolution, introduced by Representative Henry Blair of New Hampshire, followed a journalistic crusade by Theodore W. Noyes, publisher of *The Washington Evening Star* in behalf of District representation.\(^7\) Noyes became the most persistent and articulate proponent of District representation at that time. His presentations dominated congressional hearings on this matter well into the 20th century.\(^7\)

While the Blair resolution revived a small measure of interest in District representation, it was not until nearly three decades later that the first congressional hearings on the subject took place.\(^7\) A resolution successfully reported by a Senate committee in 1922 would have empowered, but not required, Congress to provide voting representation for the District.\(^7\) No further congressional action, however, was taken on the proposal.

Although sporadic hearings were conducted on District representation during the 1930s and 1940s, serious congressional interest was not renewed until the late 1950s. There has been sustained legislative attention since then.\(^7\) While proposals were reported out of committees in the House in 1967 and 1972, it was not until 1975 that a representation proposal reached the floor of either

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73. See note 69 supra.


75. See note 69 supra.
house for debate and vote. A resolution, H.J. Res. 280, introduced during the 94th Congress, would have provided the District with full congressional representation, but was defeated in the House with 45 votes short of the requisite two-thirds majority. 76

On two occasions, the District has been authorized to elect non-voting delegates to the House of Representatives. Concurrent with the institution of the District's territorial government in 1871, Congress provided that 77

a delegate to the House of Representatives of the United States, to serve for a term of two years . . . may be elected . . . and shall be entitled to the same rights and privileges as are exercised and enjoyed by the delegates from the several Territories of the United States to the House of Representatives, and shall also be a member of the Committee for the District of Columbia . . . .

The office of the delegate was eliminated in 1874 in the same Act which abolished the territorial form of government. 78 A non-voting delegate was again authorized for the District by the 91st Congress, 79 and the authorization has remained in effect since that time. Periodic efforts to provide non-voting representation in the Senate, 80 and

76. 122 CONG. REC. H2265 (daily ed. March 23, 1976); 34 CONG. Q. WEEKLY REP. 728 (March 27, 1976).

77. Act of February 21, 1871, 16 Stat. 419, 426. On April 21, 1871, the voters of the District elected as Delegate, General Norton P. Chipman, a Republican who served until March 3, 1875, at which time the office was abolished by Congress. Contemporary adversaries attributed his victory in 1871 to "the cupidity of the blacks, the necessities of government clerks, and to the advocacy of mixed schools." C.M. GREEN, CAPITAL AND VILLAGE, supra note 68, at 342. Chipman considered himself "the representative in the new government of national interests." BRYAN, supra note 48, at 598. Despite parliamentary difficulties, the District's delegate was appointed to the House District of Columbia Committee. CONG. GLOBE, 42d Cong., 2d Sess. 9 (1872). See also UNCIVIL WAR, supra note 56, at 107-09.

78. Act of June 20, 1874, 18 Stat. 116. The position of D.C. Delegates was abolished at this time virtually without discussion. 3 CONG. REC. 5116-24, 5154-56 (1874). An effort by Senator Aaron Sargent of California to restore the position was defeated on February 11, 1875. 3 CONG. REC. 1173 (1875).


Under the rules of the House, the delegate is permitted all the privileges of a Member of the House, except those directly related to floor votes. These include full participation in subcommittees and committee proceedings, as well as appointment to conference committees. HOUSE RULES AND MANUAL, 95th Cong., §§ 603, 631, 701(e), 740, 741, 760.

80. For a discussion of the history of proposals to provide non-voting delegates for the
to increase the number of delegates to which the District was entitled in the House have been rejected, generally with little discussion.

A greater voice in national affairs was granted to the District in 1961 through the twenty-third amendment to the Constitution. The amendment permits the District to be represented in the electoral college to that extent to which its population would entitle it if it were a State, except that in no event more than the least populous State. As a practical matter, the District is limited to three electoral votes. Subject only to this limitation and to an inability to participate in deadlocked elections under the twelfth amendment, the twenty-third amendment has conferred upon the District the advantages of statehood with respect to the selection of the President and Vice President.

IV. The Arguments For Representation

The case in behalf of the proposed D.C. Representation Amendment is relatively straightforward:

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District in the Senate, see N. RIMESNYDER, THE POLITICAL EVOLUTION OF THE DISTRICT OF COLUMBIA: CURRENT STATUS AND PROPOSED ALTERNATIVES 30-37 (1975). The mere fact that this issue has always been treated as distinct from provisions for a non-voting delegate in the House is evidence of a presevering appreciation by members of both bodies of the conceptual differences between the chambers.

81. E.g., H.R. 20529, 59th Cong., 2d Sess. (1906) (would have granted District two non-voting delegates). 82. The amendment states:

Section 1. The District constituting the seat of Government of the United States shall appoint in such manner as Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled to were it a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XXIII.

The reference to the twelfth amendment which describes the mechanics of the electoral college process, does not allow the District to participate fully in the twelfth amendment process, as the District does not elect senators and congressmen who are charged with casting votes for presidential and vice presidential candidates in the case of the deadlocked elections.

83. After the 1970 census, each of the following states was entitled to only a single representative in Congress and three electoral votes: Alaska, Delaware, Nevada, North Dakota, Vermont, and Wyoming. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 510 (table 819) (U.S. Dep’t of Commerce 1978).
The District of Columbia is presently the only political entity within the United States whose citizens bear the full responsibilities of government without also sharing in the privileges of determining the policies of government. In a nation premised upon the wisdom of representative government, it is a continuing blemish that citizens remain who are denied such representation in their national legislature.84

District of Columbia representation is a critical issue of civil, indeed human, rights. It is a matter of fundamental injustice to deny the right of representation in Congress to people who must pay the taxes imposed by Congress, abide by the laws promulgated by Congress, and fight the wars engaged in by Congress.85 Compounding this injustice is the fact that a high percentage of the District of Columbia residents are members of a racial minority that, for so many years, had been denied political and civil rights in other respects.86

There are no legitimate constitutional issues raised in opposition. In the absence of constitutional prohibitions against investing the District with some of the privileges of statehood, the debate is reduced to a “matter of policy.”87 This being the case, there is no policy more basic to this country than the fair and equal representation of all citizens in the processes of national decision-making.88

Arguments raised by opponents of D.C. representation are basically camouflage for concerns stemming from the racial, partisan, or ideological make-up of the District electorate.89 The District has been deprived of voting representation for more than 175 years

85. See generally, DEMOCRACY DENIED, supra note 27.
86. E.g., Hearings on District of Columbia Representation in Congress Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. 276-77 (1978) (remarks in behalf of the National Conference of Black Lawyers).
87. DEMOCRACY DENIED, supra note 27, at 14-16.
88. See sources cited in note 84 supra.
as a result of historical accident, congressional inertia, and prejudice. There is simply no valid reason, at this late date, for continuing to deny the citizens of the District the democratic heritage that belongs to all the citizens of the United States.

V. Constitutional Concerns

A. Federalism

With a minor exception there are no substantive limitations upon the amending power;\(^{90}\) therefore, it is generally inappropriate to argue that an amendment will be inconsistent with existing provisions of the Constitution.\(^{91}\) It is nevertheless a fair observation that an amendment can do inadvertent, although very real, injury to the basic governmental structure erected by the Constitution. The extent of that injury is a relevant area of inquiry.

The constitutional amendment proposed by H.J. Res. 554 creates a new breed of political entity within the United States. It proposes the creation of a quasi-state which was never contemplated by the framers of the Constitution. This new creation would be imbued with the same powers heretofore reserved under the Constitution for the states. These powers include the ability to participate in the electoral college and the constitutional amendment process, and the right to elect representatives to both houses of the national legislature. In these areas, all distinctions between the states and the District of Columbia would be removed.\(^{92}\)

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90. The exception is that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate." U.S. Const. art. V. See note 142 infra; but see, e.g., Abbott, Inalienable Rights and the Eighteenth Amendment, 20 Colum. L. Rev. 183 (1920).

91. However, this argument is made periodically. For example, the United States Civil Rights Commission contended that proposals to amend the Constitution to prohibit abortions were "unconstitutional" as violative of various amendments, including the first amendment. U.S. Civil Rights Comm'n, Constitutional Aspects of the Right to Limit Childbearing 27 (1975). See also Leser v. Garnett, 258 U.S. 130 (1920) (challenging adoption of nineteenth amendment); National Prohibition Cases, 253 U.S. 350 (1920) (challenging eighteenth amendment).

In several other areas, however, these distinctions would remain intact. Article IV, section three of the Constitution guarantees the territorial integrity of the states. This requires the states' consent before new states are created from their lands. No such guarantee is made to the District.63

In addition, the tenth amendment to the Constitution provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The United States Supreme Court has interpreted this to mean that there are "attributes of sovereignty attaching to every state government which may not be impaired by Congress."74 The states have had broad discretion in the determination of public policy on purely internal matters even though the scope of what is purely internal has narrowed considerably in recent years.65 The states, according to the Court, are separate


The general rule, as stated by the Court, is:

Whether the District of Columbia constitutes a "State or territory" within the meaning of any particular statutory or constitutional provisions depends upon the character and aim of the specific provision involved. Indeed, such "words generally have different shades of meaning, and are to be construed if reasonably possible to effectuate the intent of the lawmakers. . . ."

District of Columbia v. Carter, 409 U.S. 418, 420 (1973) (quoting Puerto Rico v. The Shell Co., 302 U.S. 253, 258 (1937)) (footnote omitted). In so stating, the Court has simply recognized that, for various purposes, such as the requirement that jury trials be held in the "State" where a crime is committed, the significance of the state is largely administrative in nature. Where, however, a constitutional provision touches upon the most fundamental aspects of federalism, and the relationship between the states and the national government, such as the election of the president and vice president, congressional representation, and the amendment of the Constitution, the Courts have never purported to treat the District of Columbia as a state.

93. There was a territorial violation of the District. In 1846, as a result of a popular petition effort by citizens of the District of Columbia, the District was retroceded to Virginia. See H.R. REP. No. 29-325, 29th Cong., 1st Sess. (1846), reprinted in TINDALL, supra note 22, at 82-88.


and distinct sovereignties acting separately and independently of each other within their respective spheres. 96

This is not the case with respect to the District of Columbia. The Constitution gives the Congress full authority to enact laws and make public policy for the District. 97 While Congress is permitted to delegate at least a portion of this authority to the District itself, 98 this delegated authority may be revoked at any time at Congress’s discretion. With respect to the District, Congress possesses the “combined powers of a general and of a State government in all cases where legislation is possible.” 99 The District, unlike the states, is limited in its ability to regulate its own affairs and organize its own government. Its institutions exist purely at the discretion of Congress.

What are the implications of granting the District some, but not all of the “rights” or attributes of statehood? This threatens to undermine some of the most basic principles of federalism that have guided this nation since its inception. American federalism embraces the division of legislative powers, “between a National government on the one hand, and constituent States, on the other, which division is governed by the rule that the former is a government of enumerated powers, while the latter are governments of residual powers.” 100 Madison observed, in commenting upon the strengths of such a division that 101

96. See License Cases, 46 U.S. (5 How.) 504 (1847).
In the compound Republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

The division of powers between the national and the state governments is a critical part of the structure of "checks and balances" erected by the Founding Fathers in an effort to limit the encroachments of government upon the individual.

One of the primary vehicles through which the states are able to exercise this check upon the authority of the national government lies in the structure of representation in the national legislature. The Senate is designed for the representation of the "States" in the national government, while the House of Representatives is designed for the representation of the "[p]eople of the several States." This resulted from the Great Compromise reached at the Founding Convention between the more populous and the less populous states.

There are those who contend that this basic textbook distinction between the chambers has largely been eroded by the passage of the seventeenth amendment. It has been suggested that by introducing direct popular election of members of the Senate, the process employed for election of representatives, the Senate is no longer representative of the "States" in the same manner as it was prior to the amendment. However, the seventeenth amendment only...

102. U.S. CONST. art. I, § 3, cl. 1; id. amend. XVII. "The Senate . . . will derive its powers from the States as political and coequal societies." FEDERALIST, supra note 20, #39 at 244.
105. However, note the observations of Rep. Seiberling of Ohio on the nature of representation in the Senate: "I submit they represent the people of the State even though they are from each State. I think that is the fact, whatever the semantics that we have chosen in the Constitution." Hearings on Voting Representation in Congress for the District of Columbia Before Subcomm. No. 1 of the House Comm. on the Judiciary, 92d Cong., 1st Sess. 85 (1971).
addresses the methods by which members of the Senate are to be selected. It does not alter, but rather reinforces, the basic structure of the Compromise and the nature of representation in the Senate. While article I, section two refers, in speaking of the House, to representation “from any State,” both article I, section three and the seventeenth amendment, in speaking of the Senate, refer to representation “of any State.” In addition, if the Senate is indistinct from the House in representing the “[p]eople,” why are the people represented unequally in the Senate?

Providing the District of Columbia with full representation in the Senate would erode that body’s contribution to preserving the equilibrium between the federal and state governments. The decision to link Senate representation to statehood was not arbitrary. In his Commentaries, Mr. Justice Story observed, “[t]he equal vote allowed in the Senate is . . . at once a Constitutional recognition of the sovereignty remaining in the States, and an instrument for the preservation of it. It guards them against . . . a consolidation of the States into one simple republic.”

Since the District of Columbia is not a state and does not possess the sovereignty that affixes to statehood, the District does not have this same interest in Senate representation. Certainly, its citizens are as affected by the great mass of legislation considered by the Senate as are the citizens of the states. However, it is the nature of District representation rather than the source of that representation which is objectionable. The District’s infirmity with respect to national representation is not attributable to the qualities or characteristics of its citizens. District residents would immediately be entitled to suffrage upon departure from the District. Rather, this infirmity is attributable to the fact that the District is not a state and cannot bear the same commonality of interest in its Senate representation as do the states.

Madison observes of the national legislature,

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[t]he prepossessions, which the members themselves will carry into the federal government, will generally be favorable to the States. . . . [A]mbitious enroachments of the federal governments on the authority of the State governments would not excite the opposition of a single State, or of a few States only. They would be signals of general alarm. Every government would espouse the common cause. A correspondence would be opened. Plans
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106. 2 J. Story, Commentaries on the Constitution of the United States § 696 (1st ed. 1833); see Federalist, supra note 20, #62 at 378.
of resistance would be concerted. One spirit would animate and conduct the whole.

The Senate was intended to be comprised of individuals whose primary loyalty was to the states and not to the national government. The District does not have this same self-interest in resisting the "ambitious encroachments" of the national government. Its Senators and Representatives would not have any concern for balancing the interests of the national and state governments. No pressure would be brought to bear upon them from local officials, administrators, and legislators to consider the impact of their actions upon state prerogatives. Unlike the other 100 Senators, the Senators from the District would have no loyalty or attachment to a state, no natural loyalty to the principle of states' rights, and no loyalty to preserving the balance of power between the national and state governments; their sole loyalty would be to the national government. The spirit which pervades Congress and causes it to be "dissinclined to invade the rights of the individual States" would be absent in the Representatives of the District.

The Senate is not the only custodian of state interests within the federal government. The Constitution also provides Representatives for the states, although on a different basis than the Senate. It is evidenced by the explicit language of the Constitution which allots a minimum of one Representative to each state, regardless of population. In addition, it is evidenced by the fact that congressional districting is a function of the states, and by the nature of the House's involvement through the twelfth amendment in the presidential selection process wherein each state is entitled to a single vote. And lastly, it is manifested repeatedly in the informal

107. Federalist, supra note 20, #46 at 296, 298.
It doubles the security to the people by requiring the concurrence of two distinct bodies in schemes of usurpation or perfidy, where the ambition or corruption of one would otherwise be sufficient. . . . No law or resolution can now be passed without the concurrence, first, of a majority of the people, and then of a majority of the States.

108. "[A] state should be represented by one who, besides an intimate knowledge of all its wants and wishes, and local pursuits, should have a personal and immediate interest in all measures touching its sovereignty, its rights, or its influences." 2 J. Story, Commentaries on the Constitution of the United States § 729, at 207 (1st ed. 1833).

109. Federalist, supra note 20, #45 at 296, 298.

110. U.S. Const. art. I, § 2, cl. 3.

111. Id. amend. XII.
“folkways” and procedures of the House, as, for instance, in its manner of balancing committee appointments by states.

With respect to both the Senate and the House, although primarily the former, the states are “the strategic yardsticks for the measurement of interest and opinion, the special centers of political activity, the separate geographical determinants of national as well as local politics.” The states, acting in their sovereign capacity, created the national government, and the principal branches of the federal government owe their existence to the states.

B. The States and the Amendment Process

Considerations similar to those which justify the preeminent role of the states in the national legislature exist to justify their equally important role in the constitutional amendment process. Although each of the amendments to the Constitution has been proposed by Congress and submitted to the states for ratification, article V provides an alternative method for ratification designed to safeguard the right of the states to change the Constitution in the event that Congress proves unwilling to act: the convening of a constitutional convention. Upon the application of the legislatures of two-thirds of the states, Congress “shall call a Convention” to propose amendments. According to Alexander Hamilton, “[b]y the fifth article of the plan, the Congress will be obliged on the application of the legislatures of two thirds of the States... to call a convention’. Nothing in this particular is left to the discretion of

113. Although never successfully invoked, the constitutional convention alternative has met with near success on such matters as direct popular election of senators, limitations on income tax rates, and overturning the Supreme Court’s reapportionment decisions. The first effort was averted by congressional proposal of the seventeenth amendment, while the other two proposals narrowly fell short of the requisite two-thirds states petitioning. See generally C. BRICKFIELD, PROBLEMS RELATING TO A FEDERAL CONSTITUTIONAL CONVENTION, 85th Cong., 1st Sess. (Comm. Print 1957); Federal Constitutional Convention: Hearings of S. 2307 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess. (1967). The Federal Constitutional Convention Procedures Act, S. 215, was approved by the Senate during the 1st session of the 92nd Congress (1971) but failed to be reported from the House Committee on the Judiciary. The bill established procedures for invoking and convening a constitutional convention called by Congress in response to state petitions under article V. See S. REP. No. 336, 92d Cong., 1st Sess. (1971). Many procedural questions continue to surround the constitutional convention method.
Through the convention mode of amendment, the states are empowered to alter the Constitution in the absence of any meaningful participation by the national government. This reflects the intention of the Founding Fathers that the amendment process should guard the rights of the states.\textsuperscript{116}

In 1793, following a decision by the Supreme Court to accept jurisdiction in a suit against the State of Georgia by a citizen of another state,\textsuperscript{117} an effort was made to amend the Constitution to prevent the recurrence of this violation of the principle of sovereign immunity. With "vehement speed,"\textsuperscript{118} the eleventh amendment was ratified in less than one year. This is particularly impressive considering the absence of modern communications and transportation and the infrequency of state legislative sessions. What is instructive is that the states responded to a perceived threat to their independence in exactly the manner foreseen by Madison.\textsuperscript{119} An encroachment upon their sovereignty served as a "signal of general alarm," leading directly to a "concerted" plan of resistance.

What, however, would have been the response of the District of Columbia to such a situation? Would it have felt the same urgency as the states? The absence of any sovereignty in the District makes this unlikely. In considering proposed amendments of the Constitution, the District would be operating under different premises than would the states. It would be subject to different motivations than the states, and would not likely be influenced by the same range of complexities as the states.\textsuperscript{120}

Substantial concern has been expressed in recent years\textsuperscript{121} with

\begin{itemize}
  \item \textsuperscript{115} Federalist, supra note 20, \#85 at 526 (emphasis added).
  \item \textsuperscript{116} You will not find an article [in the Constitution] which is not founded on the presumption of a clashing of interests. . . . It was that jealous caution which foresaw the necessity of guarding against the encroachments of large States . . . . [T]here was no safety in association unless the small States were protected here.
  \item \textsuperscript{117} Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).
  \item \textsuperscript{118} Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 708 (1949) (Frankfurter, J., dissenting).
  \item \textsuperscript{119} See note 107 supra and accompanying text.
  \item \textsuperscript{120} See pt. VI(A) infra.
\end{itemize}
respect to section two of the proposed Equal Rights Amendment which would accord Congress "the power to enforce, by appropriate legislation, the provisions of this article." It is not unprecedented language, but it is language that has caused increasing concern among many state legislators. Similar language in the thirteenth and fourteenth amendments has been interpreted by the courts as investing in Congress far greater power to legislate in traditional areas of state jurisdiction than had originally been intended.\(^{122}\)

As the District is ultimately subject to congressional or presidential reversal in matters of local legislation, it is difficult to conceive that this concern would arise within whatever body is designated to ratify constitutional amendments for the District. An important aspect of a proposed constitutional amendment would be outside the scope of debate in the District because the District is unlike each of the other ratifying entities. Indeed, it is easy to imagine a reaction exactly opposite to the natural response of the typical state legislator. There may exist a natural feeling that if one's own jurisdiction must be subject to the full weight of congressional policy-making in a given area, as is the District, then other jurisdictions should be subject to these dictates as well. If the District is circumscribed in its decision-making, why should the states be entitled to any more freedom? The inherent nature of the District as a political and governmental entity is distinct from that of the states. It is to be expected that its responses to policy initiatives will be influenced by those differences.

C. The People of the District

1. Effect on the Constitutional Amendment Process

The ambiguous language of H.J. Res. 554 would present many problems which would have to be settled should the amendment be ratified. The question arises as to which body within the District will carry out responsibilities invested by the Constitution in the

“Legislature” or in the “Executive Authority.” As a unique entity, the District possesses neither a state legislature nor a governor. Like most municipalities, it has a city council and a mayor. Which body within the District will be charged, under article V with proposing and ratifying constitutional amendments? Which body within the District will establish congressional districts if the District were ever to be entitled to more than one Representative? How will the qualifications of House and Senate electors be determined? Which body is to determine the “Times, Places, and Manner” of holding congressional elections within the District? Which body is to appoint electors to the electoral college? Who is to issue writs of election, and make appointments, for House and Senate vacancies respectively? Is the “Executive Authority” within the District the Mayor or the President of the United States?

H.J. Res. 554 merely states that “[t]he exercise of the rights and powers conferred under this article shall be by the people of the District constituting the seat of government, and as shall be provided by the Congress.” A number of problems arise from this purposely ambiguous language. With respect to constitutional amendments, for example, there are constitutional difficulties if “Congress” or the “people” participate in ratification. If the “people of the District” are empowered to participate in the ratification process, then the citizens of the District alone among United States citizens will enjoy this privilege. Article V specifies that the elected representatives of the “people,” either in convention or in the state legislatures, are to be involved in this function. The Supreme Court noted in *Leser v. Garnett* that “the function of a

123. The term “Legislatures” as used in article V means deliberative, representative bodies of the type which in 1789 exercised the legislative power in the several states. Constitution of the United States Annotated, S. Doc. No. 82, 92d Cong., 2d Sess. 859 (1972). There is no body of this precise character within the District.

124. *Cf.* U.S. Const. art. I, § 2, cl. 1 & amend. XVII.


126. *Cf.* id. art. II, § 1, cl. 2.

127. *Cf.* id. art. I, § 2, cl. 4 & amend. XVII.


129. Ratification of amendments proposed by either Congress or a constitutional convention is to be done by the “Legislatures” of the several states or “Conventions.” U.S. Const. art. V. Legislation approved unanimously by the Senate in 1971 would have had delegates selected on the basis of popular election. Federal Constitutional Convention Procedures Act, S. 215, 92d Cong., 1st Sess. (1971).

130. 258 U.S. 130 (1922).
State legislature in ratifying a proposed amendment to the Federal Constitution, like a function of Congress in proposing the amendment, is a Federal function derived from the Federal Constitution; and it transcends any limitations sought to be imposed by the people of a State." H.J. Res. 554 would introduce into the Constitution the novel principle that entities other than state legislatures may participate in the article V ratification process.

The proposed amendment leaves unclear what the relationship is to be between the "people of the District" and "Congress" in the constitutional amendment process. Does Congress have the power to ratify amendments directly, or can it only establish the manner in which the people shall express their will? Can Congress, if it chooses, permit a body representative of the people to ratify a proposed amendment? Can Congress veto the decision on ratification reached by either the people or a representative body? Can Congress be compelled to enact legislation implementing section one of H.J. Res. 554 which allows the District to participate in the article V process?

To the extent that Congress is given any role in the ratification of constitutional amendments, as in section two of the D.C. representation amendment, another novel principle is introduced into the Constitution. Congress, under article V, has no role whatsoever in the process of ratifying amendments. Congress is authorized to propose amendments for the approval of state legislatures. Any further action by Congress represents an intrusion into the constitutional province of the states. Heretofore, the proposing authority and the ratifying authority under article V have been separate and distinct.

Permitting Congress to be involved in the ratification process, as


132. This proposition has been called into question by Congress's decision to extend the ratification period for the proposed Equal Rights Amendment, H.J. Res. 638, 95th Cong., 2d Sess. (1978). Opponents of the time extension argued that Congress was powerless to involve itself in the amendment process once an amendment had been submitted to the states. See, e.g., Hearings on The Equal Rights Amendment Extension Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 95th Cong., 1st & 2d Sess. 105 (1977-78) (testimony of Dean Erwin N. Griswold). Supporters of the extension argued that, with respect to "matters of detail," the Congress is not precluded from such action. See, e.g., id. at 122 (testimony of Prof. Ruth Bader Ginsburg). See also Dillon v. Gloss, 256 U.S. 368 (1921); Coleman v. Miller, 307 U.S. 433 (1939).
under section two of H.J. Res. 554, is to erase this line of division and allow Congress both to propose, and to participate in the ratification of, amendments. An inherent conflict of interest is created. It can be reasonably expected that Congress will be sympathetic to its own proposed amendments. Also, it is more than likely that where alternative procedures are considered which will make ratification either more or less probable (as, for example, whether to impose super-majorities for ratification, as some states have chosen), Congress will opt for procedures that facilitate ratification.

In his classic work on constitutional amendments, Professor Orfield observes: “The status of the amending body has an important bearing on the controversy over the nature and extent of the powers of the Federal government.” In providing Congress with an unprecedented opportunity for a voice in the ratification process, H.J. Res. 554 subtly may alter the balance of power between the states and the federal government. By itself, no shift of great magnitude is effected by this resolution. Nonetheless, it remains a valid question whether at this time in our history any further shift in this direction ought to be tolerated.

2. The Effect on the Presidential and Vice Presidential Election Process

Problems arise also with respect to the impact of section two upon the District’s participation in the presidential and vice presidential election process. The citizens of the District again seem to be accorded privileges beyond those accorded to citizens of the states. Section two expressly involves the “people of the District” in the national electoral process. While there has been much concern about the electoral college in recent years given expression through a number of serious reform efforts, the substitution of direct popu-


134. L.B. ORFIELD, THE AMENDING OF THE FEDERAL CONSTITUTION 164 (1942). “That the rights of neither the States nor the Federal government will be impaired is guaranteed by their joint action in the amending process . . . ." Id. at 165.

135. The Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary has held hearings on electoral college reform periodically since early in 1966. See, e.g., Hearings on Election of the President Before the Senate Comm. on the Judiciary, 89th Cong., 2d Sess. (1966); Hearings on Election of the President Before the Senate Comm. on the Judiciary, 90th Cong., 1st Sess. (1967); Hearings on Electing the President Before the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. (1969); Hearings on the Electoral College and Direct Election Before the Senate Comm. on the Judiciary, 95th Cong., 1st Sess.
lar elections in place of the electoral college should not come inadvertently in the vehicle of a District of Columbia representation amendment. It is only through the states that the popular will is expressed in our current system of government. Both article II, section one, and the twelfth amendment require that national elections be conducted through legislature-appointed "electors," not the "people." H.J. Res. 554 grafts upon our Constitution an alien form of direct or absolute democracy uncompromisingly rejected by its framers.\(^{136}\)

Proponents of H.J. Res. 554 argue that reference in section two to the "people of the District" must be read in conjunction with language in section one specifying that, for purposes of national elections, the District is to be treated "as though it were a State."\(^{137}\) Section two, they contend, simply provides the "people" with the right to establish rules, subject to Congress's "reserve" authority, on such trivial matters as opening and closing poll times. Proponents contend that the intention is to treat residents of the District of Columbia in a manner identical to the residents of the states.\(^{138}\)

At the very least, however, the language of H.J. Res. 554 is contradictory and ambiguous. Section one purports to treat the District in the same manner as a "State." Section two expressly provides that the exercise of section one rights be done in a manner unlike that of the states. Section three, by repealing the twenty-third amendment, eliminates the only basis by which the District can exercise section one rights in the manner of the states.

By repealing the twenty-third amendment, H.J. Res. 554 repeals the only constitutional authority for D.C. representatives to the electoral college. It is only through the provisions of that amendment that the District is currently entitled to electors with a vote

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\(^{137}\) Id. at 286.
in the college. Rather than borrowing the precise language of the twenty-third amendment with respect to the appointment of electors, the D.C. Representation Amendment substitutes language less clear. This language contains only the implication that electors are to be appointed to represent the District. In view of the specificity of the twenty-third amendment and of section one of article II, in providing for the appointment of electors, a more sensible interpretation might be that the absence of such language in H.J. Res. 554 combined with the reference to the "people of the District" implies that the District is to be deprived of electors. Even if this view is not adopted, it is perplexing that the drafters of the D.C. Amendment chose to provide Congress with unchecked discretion over appointing D.C. electors rather than imposing the guidance of the twenty-third amendment. One may only wonder which alternative appointment procedures the drafters might have contemplated.

An integral part of the quandary involving the provisions of section two is the mandate in section one to treat three separate and distinct types of constitutional voting procedures as the same. Voting methods for electing members of Congress, electing the President and Vice President, and ratifying proposed amendments, involve differing degrees of popular participation and involvement by state legislatures. By combining these procedures in one sentence in section one, the drafters of H.J. Res. 554 have created the almost impossible task of isolating in section two the unique requirements of each procedure that would enable the District to participate in a manner identical to that of the states. The exercise of the "rights and powers" in section one demands varying degrees of participation by the people, state legislative authorities, and state executive authorities. They cannot be fused together in a single sentence without sacrifice of the amendment's guidance on the way District participation in these procedures is effected. While the economy of language in H.J. Res. 554 may be admired, the resultant vagueness is fatal to an amendment involving such delicate constitutional matters as presidential and vice presidential elections, congressional representation, and the process of amending the Constitu-

139. See note 82 supra.
140. "For purposes of representation in the Congress, election of the President and Vice President, and article V of this Constitution, the District constituting the seat of government of the United States shall be treated as though it were a State." H.J. Res. 554, § 1, 95th Cong., 2d Sess. (1978).
tion. While strongly supportive of H.J. Res. 554, the Attorney General has observed with respect to section two: "The purpose of Constitutional enactments is to provide broad guidelines for the conduct of government. At the same time, they must not be so unspecific as to provide no guidance at all."

Section two can be interpreted in conjunction with section one in a variety of ways. Interpretations differ as to the degree of congressional authority over District matters. As some of the questions arising out of the relationship between sections one and two are likely to be resolved by Congress itself and not by the courts due to the "political questions" doctrine, the effect of H.J. Res. 554 is to provide Congress with discretion to determine the nature of its involvement in constitutional processes at least partially designed to limit the very powers of Congress itself.

D. Equal Suffrage in the Senate

The Constitution contains an express limitation on the substan-

141. See also Hearings on Representation for the District of Columbia Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 132 (1977) (statement of Patricia M. Wald, Assistant Attorney General, Office of Legislative Affairs); id. at 152 (statement of Prof. Stephen Saltzburg of the University of Virginia Law School).

142. The general rule as to whether a matter is a "political question" has been stated in Baker v. Carr, 369 U.S. 186 (1962):

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217.

During the debate over extension of the ratification period for the proposed Equal Rights Amendment, proponents of ratification argued for a broad interpretation of the "political questions" doctrine with respect to article V. Exemplifying this approach was Prof. Ronald Rotunda of the University of Illinois College of Law: "[I]t may be the rule that all amendment questions relating to the constitutionality of the amendment procedures should be regarded a political . . . . Congress is free to do as it will . . . . [I]t alone will be the ultimate arbiter." (Aug. 3, 1978) (unpublished testimony before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary). One might argue that the "political questions" doctrine, which avoids any resort to "checks and balances" or "separation of powers," is particularly indefensible with respect to procedures for amending the very Constitution from which these latter principles are derived.
tive nature of the amending power. The last clause of article V provides that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate." The intention is to require unanimous agreement of the states with respect to constitutional amendments which infringe upon this right of the states. However, there is virtually no law on the scope of this provision.

The intent of the Great Compromise, from which this provision resulted, was to ensure that the least populous states would be forever protected in their ability to exert influence in Congress. Madison commented:  

The exception [to the amending power] in favor of the equality of suffrage in the Senate was probably meant as a palladium to the residuary sovereignty of the States, implied and secured by that principle of representation in one branch of the legislature; and was probably insisted on by the States particularly attached to that equality.

Does the District of Columbia Representation Amendment violate this provision of the Constitution? Commentators have observed that "equality of suffrage" does not refer to the maintenance of a fixed aliquot share of representation in the Senate, but rather to the maintenance for each state of the same number of Senators. A proposal to provide the ten largest states of the Union with a third Senator would fall within the purview of the final sentence of article V. As a matter of policy, to provide New York or California with three Senate votes would do even less to deprive Delaware of its influence upon the deliberations of the Senate than would the D.C. Amendment. A proposal to admit a new state into the Union, however, would not fall within that article as it would reduce each state's influence in the upper house from 1/50 to 1/51.

143. U.S. Const. art. V. This apparently is the only remaining substantive limitation in the Constitution on the federal amending power. See L.B. Orfield, The Amending of the Federal Constitution 83-84 (1942); cf. id. at 87-126 (implied limitations on exercise of amending power).

144. The U.S. Supreme Court in Leser v. Garnett, 258 U.S. 130 (1922), failed even to comment upon the merits of this contention when it was used to attack the nineteenth amendment which established women's suffrage.

145. "The equality of representation in the Senate is another point which, being evidently the result of compromise between the opposite pretensions of the large and the small States, does not call for much discussion." Federalist, supra note 20, #62 at 337. See Scheips, The Significance and Adoption of Article V of the Constitution, 26 Notre Dame Law. 46 (1950).

146. Federalist, supra note 20, #43 at 279.

147. See, e.g., Franchino, supra note 19, pt. II at 410; Raven-Hansen, supra note 18, at 189.
This follows from the authority given Congress in article IV, section three to admit new states into the Union. However, it does not necessarily follow under other circumstances. H.J. Res. 554 would provide Senate representation to a non-state. This would necessarily dilute the influence of the states, considered in the aggregate, in the Senate. The "equal suffrage" of the accumulated states would be reduced by the proportion that non-states are represented in that body. As this occurs, "equal suffrage" of the individual state must also be reduced. It is the implication of article V that only "States" are to be given Senate representation. The framers fully contemplated a gradual reduction in each state's influence as new states were admitted into the Union and assumed a share of that influence.¹⁴⁸ They did not contemplate that the sum of that influence belonging to the states would ever be diminished.

The "equal suffrage" clause must also be interpreted in light of the differences in character of the Senate and the House. The equal representation of the states in the Senate contrasts with the unequal population-based representation in the House. The only manner in which the states are equal, and which justifies the "equal suffrage" clause, is in their inherent attribute of being a state. Read in this manner, the clause precludes District representation in the Senate. The District lacks the basic quality that underlies the "equal suffrage" clause, the quality of statehood.

VI. Policy Concerns

There are many arguments based on policy considerations which belie criticisms by proponents that opposition is largely premised upon racial or partisan motives.

A. Nature of the District

1. The Nature of the Geography

One Senator was moved during debate on H.R. Res. 554 to ask about the proposed Senators-to-be from the District: "How do they stand on soybeans?"¹⁴⁹ This question grasps the greatest difficulties

¹⁴⁸ See U.S. CONST. art. IV, § 3; art. I, § 3, cl. 1. "Again and again, in adjudicating the rights and duties of the States admitted after 1789, the Supreme Court has referred to the condition of equality as if it were an inherent attribute of the Federal Union." THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION, S. DOC. No. 92-82, 92d Cong., 2d Sess. 843 (1973). See Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845).
with providing representation for the District perhaps more than he appreciated.

Far more than any state, the District of Columbia is an homogeneous political entity. Within the area of the District, there is no farming, no mining, no ports or harbors, no rural or suburban communities, no resort areas, and no manufacturing or industry. The District has aptly been called a "company town." The federal government dominates the landscape of the District. The federal government employs more than 33% of the work force of the District, with another 25% employed in industries related to the presence of the federal government, such as consulting firms and lobbying offices.150

While the District's population is larger than that of at least nine states, its geographical area is less than one-fifteenth that of the smallest state.151 This ensures that the District's political characteristics are entirely different from that of every state. There is not that "dissimilarity in the ingredients [nor that] diversity in the state of property, in the genius, manners, and habits of the people" that Hamilton observed in the states.152 The Senators from the District of Columbia will find it unnecessary to balance the variety of elements that must be considered by the senators from the states in representation of their constituency. They will find it easier to bring to their work predispositions unaffected by the moderating influence of political pluralism. In addition, they will have no need to handle possible animosity to federalism emanating from their con-


151. The District's population in 1970 was 756,510, larger than Alaska, Nevada, Wyoming, Vermont, South Dakota, North Dakota, New Hampshire, Montana, and Idaho. On the basis of recent estimates, it is expected that the 1980 census will show the District having fallen behind at least New Hampshire, Montana, and Idaho. U.S. BUREAU OF THE CENSUS, POPULATION ESTIMATES AND PROJECTIONS (Table I) (Dec. 1978). The District's geographical area is approximately 67 square miles. The smallest state is Rhode Island which has an area of 1214 square miles. The 48 states of the contiguous United States possess an average area in excess of 60,000 square miles. NEWSPAPER ENTERPRISE ASS'N, INC., THE WORLD ALMANAC: 1978 at 191, 456.

152. FEDERALIST, supra note 20, #60 at 367.
stituency. There will be no state legislators or city councilmen urging them to keep Washington out of their affairs.

2. The Nature of the Population

Not only is there an absence of diversity in the population of the District, but its homogeneous citizenry is at fundamental odds with the citizenry of the rest of the nation. There is a natural conflict between the interests of the District and its residents and the interests of the states and their residents. The District is essentially a non-materially productive political entity that subsists on tax revenues. As observed by Senator S.I. Hayakawa of California during Senate hearings on District representation,

[the District's major economic concern, then, is not how much wheat it can grow, or chickens it can hatch, or shoes it can manufacture, but rather how much money it can get the wealth-creators of the fifty States to send it. It lives and works only on the strength of other people's taxes.

As representatives of the federal bureaucracy in Congress, the District's senators and congressmen would bring with them a bias in favor of perpetuation of this bureaucracy and a bias against dismantling it.

This must be distinguished from political liberalism, or a philosophy in support of a strong, activist central government. The constituencies of many states demand of their representatives in Congress some element of liberalism or conservatism. To the constituency of the District, a large federal work force, the administration of a large number of well-funded programs becomes not simply a means of achieving some desired policy objective, but a policy objective in and of itself. A senator from a "liberal" state encounters no opposition from his constituents to the elimination of obvious instances of bureaucratic "fat," government "waste," and agency duplication. A senator from the District of Columbia would have to respond in a different manner. For him, the whole of the federal government is a "porkbarrel."

153. In addition to its public employee population, approximately one-sixth of the total resident population of the District receives some form of public welfare assistance. One commentator has described the District, in economic terms, as one "huge stomach." The Chicago Tribune, Sept. 16, 1978, at 8.

B. Need for Representation

It is argued that regardless of the nature of the representation that the District would send to Congress, District residents are entitled to more than a non-voting delegate in the House of Representatives. As stated by D.C. Delegate Walter Fauntroy:

Are we to say to the world, and much more importantly to each other, that ours is a representative democracy for all Americans except for the citizens of the nation's capital; that we have no second-class citizens, except those who reside in the capital of our nation; that we have established the principle of "one-man, one-vote" for all Americans, except the citizens of the capital of the free world?

The people of the District are entitled to have their voice heard in the formulation of national policy to the same extent as the citizens of the states.

It may be that the citizens of the District, rather than presently being deprived of influence within Congress, actually exercise disproportionate influence in that body. The District may already be too powerful in the affairs of the national government.

District of Columbia Circuit Court Judge MacKinnon has observed that

it is commonly recognized that [the District's] close proximity to the seat of Government, the influence of a favorable local press that articulates their position and the frequency with which members of Congress, long resident in the District and its environs, tend to acquire similar local interests to those of local residents, on many issues, gives them more actual influence in Congress than citizens of states.

This has been recognized ever since George Mason voiced his concern about allowing national affairs ever to take on a "provincial tincture."

There are several factors accounting for the District's powerful influence upon the affairs of the national government. The physical proximity to the seat of the government ensures a certain measure of communication with national lawmakers. As one legislator observed more than a century ago in speaking of District residents,

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157. See note 21 supra and accompanying text. See also note 37 supra (remarks of Rep. Dennis).
“[t]hey come up to us at our homes, they come up to us on the street, they come at social entertainments, they come in the lobbies of Congress, they come into these halls themselves where their honored citizens are frequently admitted.” District residents express their views to Congress both through the informal social contacts their proximity permits and through easier access to more formal lines of communication such as lobbying and congressional hearings. While they possess far less direct influence on any single member of Congress than do his constituents, District residents exert a far more prevalent, though general influence over the Congress as a whole.

Residents of the District exert significant indirect influence upon Congress through the local media. The problems, needs, and concerns of the District, unlike those of Wichita or Dubuque, inevitably come to the attention of nearly all members of Congress through District radio, television, and newspapers. Through the media, the sentiments and informed opinion of the District’s residents are impressed daily upon the consciousness of these legislators. The widely acknowledged influence of a paper such as The Washington Post is not limited to such matters as SALT, federal budgets, and Middle Eastern affairs. Interspersed among its editorials and background analyses are those written just as forcefully and perceptively on such matters as the District’s mass transportation needs, the District’s need for authority to impose a commuter tax, and the necessity of District representation in Congress. The typical letter-to-the-editor read by Senator Smith on Sunday morning is far more likely to be from a GS-15 bureaucrat at the Department of Energy than from a pharmacist in Laramie, Wyoming.

As Congress now meets on a full-time, year-round basis, legislators must maintain permanent homes in and around the District, and reside there for a considerable portion of the year. As part of the District community, they are naturally aware of the community’s problems and have a strong self-interest in solving these problems. Senators and members of the House must pay the same

158. 3 CONG. REC. 1170 (1875) (remarks of Senator Allen G. Thurman of Ohio). He further observed that “no people in the world have ever been brought in as close contact with their lawmakers as are the people of the District of Columbia with their lawmakers, the Congress of the United States . . . . There is not a thought they have, there is not a wish they indulge, that cannot be communicated and is not communicated to scores and scores, I might say hundreds of members of Congress in every week.” Id.
taxes as their neighbors in the District. They must abide by virtually all of the same laws and ordinances. They must travel the same roads and highways to work during the day, and walk the same sidewalks during the night. They and their families must carry on their day-to-day lives within the same general environment. Because most of them anticipate stays of substantial duration in the Washington, D.C., area, it is not surprising that the vast majority of senators and congressmen should be genuinely concerned about the welfare of the District. 

Furthermore, the District is the nation’s only municipality that has a permanent legislative committee or subcommittee in each house of Congress devoted solely to its affairs. The House Committee on the District of Columbia is a standing committee with full jurisdiction over “all measures relating to the municipal affairs of the District . . . other than appropriations.” The House Committee on Appropriations Subcommittee on the District of Columbia fills in that jurisdictional gap. In the Senate, the Senate Committee on Appropriations Subcommittee on the District of Columbia also has jurisdiction over District affairs. While these panels may not always be as responsive to the District’s desires as District leaders would prefer, the same can be said about Congress as a whole with respect to its voting constituencies. Far more than in the past, however, the powerful District of Columbia Committee in the House has been viewed as a “clientele” committee. Membership on these panels is predominantly sought by those congressmen eager to secure benefits for the committees’ “constituency,” as opposed to those committees where membership is motivated by a variety of other factors. Third in seniority on the committee is the District’s

159. Since 1956, more than 93% of the incumbents seeking reelection to the House of Representatives have been successful. During this same period, more than 80% of the incumbents seeking reelection to the Senate have been successful. See CONGRESSIONAL QUARTERLY, ELECTING CONGRESS 9 (April 1978). Also, a large number of defeated or retired Senators and Representatives choose to remain in the District of Columbia following their careers in Congress. Their presumed political sophistication notwithstanding, they are apparently willing to tolerate the constitutional infirmities of District residence. 35 Cong. Q. WEEKLY REP. 1969 (Sept. 17, 1977); N.Y. Times, April 14, 1975, at A27.

160. H.R. R. 10(f).


162. The evolution of the D.C. Committee is best illustrated by the changes in committee leadership within recent years. From 1948 to 1972, the panel was chaired by Rep. John McMillan of South Carolina, a virulent opponent of both D.C. representation and home rule. His defeat in a 1972 Democratic primary was partially the result of efforts by civil rights
non-voting delegate in Congress who participates and votes on an equal basis with other members of Congress in the committee. 163

Finally, the District carries its share of influence in Congress due to the nature of the employment of its residents. An extremely high percentage of the District's population is employed within the federal government. 164 Unlike the rest of the country's citizenry, the citizens of the District directly participate in the federal government. District residents comprise a majority of the congressional staffers which draft laws, the lobbyists who shape laws, the members of Congress who approve laws, the bureaucracy that administers and interprets laws, and the public relations "consultants" who communicate laws to the rest of the country. The influence exerted by these persons upon the development of laws is necessarily affected by their environment, Washington, D.C. The citizens of the District are the embodiment of the government. This is particularly true during a period in which the bureaucracy has grown in power and influence at the expense of the elected legislative branch.

The citizens of the District may lack national representation in the narrowest sense. However, in terms of effective input into the determination of national policy, the objective of that representation, their voices are heard loudly and persistently.

C. District of Columbia Finances

Proponents of D.C. representation are quick to point out that citizens of the District, though denied a vote in Congress, must pay federal income taxes, 165 evoking the memory of the colonists' cry of "taxation without representation is tyranny." 166 This analogy, how-

organizations and the D.C. city leadership to mobilize the long dormant black vote in Rep. MacMillan's district. See 30 CONG. Q. WEEKLY REP. 2337 (Sept. 16, 1972); 127 AMERICA 277 (Oct. 14, 1972); id. at 485 (Dec. 9, 1972). He was succeeded by Rep. Ronald Dellums of California, who is interested in eliminating virtually all congressional involvement in the affairs of the District.

163. U.S. House of Representatives, Rules and Manual § 740 states that the Delegate from the District of Columbia "shall" serve as a member of the House Comm. on the District of Columbia.

164. See note 150 supra.


ever, is unsound. The residents of the American colonies were subjected to a variety of burdensome taxes which the British Parliament imposed upon no other citizens of the empire. The tax imposed by the Tea Act of 1773, for example, was expressly designed to undercut American tea merchants. In contrast, the citizens of the District are subject only to those federal taxes that are borne in equal weight by all the citizens of the United States. In addition, District citizens enjoy the benefits of extraordinary government services, while the same could certainly not be said of the colonists. Indeed, the District is the beneficiary of more direct federal assistance than any other municipality in the country except New York City, which has at least a dozen times the population of the District.

The District receives an annual unqualified federal payment in excess of $200 million (approximately 20% of its total budget);
more than $30 million in revenue-sharing funds; and is allowed to participate on an equal basis in every federal grant-in-aid and entitlement program. In addition, the District, alone among municipalities and states, is permitted to borrow directly from the federal treasury. It is currently the recipient of at least $6 billion in federal funds for a major subway system. Its football stadium bonds are being retired by the federal government. Also, a local convention center is being erected with the assistance of the federal government. Under the D.C. Representation Amendment, the District would continue as the beneficiary of these and similar programs of financial assistance from the federal government.

As a result of such largesse, the District spends far more per capita than any comparably sized city. The District spent nearly $2900 for each of its 730,000 residents in fiscal year 1975. During this same period, thirteen of eighteen similarly-sized cities spent less than one-half this amount per citizen. Indianapolis spent less than one-third the amount per citizen as the District. Closest to the District was Boston, which spent approximately $2000 per head, roughly 70% of the District's expenditure.

for the burdens of the federal presence upon the District. See N.F. Rimensnyder, A HISTORY OF THE FISCAL RELATIONS BETWEEN THE UNITED STATES AND THE DISTRICT OF COLUMBIA: 1790-1975 (1974). The District's tax base, for example, is reduced because of the heavy concentration of federal buildings within the District. However, the States of Maryland and Virginia ceded what is now the District to the federal government. See notes 24-26 supra and accompanying text. They did not cede it for the pleasure of the local government and its citizens. The territory within the District belongs to the federal government, not the District of Columbia. There is no reason that the federal government should have to "compensate" the District for the use of its own land. Simply because the federal government has allowed the District to tax some of the land within the federal enclave does not mean that compensation is due when the federal government does not allow the District to tax all of its land. Also, the extent of the federal "burden" upon the District is unclear. See notes 172-81 infra and accompanying text. States and municipalities outside the District also have non-taxed federal properties within their boundaries. However, their representatives in Congress are generally considered heroes when they are able to obtain such facilities. There is a clamor for federal buildings. They create economic stimulation, impose virtually no public costs upon local and state governments, and bring a variety of benefits to most communities.


The initial appropriation for the D.C. Civic Center was contained in Pub. L. 95-288, 92 Stat. 285 (1978). The appropriation was contingent on approval by the appropriate House and Senate committees of a plan drafted by the city.

L. Rymarowicz, PER CAPITA EXPENDITURES IN 18 CITIES IN THE POPULATION RANGE OF
Employing a slightly different approach, another study determined that the ratio of federal benefits received to federal taxes paid in the District was 7.02 to 1 in fiscal year 1977. This compares with ratios of 1.84 to 1 and 1.54 to 1 for the next highest states, New Mexico and South Dakota respectively. Twenty-one states received less than one dollar in outlays for each dollar paid in taxes.

The presence of the federal government in the District of Columbia provides hundreds of thousands of recession-proof jobs. The nature of the federal presence, including museums, monuments, and historic sites, ensures a substantial influx of tourist and convention dollars. Great libraries and hospitals provide the District with an intangible quality of life unknown in most other cities of comparable size. It is disingenuous for the District’s citizens to liken their status to that of oppressed and helpless victims of a distant power.

D. The Problem of House Apportionment

To the extent that the District is entitled to apportionment in the House of Representatives on the basis of the District’s resident population, the District will be represented in that body disproportionately. This is due to the transience of the District’s population. The District has a greater concentration of persons domiciled elsewhere than any municipality or state.

At any given time, the resident population of a state and the number of domiciliaries of that state will differ. This has never been a problem with respect to the allocation of House seats under article I of the U.S. Constitution, because there is no evidence that individual states vary widely between these measures. The transience of

500,000 to 1,000,000 compared to Washington, D.C., Fiscal Years 1974-1975 at 16 (1977). In comparing the District of Columbia to the states, the District’s per capita general expenditures exceed the national average by 76%. Only one state, Alaska, surpassed the District. Id. at 9.


180. Id.


182. Zitter Testimony, supra note 150, at 65-68.

183. A state’s “apportionment population” is determined on the basis of the number of individuals for whom the state is their “abode” or “usual place of residence.” This, rather
the District population was recognized more than a century ago by one member of the United States Senate: "Most of them are here temporarily. Though they may stay here a few years, their main interest or business is elsewhere. . . . [T]hey are mere sojourners . . . not citizens of the District in the legitimate sense of the term to control its destiny." This observation is as appropriate today as it was shortly after the Civil War. Although precise figures are difficult to obtain, the present District of Columbia Delegate has asserted that approximately 200,000 residents in the District in 1969, or about 40% of the voting age population, were eligible to vote under the absentee laws of the states. A study by the Bureau of the Census has suggested that the percentage of District residents who are domiciliaries of states might be 70% of the voting age population. While there are many various factors that influence voter turnout in different jurisdictions, the extremely low voter participation in the District may suggest that large numbers of its citizens are availing themselves of opportunities to vote in other jurisdictions. The percentage voter turnout in the 1976 presidential election in the District of Columbia was at least one-third lower than that in the state with the next lowest turnout.

While the District population is stable in size, there is a large number of individuals who have no permanent relationship to the District. These include congressional staff members, temporary executive appointees, students, diplomats, and lobbyists. All are included in the apportionment population of the District. Should
the District be accorded congressional representation on the basis of this population, the question would arise whether the continued separation of the apportionment and the electoral processes was violative of the fourteenth amendment. The Supreme Court, which has expressed concern about the "equal protection" implications of disparities of as few as several hundred persons between congressional districts within states, might conclude that the discrepancies resulting from counting a state's resident population as its apportionment population justify reformed apportionment procedures. Congressional representation for the District of Columbia would hasten the need for such a determination.

It is not inconsistent to argue that the District citizenry is both transient and influential in behalf of District causes. Much of the transience is attributable to the vagaries of politics. Often it is psychologically difficult for politically-placed persons to assume an impermanence to their positions and their stays in Washington. Wherever their permanent domicile, the affairs of the District become a concern to those situated there. Furthermore, while the instability of the Washington population is high compared to other cities, the majority of the population nevertheless has achieved a relatively permanent residence in Washington. This is a majority that continues to increase as the scope of employment opportunities in Washington continues to expand.

E. Effects on Present Statutory Structure

1. Hatch Act

The Hatch Act prohibits partisan political activities by the three million civilian employees of the federal government, including D.C. municipal employees. It is designed to promote public

189. See Hearings on Representation for the District of Columbia Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 147 (1977). The issue has been raised as to whether the process of apportioning members of Congress might be made to explicitly recognize that some jurisdictions contain disproportionate numbers of non-domiciliaries, and to incorporate an adjustment of congressional representation accordingly.


192. District of Columbia municipal employees are treated as federal employees under amendments to the Hatch Act passed in 1940. Act of July 9, 1940, 54 Stat. 767.
confidence in the civil service system and to protect federal employ-
ees from the improper political pressures of their superiors.\footnote{193} In commenting upon the Act, the Supreme Court has stated: “It is in the best interest of the country, indeed essential, that federal service should depend upon meritorious performance rather than political service, and that the political influence of federal employ-
ees on others and on the electoral process should be limited.”\footnote{194}

Should the District be granted congressional representation, the Hatch Act, with its comprehensive ban on partisan political activity by federal employees, would prevent a large proportion of the Dis-
trict’s electorate from participating in congressional election cam-
paigns. Unless such campaigns are to be conducted in a relative vacuum, substantial reforms of the Hatch Act would be required.\footnote{195}

\footnote{193. Among the activities outlawed by the Hatch Act are:
(1) Serving as an officer of a political party, a member of a National, State, or local committee of a political party, an officer or member or a committee of a partisan political club, or being a candidate for any of these positions;
(2) Organizing or reorganizing a political party organization or political club;
(3) Directly or indirectly soliciting, receiving, collecting, handling, disbursing, or accounting for assessments, contributions or other funds for a partisan political purpose;
(4) Organizing, selling tickets to, promoting, or actively participating in a fund-raising activity of a candidate in a partisan election or of a political party, or political club;
(5) Taking an active part in managing the political campaign of a candidate for public office in a partisan election or a candidate for political party office;
(6) Becoming a candidate for, or campaigning for, an elective public office in a partisan election;
(7) Soliciting votes in support of or in opposition to a candidate for public office in a partisan election or a candidate for political party office;
(8) Acting as recorder, watcher, challenger, or similar officer at the polls on behalf of a political party or a candidate in a partisan election;
(9) Driving voters to the polls on behalf of a political party or a candidate in a partisan election;
(10) Endorsing or opposing a candidate for public office in a partisan election or a candidate for political party office in a political advertisement, a broadcast, campaign, literature, or similar material;
(11) Serving as a delegate, alternate, or proxy to a political party convention;
(12) Addressing a convention, caucus, rally, or similar gathering of a political party in support of or in opposition to a partisan candidate for public office or political party office; and
(13) Initiating or circulating a partisan nominating petition.
195. Reforms of the Hatch Act are not unprecedented. A special exemption was granted in the “Home Rule” charter to “Hatched” federal employees, for example, to enable them to participate as candidates in the 1974 D.C. mayoral elections. Pub. L. 93-268, 88 Stat. 85 (1974).}
There has been virtually no discussion of the possible impact D.C. representation may have on the Hatch Act. Inadvertently, passage of the Amendment threatens a modest return to the "spoils system" of federal employment. In the process, levels of public confidence in the federal civil service may well diminish significantly.

2. District of Columbia Courts

Senators from the District of Columbia will be "first among equals" in one particularly important aspect of their job. As a matter of "Senatorial courtesy," United States Senators have been accorded a critical role in the selection of federal judges from their states.196 The President traditionally consults with the senators of his own party regarding possible nominees for the federal bench from their home state. In addition, through informal procedures adopted by the Senate Judiciary Committee, senators belonging to the opposition party are able to exert a major influence in the nominating process as well.197

Although it remains unclear in what manner this prerogative would be exercised by a District of Columbia senator in view of the dissimilarities in the judicial systems between the states and the District,198 it is evident that the District senators would be capable of an influence in this capacity far exceeding that of the other 100 senators. Federal courts in the District, because of their jurisdiction over federal agencies located within the District and exclusive jurisdiction conferred upon them by Congress in a wide variety of areas, have traditionally been the courts most active in litigation concerning federal rules, regulations, and procedures.199 Unique among the

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lower federal courts, the decisions of these courts routinely have had broad national impact. To provide District senators substantial influence in the selection of judges to these courts is to provide them with an unusual degree of influence over a wide variety of policies affecting the fifty states at least as much as the District.\footnote{200} No other senator would possess this influence in judicial appointments as there are no other federal courts with this breadth of jurisdiction. Absent a clear modification of "Senatorial courtesy," and internal Senate committee operating procedures, the senators from the District will be in a position to exert an unprecedented degree of influence over national regulatory policies.\footnote{201}

\textbf{VII. Territorial Suffrage}

Responding to the concern that D.C. representation will lead to efforts to provide similar representation in Congress to the territories of the United States,\footnote{202} supporters of District representation suggest several distinctions.\footnote{203} The Coalition for Self-Determination for the District of Columbia distinguishes the District from the territories on the grounds that: (a) the District is the beneficiary of a precedent established by the twenty-third amendment; (b) only the District of Columbia is specifically mentioned in the Constitution; (c) only the District is part of the contiguous United States; (d) unlike the territories, the District does not have the option of independence; (e) only the District is subject to full budgetary review by Congress; (f) only the District bears the full burdens of federal taxation; and (g) District residents alone are United States citizens.\footnote{204}

Contrary to the Coalition's contention, inhabitants of several territories possess United States citizenship just as inhabitants of the District.\footnote{205} Also, territories and their domiciliaries bear many of the珍贵
basic responsibilities of United States citizenship, including subjection to the military draft. The citizens of the territories, like the citizens of the District, are subject to a broad range of programs and policies. And they, like the citizens of the District, lack a direct vote for representation in the determination of those policies. In short, there is no conclusive justification for treating the citizens of the territories different than the citizens of the District.

The United States territories of Puerto Rico, Guam, and the Virgin Islands are presently each entitled to a single non-voting delegate in the House of Representatives in the same manner as the District of Columbia. Once the precedent has been established that a non-state may be represented in either house of Congress, these territories will have a credible claim upon their own voting representation in these bodies.

Puerto Rico and Guam have taken an active role in the fight for ratification of the proposed District Representation Amendment. On October 20, 1978, Puerto Rico "symbolically ratified" the Amendment. Joaquin Marquez, the Director of Puerto Rico's...
liaison office in Washington, remarked on the occasion: "The people of Puerto Rico fully empathize with the situation in which the residents of the District of Columbia find themselves." On July 19, 1978, Guam's legislature approved a resolution endorsing H.J. Res. 554 while also requesting voting representation for Guam in Congress.

VIII. Alternatives To H.J. Res. 554

Most congressional opponents of H.J. Res. 554, including this author, were not opposed in principle to providing the citizens of the District with a direct voice in the affairs of the national government. It is the position of opponents of H.J. Res. 554, however, that there are alternative means of achieving such representation that would be free from at least some of its infirmities. Resort to constitutional amendment should be made sparingly and only when no less drastic alternative exists.

The most obvious alternative is for the District to seek full statehood under article IV of the Constitution. This would guarantee the District full voting rights in both houses of Congress, as well as local autonomy. The most attractive aspect of statehood would be that it can be achieved by a simple majority of each house of Congress without resorting to constitutional amendment.

under the American flag." Hearings on District of Columbia Representation Before Subcomm. No. 5 of the House Comm. on the Judiciary, 86th Cong., 2d Sess. 21 (1960).


211. The legislature acknowledged differences between Guam's situation and that of the District, but noted that the most significant among these was the fact that "the highest point in the District is 410' above sea level, while the highest point in Guam is 1329' above sea level." The Washington Post, July 19, 1978, at B5. The Democratic Chairman from Guam, Mr. Frank Cruz, predicted at the 1978 Democratic mid-term convention in Memphis, Tenn., that the D.C. Amendment would establish a precedent for Guamanian representation in Congress. The Washington Post, Dec. 10, 1978, at B1.


213. One commentator has proposed a theory of "nominal Statehood" by which Congress, through a simple statute, could enfranchise the citizens of the District of Columbia. Exercising its authority under article I, § 8 rather than article IV, Congress could provide that the District be treated as a "State" for purposes of congressional representation only. See Raven-Hansen, supra note 18, at 167, 179.
There has always been support in the District in favor of statehood. This is a position that has placed statehood supporters at odds with those favoring the status quo in the District, as well as those willing to accept such "middle of the road" arrangements as "home rule" or national representation in Congress. The Statehood Party formed in the District in 1970 has proven successful in a number of local elections. As observed, however, in a study by the Library of Congress, "[t]he overriding question of economic viability . . . has tended to impede the efforts of Statehood advocates to mobilize any widespread support for their cause." Many supporters of District national representation view the statehood alternative as a delaying tactic by those who would maintain the District's present status. Indeed, this is the D.C. Amendment's proponents' view of all of the proposed alternatives. Statehood supporters have countered that statehood involves far more expeditious procedures than does a constitutional amendment. They allege that much of the opposition to statehood comes from those who are unwilling to accept the attendant responsibilities of statehood.


217. "To grant national representation to the District of Columbia would confer on the District privileges tantamount to Statehood without co-extensive responsibilities [and] would transform the District into a super-State with all its attendant possibilities for confusion with the Federal government." Senate Comm. on the Judiciary, National Representation of People of the District of Columbia, S. Rep. No. 646, 77th Cong., 1st Sess. 4 (1941)(adverse report). While there are numerous "responsibilities" that most states undertake that are not undertaken in an identical manner by the District, including basic taxing, spending, and criminal justice functions, all of which in the District are subject to congressional approval (see notes 97-99 supra and accompanying text), it is difficult to identify areas in which constitutional burdens are imposed upon the states but not also upon the District.

The full faith and credit clause of article IV, for example, has been judicially and statutorily extended to District courts. See Mills v. Duryea, 11 U.S. (7 Cranch) 481 (1813); 23 U.S.C. § 1738 (1970). See also Bolling v. Sharpe, 347 U.S. 497 (1954). Apart from constitutional burdens upon the states relating directly to the establishment of machinery for the election process, and the "republican form of government" limitation in article IV, there are few other requirements for state conduct not also imposed upon the governing body of the District,
A major problem attending the statehood proposition is the constitutional grant of exclusive legislative authority over the District to the Congress.218 Short of repealing that provision, which would ensure the location of the national capital within a state, there is nothing to prevent Congress from redefining the boundaries of the "Seat of Government." The only guidance provided to Congress by the Constitution is that the "Seat" be no more than "ten Miles square."219 Congress might establish a new "District" within the territory of the current District. This new enclave would include only the territory encompassing the major federal office buildings and monuments, the White House, the Capitol, and the Supreme Court. The District of Columbia reorganization plan in 1973 established a "National Capital Service Area" for administrative purposes, the boundaries of which approximate such a federal enclave.220

Another question which arises concerning D.C. statehood lies in the scope of the original cession by Maryland to the District of Columbia in 1788. By the terms of that cession, these lands were given to the United States for the purposes of establishing a "seat of Government."221 It remains a question as to whether the beneficiary of this cession can now convert the land to a wholly different purpose without violating both the terms of that cession as well as the Constitution.222

Another option to H.J. Res. 554 is retrocession. This would entail the return of the lands of the District to the State of Maryland.

whether that be Congress or the locally elected City Council. One remaining distinction, however, permits Congress to exclude aliens from the District of Columbia's civil service system, a discrimination not permitted in the states. See Hampton v. Mow Sun Wong, 426 U.S. 88 (1976).

219. Id.
220. See 1973 Act, supra note 63, § 739. Other residents of federal enclaves, established pursuant to article I, section 8, clause 17 are entitled to vote as citizens of the state in which the enclave lies. See Evans v. Corman, 398 U.S. 419 (1970). The 1973 Act provides that citizens living within the National Capital Service Area would be eligible to vote in local elections.
221. See note 24 supra.
222. "[N]o new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress." U.S. Const. art. IV, § 3, cl. 1. See also Fort Leavenworth R.R. v. United States, 114 U.S. 525 (1885); Wedding v. Meyler, 192 U.S. 573 (1904).
except for a circumscribed federal district.\textsuperscript{223} Partial retrocession, a modification of this proposal, would effect this transfer only for purposes of national suffrage. The citizens of the District would cast votes for senators and congressmen representing Maryland, and be included in Maryland’s apportionment population.\textsuperscript{224} The citizens, however, would remain independent for all other purposes.

Both full and partial retrocession could be accomplished without resort to the constitutional amendment process. Precedent for the former exists in the District’s 1846 retrocession of lands originally belonging to the Commonwealth of Virginia.\textsuperscript{225} Everything that presently comprises the District was ceded originally by the State of Maryland.

Either form of retrocession would ensure District residents the full opportunity to participate in national elections without the delay of a constitutional amendment. There is a strong pragmatic argument that is suggested by full or partial retrocession. Either proposal would moderate the political impact of District suffrage through its intermixture in the electoral system with the Maryland electorate. To the extent that D.C. representation proponents are correct that opposition is motivated by fear of an electorate that is “too liberal, too urban, too black, and too Democratic,”\textsuperscript{228} retrocession might serve to lessen the intensity of their opposition.

Opponents of full retrocession argue that the Maryland State Legislature, which must agree to the retrocession, would be unlikely to do this. Each jurisdiction faces its own problems, and possesses its own traditions and cultural characteristics. Retrocession of the District would subordinate the character of the District, while causing tensions between the citizens of the District and of Maryland. Opponents also argue that retrocession would reduce the influence

\begin{itemize}
\item \textsuperscript{223} See note 220 \textit{supra} and accompanying text.
\item \textsuperscript{224} See \textit{Hearings on Representation for the District of Columbia Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 36-43 (1977)(testimony of Rep. Ray Thornton of Arkansas)}.
\item \textsuperscript{225} See notes 52-53 \textit{supra} and accompanying text. \textit{See also Phillips v. Payne, 92 U.S. 130 (1875), in which a number of constitutional questions were raised about the 1846 retrocession of District lands to Virginia. The Court did not explicitly decide the constitutionality of the then forty-year-old action. Instead, it resolved the suit, which had been brought by a disgruntled taxpayer living within the retroceded area, on the ground of lack of standing and de facto possession of the lands by Virginia. The Court seemed to suggest that standing would be limited to the United States or the Commonwealth of Virginia. \textit{Id.} at 133-34.}
\item \textsuperscript{226} See note 1 \textit{supra} and accompanying text.
\end{itemize}
that the District possesses in presidential elections by requiring it to participate in the electoral college through Maryland electors rather than through those to which they are entitled by the twenty-third amendment.227

Opponents of partial retrocession point to constitutional difficulties with allowing District citizens who are not "People" of Maryland to choose Maryland representatives to Congress.228 They also note that District citizens would be voiceless in the alignment of congressional districts within Maryland, and the determination of qualifications for voting in Maryland elections, because they would be ineligible, as non-residents, to participate in Maryland State legislative elections.229

A final alternative to H.J. Res. 554 would be to provide the District with voting representation in the House of Representatives alone.230 Opponents of H.J. Res. 554 point out that most of the same constitutional impediments to H.J. Res. 554 are also applicable to this proposal.231 However, this proposal acknowledges critical distinctions between the House and the Senate, distinctions which are important in our federal system of government. Limiting District representation to the House recognizes the Senate's unique role as an institution through which the states are represented in the national legislature. The District would be treated as the singular entity that it is, the only non-state entitled to full voting representation in the House of Representatives.

IX. Conclusion

The granting of full representation in Congress for the District of

227. See note 82 supra and accompanying text. The twenty-third amendment would be nullified if there were no longer a populated "Seat of Government." The language of that amendment refers to the "Seat of Government" rather than to the District of Columbia itself.


Columbia has been justified on the basis of federal taxes paid, numbers of military troops provided, numbers of military casualties suffered, liberty bond purchases, postal revenues, literacy levels, and average intelligence. These are certainly matters of interest, and confirm that the citizens of the District are as patriotic and capable as the citizens of the states. They are irrelevant, however, in overcoming the objections to treating a non-state "as though it were a State" for a variety of constitutional purposes, and according voting representation in Congress on a basis other than statehood.

Proponents of District representation err in confusing opposition to District representation with opposition to representation for the citizens of the District. It is the peculiar nature of the District that generates opposition to the proposed constitutional amendment, not the qualities or capabilities of the District's citizens. It is the role of the District in our constitutional framework, not anything inherent in the individuals that comprise its citizenry, that demands that it not be represented in Congress.

The District of Columbia is an artificial political entity created solely for the purpose of providing a "Seat of the Government." It is a creation of the national government which is, in turn, a creation of the sovereign states of the Union. The national interest


Resident aliens are also subject to both taxes and military service by the United States. 26 U.S.C. § 6012a (1976); 50 U.S.C. App. § 454a (1976).

Arguments in favor of D.C. representation based upon how citizens of other national capital cities are treated with respect to national suffrage are irrelevant due to the unique system of interplay between the national and state governments in the United States. See, e.g., 124 Cong. Rec. S13468-69 (daily ed. Aug. 16, 1978)(remarks of Senator Edward Kennedy); D. Nispel & N. Shafran, National Legislatures and Capital City Representation (1978).

that exists in the District demands that we not reverse the traditional relationship between the federal government and the District. The states must retain an effective voice in the affairs of the District through the federal government.

During the initial days of consideration of the District Representation Amendment in the states, opposition has emerged, perhaps most vocally, on the basis of transitory partisanship and single-issue political interests.\(^2\) It is just as clear, however, that these are also motivating factors behind much of the support that has been generated in behalf of the amendment.\(^3\) One hopes that the more principled permanent arguments will soon rise to the surface on an issue of such central importance to the structure of our system of government.

The D.C. Representation Amendment affords a welcome opportunity for citizens and legislators throughout the country to engage in debate, and to reacquaint themselves with the principles of federalism that underlie our Constitution. Whatever the substantive outcome of H.J. Res. 554, the controversies that it generates through 1985 will be reminiscent of those which occurred two centuries ago.

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235. See, e.g., How Blacks Can Gain Two Senators, ESBONY, June 1978, at 31; Julian Bond says amendment ok may stir black political move to D.C., Houston Chronicle, Sept. 1, 1978, § 6, at 1; The Washington Post, Oct. 1, 1978, at B6 (Michigan GOP memo urging quick D.C. amendment ratification "so that Michigan can send this potential hot potato on its way before the public and media become sufficiently aware of its existence to turn it into a major issue."); The Washington Star, Feb. 13, 1978, at DC1 (Massachusetts State Senator Bill Owens explained that his support for the D.C. Amendment is based on the fact that it "would add three black, liberal, urban Democrats to Congress."); N.Y. Times, Feb. 6, 1979, at B3 ("urban outlook helpful to the general cause of the Northeast"); The Washington Post, Jan. 29, 1979, at C1 ("voice for urban America").