

POLICY ESSAY

“NO RIGHT IS MORE PRECIOUS IN A FREE COUNTRY”: ALLOWING AMERICANS IN THE DISTRICT OF COLUMBIA TO PARTICIPATE IN NATIONAL SELF-GOVERNMENT

SENATOR ORRIN G. HATCH*

In this Policy Essay, Senator Orrin Hatch argues for passage of the District of Columbia House Voting Rights Act of 2007, a bill that neared passage in 2007 but failed to survive a cloture vote in the Senate. The bill would treat the District of Columbia as a congressional district, granting the District a seat in the House of Representatives. Focusing on the history of the District’s creation and on existing case law regarding Congress’s authority over the District, Senator Hatch argues that Congress has the constitutional authority to grant the District a seat in the House. Senator Hatch also argues that the 2007 Act would be an appropriate means to remedy the District’s lack of voting representation in Congress, and why it is superior to past proposals relating to District representation.

In 2005, the world witnessed Iraqis holding up fingers stained with purple ink, proudly demonstrating that they had voted. Decades earlier, the U.S. Supreme Court had suggested why such a scene would be so dramatic, stating that “[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.”¹ Yet, unlike American citizens living in the fifty states or even outside the United States altogether, Americans living in the District of Columbia (“the District”) cannot exercise this most precious right with respect to their national government. Residents of the District are “Americanized for the purpose of national and local taxation and arms-bearing, but not for the purpose of voting.”² This is simply inconsistent with the well-recognized principle that “[f]oremost among the basic principles of American political philosophy is the right to self-government.”³

Efforts to allow District residents to exercise the right of representative self-government began more than two centuries ago, within months after it

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¹ *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964); *see also Powell v. McCormack*, 395 U.S. 486, 547 (1969) (“A fundamental principle of our representative democracy is, in Hamilton’s words, ‘that the people should choose whom they please to govern them.’”) (quoting 2 DEBATES ON THE FEDERAL CONSTITUTION 257 (Jonathan Elliot ed., 1876)).

² Roy P. Franchino, *The Constitutionality of Home Rule and National Representation for the District of Columbia*, 46 GEO. L.J. 207, 207 (1957–58) [hereinafter Franchino I].

³ Roy P. Franchino, *The Constitutionality of Home Rule and National Representation for the District of Columbia*, 46 GEO. L.J. 377, 377 (1958) [hereinafter Franchino II].

became the seat of national government.⁴ That effort continues today with the District of Columbia House Voting Rights Act of 2007,⁵ which would give the District one seat in the House of Representatives by treating it as a congressional district.⁶ Other provisions of the bill would prohibit treating the District as a state for purposes of Senate representation,⁷ give Utah an additional House seat, thereby increasing the total House membership from 435 to 437 seats;⁸ repeal the current law establishing the office of District of Columbia delegate to the House of Representatives;⁹ and provide for expedited judicial review of any action challenging the bill's constitutionality.¹⁰ Last year, although a majority of Senate and House members registered their support for this bill, a filibuster kept it from a final Senate vote.¹¹

After briefly reviewing the history of the District's establishment and past efforts to give it congressional representation, this Article will explain why Congress is constitutionally empowered to enact this legislation, and why it should do so.

I. THE ESTABLISHMENT OF THE DISTRICT OF COLUMBIA

When the Continental Congress met in Philadelphia during the summer of 1783, hundreds of Revolutionary War soldiers surrounded the meeting site, demanding back pay while "wantonly pointing their muskets to the windows of the halls of Congress."¹² The Commonwealth of Pennsylvania and the City of Philadelphia ignored Congress's requests for military or police assistance, and so it was forced to move its proceedings to New Jersey.¹³ Thus, the nation's early leaders learned of the dangers of holding congressional meetings under state jurisdiction.¹⁴ Three months later, the Continental Congress endorsed the idea of locating the national legislature in a

⁴ See *infra* note 42 and accompanying text.

⁵ S. 1257, 110th Cong. (2007); H.R. 1905, 110th Cong. (2007).

⁶ S. 1257 § 2(a)(1).

⁷ *Id.* § 2(a)(2).

⁸ *Id.* § 4.

⁹ *Id.* § 5(a).

¹⁰ *Id.* § 7.

¹¹ The House passed its version of the bill, H.R. 1905, on April 19, 2007, by a vote of 241–177. 153 CONG. REC. H3,593 (daily ed. Apr. 19, 2007). On September 18, 2007, a Senate vote on a motion to end debate over the Act failed by a vote of 57–42. 153 CONG. REC. S11,631 (daily ed. Sept. 18, 2007). Rule 22, Clause 2, of the Standing Rules of the Senate requires "three-fifths of the Senators duly chosen and sworn" for passage of a motion to end debate on "any measure, motion, [or] other matter pending before the Senate." S. Doc. No. 110-9, at 16 (2007).

¹² 1 THE WRITINGS OF JAMES MADISON 481 (Gaillard Hunt ed., 1900).

¹³ See KENNETH R. BOWLING, THE CREATION OF WASHINGTON, D.C. 30–34 (1991).

¹⁴ See Franchino I, *supra* note 2, at 209. ("This incident emphasized to Congress the need for a site of its own, independent of any state control.")

“suitable district” over which the federal government would exercise jurisdiction.¹⁵

America’s founders had that incident in mind when they returned to Philadelphia four years later to draft the Constitution.¹⁶ Apparently without debate, they gave the new Congress authority to create a district from land ceded by states to serve as “the seat of government of the United States” and to “exercise exclusive legislation in all cases whatsoever” over that district.¹⁷ In addition to providing the security lacking in 1783, establishing the nation’s capital outside any of its component states would, as George Mason argued, avoid “giv[ing] a provincial tincture to national deliberations.”¹⁸ There was little, if any, discussion during the framing convention or the ratification debates about whether creation of the District would deprive its future residents of the right to participate in congressional elections.¹⁹

During 1788–89, Maryland and Virginia ceded to the United States land along the Potomac River “to establish the capital city” between Alexandria and Georgetown.²⁰ It was “widely assumed that the land-donating states would make appropriate provision in their acts of cession to protect the residents of the ceded land.”²¹ As James Iredell put it in the North Caro-

¹⁵ 25 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789 714 (Worthington C. Ford ed.) (1922) (presenting notes from the October 21, 1783 meeting of the Continental Congress).

¹⁶ See JUDITH BEST, NATIONAL REPRESENTATION FOR THE DISTRICT OF COLUMBIA 14–15 (1984); Lawrence M. Frankel, Comment, *National Representation for the District of Columbia: A Legislative Solution*, 139 U. PA. L. REV. 1659, 1683 (1991); Peter Raven-Hansen, *Congressional Representation for the District of Columbia: A Constitutional Analysis*, 12 HARV. J. ON LEGIS. 167, 191 (1975).

¹⁷ U.S. CONST. art. I, § 8.

¹⁸ THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 332 (Gaillard Hunt and James Brown Scott eds., 1970); see also THE FEDERALIST No. 43, at 289 (James Madison) (arguing that the lack of an independent, permanent capital would, among other things, promote “a dependence of the members of the general Government, on the State comprehending the seat of the Government.”); Orrin G. Hatch, *Should the Capital Vote in Congress? A Critical Analysis of the Proposed D.C. Representation Amendment*, 7 FORDHAM URB. L.J. 479, 484 (1978–79) (“The inclusion of [the independent capital] provision stemmed from the concern of the Founding Fathers that the national capital be free from both the disproportionate influence of any state, and the influence of the states generally.”).

¹⁹ See *The Authority of Congress to Enact Legislation to Provide the District of Columbia with Voting Representation in the House of Representatives: Hearing Before the H. Comm. on Government Reform*, 108th Cong. 7 (2004) (statement of Viet D. Dinh, Professor, Georgetown Univ. Law Ctr., and Adam Charnes, Partner, Kilpatrick Stockton L.L.P.) [hereinafter *Voting Representation Hearing*] (“The delegates to the Constitutional Convention discussed and adopted the Constitution without any recorded debates on voting, representation, or other rights of the inhabitants of the yet-to-be-selected seat of government.”).

²⁰ 1788 Md. Acts 46, 13 Va. Statutes at Large, ch.32, reprinted in D.C. Code Ann. § 33–34 (2001). The land ceded by Virginia was ceded back in 1846. Act of July 9, 1846, ch. 35, 9 Stat. 35.

²¹ Raven-Hansen, *supra* note 16, at 172; see also RICHARD P. BRESS & LORI ALVINO MCGILL, CONGRESSIONAL AUTHORITY TO EXTEND VOTING REPRESENTATION TO CITIZENS OF THE DISTRICT OF COLUMBIA: THE CONSTITUTIONALITY OF H.R. 1905, at 2 (2007), available at <http://www.acslaw.org/files/Bress%20and%20McGill%20on%20Constitutionality%20of%20HR%201905.pdf>.

lina ratification debate, those ceding states were expected to “take care of the liberties of [their] own people.”²²

Suffrage was certainly among those liberties, as America’s founders prized the franchise as central to the political system they were establishing. Pierce Butler of South Carolina, who served in the Continental Congress and later in the Senate, said that there was “no right of which the people are more jealous than that of suffrage” and warned that limiting suffrage would risk revolution.²³ Oliver Ellsworth of Connecticut, who also served in the Continental Congress and Senate and who became Chief Justice of the Supreme Court, similarly warned that limitations on suffrage could prevent ratification of the Constitution altogether.²⁴

In ceding their land, Virginia and Maryland took steps to safeguard their residents’ liberties. They stated as a condition that their jurisdiction would not end until Congress accepted the cession and took formal control of the District.²⁵ Congress then passed legislation accepting the ceded land and agreeing that “operation of the laws” of the ceding states would govern until Congress would “otherwise by law provide.”²⁶ Thus, residents of the ceded land retained the right to vote in congressional elections in Maryland and Virginia.²⁷ As a result, “the citizens enjoyed both local and national suffrage notwithstanding the fact that the District was a federal jurisdiction and theoretically under the exclusive control of Congress.”²⁸ Thus, as the result of affirmative legislative acts both by the states and by Congress, during this period District residents ceased to be residents of any state but nevertheless could vote in congressional elections.

The District became the seat of national government in December 1800,²⁹ “and on that date, the citizens of the District became disenfranchised.”³⁰ Although Congress’s 1790 acceptance of the Virginia and Maryland cessions had allowed for the continued voting rights of District

²² 4 DEBATES ON THE FEDERAL CONSTITUTION, *supra* note 1, at 219.

²³ THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 202–03 (Max Farrand ed., 1911). Similarly, James Madison wrote that “the right of suffrage is very justly regarded as a fundamental article of republican government.” THE FEDERALIST No. 52 (James Madison).

²⁴ See RECORDS OF THE FEDERAL CONVENTION, *supra* note 23, at 201.

²⁵ See *Equal Representation in Congress: Providing Voting Rights to the District of Columbia: Hearing Before the S. Comm. on Homeland Security & Governmental Affairs*, 110th Cong. 7 (2007) (statement of Viet D. Dinh) [hereinafter *Providing Voting Rights Hearing*] (“The legislatures of both Maryland and Virginia provided that their respective laws would continue in force in the territories they had ceded until Congress both accepted the cessions and provided for the government of the District.”).

²⁶ Act of July 16, 1790, ch. 28, 1 Stat. 130.

²⁷ See Memorandum from Richard Bress and Amanda Reeves to Walter Smith 6 (May 11, 2007) (on file with author) (stating that the 1790 Act “authorized the District’s residents to continue voting in Maryland and Virginia.”); *Voting Representation Hearing*, *supra* note 19, at 9 (statement of Viet D. Dinh and Adam Charnes) (District residents’ “voting rights derived from Congressional action under the District Clause recognizing and ratifying the ceding states’ law as the applicable law for the now-federal territory until further legislation.”).

²⁸ Franchino I, *supra* note 2, at 214.

²⁹ See *id.* at 210.

³⁰ Frankel, *supra* note 12, at 1663.

residents under state law, the legislation in 1800 failed to provide for their continued representation under federal law.³¹ This disenfranchisement of District residents persists to this day, yet it came about due to no more than an “historical accident by which D.C. residents lost the shelter of state representation without gaining separate participation in the national legislature.”³²

This brief sketch of the District’s creation suggests several considerations that are important for the present discussion of whether Congress can and should enact legislation giving District residents representation in the House. First, the Framers’ purpose in providing for the creation of an independent capital city was to “create a Federal District free from any control by an individual state,”³³ and the disenfranchisement of District residents was not necessary to accomplish that goal.³⁴ Second, consistent with their philosophical and political commitment to the franchise, America’s founders had provided for continued congressional representation of District residents even after they no longer lived in a state.³⁵ There is no record of anyone in Congress, including the many members who had participated in drafting and

³¹ *Providing Voting Rights Hearing*, *supra* note 25, at 8 (statement of Viet D. Dinh).

³² Raven-Hansen, *supra* note 16, at 185; *see also* Frankel, *supra* note 16, at 1664 (“[R]esidents of the District have the same responsibilities as the residents of any state in the nation and yet simply because of geography and historical accident, they are controlled by a national government in which they have no effective representation.”); Memorandum from Richard Bress and Amanda Reeves to Walter Smith, *supra* note 27, at 6 (“It was this Act of Congress—the 1800 legislation—not a judicial interpretation of the Constitution and the Framers’ intent that took away District residents’ right to vote.”).

³³ Franchino I, *supra* note 4, at 211; *see also id.* at 213 (“It cannot be overemphasized that . . . the desire for an area free from state control was paramount.”); *Voting Representation Hearing*, *supra* note 19, at 7 (statement of Viet D. Dinh and Adam Charnes) (“The purpose for establishing a federal district was to ensure that the national capital would not be subject to the influences of any state.”).

³⁴ *See* Jamin B. Raskin, *Is This America? The District of Columbia and the Right to Vote*, 34 HARV. C.R.—C.L. L. REV. 39, 77 (1999) (“[T]he historical record is plain that the overriding purpose of the District Clause was to guarantee that Congress would not be forced to depend on a state government that could compromise or obstruct its actions for parochial reasons. Congress did not intend to disenfranchise citizens within the capital city.”). Some opponents of the bill making operative Congress’s exclusive legislative authority over the District argued that it would disenfranchise District residents. *See* Raven-Hansen, *supra* note 16, at 176. (“The premise underlying their opposition to the bill—a premise never challenged in the congressional debates which ensued—was that the location of the seat of government at the District and the lodging of exclusive legislative authority over the District in Congress were consistent with continued representation of District residents in Congress.”).

³⁵ Professor Raven-Hansen argues that the ability of District residents to vote in congressional elections between 1790 and 1800 provides “no precedent for the representation of District citizens” today. Raven-Hansen, *supra* note 16, at 174. I do not agree. Congress passed legislation that had the effect of allowing Americans not living in a state to vote in congressional elections. The fact that the entity we now call the District of Columbia had not yet been formally established is less relevant than the fact that these citizens were no longer residents of either Maryland or Virginia. *See Voting Representation Hearing*, *supra* note 19, at 9 (statement of Viet D. Dinh and Adam Charnes) (“The critical point here is that during the relevant period of 1790–1800, District residents were able to vote on Congressional elections in Maryland and Virginia not because they were citizens of those states—the cession had ended their political link with those states. Rather, their voting rights derived from *Congressional action under the District Clause* recognizing and ratifying the ceding states’ law as the applicable law for the now-federal territory until further legislation.”) (emphasis in original).

ratifying the Constitution,³⁶ suggesting that this posed any constitutional conflict.

Third, in light of the foregoing, there should be actual and substantial evidence that America's founders intended to strip District residents of the franchise they wanted for other Americans—and that District residents previously had enjoyed—to justify continuing to deny them representation. That evidence simply does not exist. There is no evidence of “intent on the part of the authors of the Constitution to . . . exclude residents of the District from voting representation in the local and national assemblies.”³⁷ And finally, it is worth noting that Congress's authority to enact legislation regarding the District is unparalleled in scope. It has been called “sweeping,”³⁸ “plenary,”³⁹ and “extraordinary,”⁴⁰ and described as surpassing “both the authority a state legislature has over state affairs and Congress's authority to enact legislation affecting the 50 states.”⁴¹

II. EFFORTS TO GIVE THE DISTRICT CONGRESSIONAL REPRESENTATION

The desire for District residents to have the same voice as other Americans in electing those who govern is not a recent development. As a Congressional Research Service report published in 2007 stated: “One year after establishing the District of Columbia as the national capital, District residents began seeking representation in the national legislature. As early as 1801, citizens of what was then called the Territory of Columbia voiced concern about their political disenfranchisement.”⁴²

That concern was borne both of the conviction that suffrage is central to the system of representative self-government America's founders had established and the desire to restore the franchise that District residents had only recently been able to exercise in electing members of Congress. The Americans living in the District were now excluded altogether from such participation, not because they no longer lived in America; indeed, they had not moved at all. They did not lose the franchise because they no longer lived in a state; indeed, Congress provided that they could vote in congressional

³⁶ The First Congress included twenty members of the House and Senate who had been delegates to the Constitutional Convention in Philadelphia, and at least forty-two members who had been delegates to their states' ratifying conventions. Louis L. Sirico, Jr., *Original Intent in the First Congress*, 71 MO. L. REV. 687, 689 (2006).

³⁷ Franchino I, *supra* note 2, at 213; *see also id.* (“At no time during the prolonged debates was there any mention of the effect upon the franchise (whether nationally or locally) of the then-residents by the cessions and the acceptance by Congress of the ceded territory.”).

³⁸ *Voting Representation Hearing*, *supra* note 19, at 1 (2004) (statement of former U.S. Solicitor General and U.S. Circuit Judge Kenneth W. Starr).

³⁹ *Hobson v. Tobriner*, 255 F. Supp. 295, 299 (D.D.C. 1966).

⁴⁰ *United States v. Cohen*, 733 F.2d 128, 140 (D.C. Cir. 1984).

⁴¹ Memorandum from Richard P. Bress and Ali I. Ahmad to Walter Smith 2 (Sept. 12, 2006) (on file with author).

⁴² EUGENE BOYD, CONG. RESEARCH SERV., DISTRICT OF COLUMBIA VOTING REPRESENTATION IN CONGRESS: AN ANALYSIS OF LEGISLATIVE PROPOSALS 2 (2007).

elections even after the land on which they lived was no longer part of a state. They lost the franchise because Congress, apparently negligently rather than deliberately, failed to protect under federal law the franchise these residents had enjoyed under state law once Congress officially started its work in the District. Early representation advocates argued that District residents “do not cease to be a part of the people of the United States” and that “it is violating an original principle of republicanism, to deny that all who are governed by laws ought to participate in the formulation of them.”⁴³

Building on such early advocacy, official efforts to provide District residents with congressional representation began as early as 1803.⁴⁴ The most common vehicle for pursuing this goal has been the constitutional amendment, with more than 150 introduced since 1888.⁴⁵ In 1976, an amendment proposal reached the House floor, but the 229–181 vote fell short of the necessary two-thirds.⁴⁶ The same proposal passed the House in March 1978 by a vote of 289–127⁴⁷ and passed the Senate three months later by a vote of 67–32.⁴⁸ This amendment would have granted the District full representation in the Senate and House, changed the way the District participated in electing the President and Vice President, and given the District a role in the constitutional amendment process.⁴⁹ With the constitutional threshold of two-thirds of Congress met, the proposed amendment went before the states for ratification, but it expired when only 16 states ratified it by the 1985 deadline.⁵⁰

Advocates have also sought to achieve congressional representation for the District through legislation.⁵¹ In the 105th Congress, Delegate Eleanor

⁴³ AUGUSTUS BREVOORT WOODWARD, CONSIDERATIONS ON THE GOVERNMENT OF THE TERRITORY OF COLUMBIA, PAPER NO. I (1801). Augustus Brevoort Woodward, who wrote this pamphlet eponymously, was a District landowner and member of its city council. BOYD, *supra* note 42, at 4.

⁴⁴ See 12 ANNALS OF CONG. 493–507 (1803) (discussing various approaches to returning suffrage or territorial control to District residents); see also, e.g., 21 CONG. REC. 10,122 (1890) (statement of Rep. Henry Blair (R-N.H.)) (arguing that denying representation for District residents is “a drop of poison in the heart of the Republic.”).

⁴⁵ See BOYD, *supra* note 42, at 3.

⁴⁶ See H.R.J. RES. 280, 94th Cong. (1976); see also BOYD, *supra* note 42, at 6 (detailing the legislative history of H.R.J. Res. 280 and similar proposals).

⁴⁷ District of Columbia Voting Rights Amendment, H.R.J. RES. 554, 95th Cong. (1977); 125 CONG. REC. 5272–73 (1978).

⁴⁸ 125 CONG. REC. 27,260 (1978).

⁴⁹ H.R.J. Res. 554, 95th Cong. § 1 (1977).

⁵⁰ BOYD, *supra* note 42, at 6.

⁵¹ The fact that most attempts to provide congressional representation for the District have utilized the constitutional amendment vehicle does not mean that this is the only vehicle by which the goal may be sought. See S. REP. NO. 107-343, at 6 (2002) (reporting on behalf of the Senate Committee on Government Affairs the Committee’s belief that “a constitutional amendment to afford D.C. full Congressional representation would be an effective and appropriate means to this end,” but also that “[t]he Committee does not, however, believe that a constitutional amendment is necessary.”). The use of a constitutional amendment, if successful, would be a clear reflection of national consensus and would be virtually impossible to change. Constitutional amendments are also, of course, very difficult to achieve, as suggested by the failure of each of the many proposed constitutional amendments on this topic. See *supra*

Holmes Norton (D-D.C.)⁵² introduced H.R. 4208, the District of Columbia Voting Rights Act of 1998.⁵³ This very short bill simply declared: “Notwithstanding any other provision of law, the community of American citizens who are residents of the District constituting the seat of government of the United States shall have full voting representation in the Congress.”⁵⁴ It had no provisions for actually implementing such representation, it attracted no co-sponsors, and it received no hearings.⁵⁵ Nonetheless, the debate allowed Delegate Norton to argue that “Congress cannot continue constitutionally to deny District residents representation in the national legislature, but must and can take all steps necessary to afford them full representation.”⁵⁶ She introduced into the Congressional Record a “petition for redress of grievances” that she said laid out “the constitutional framework that requires that District citizens be treated like the full American citizens they are.”⁵⁷

In the 107th Congress, Senator Joseph Lieberman (D-Conn.) introduced S. 3054, the No Taxation Without Representation Act of 2002.⁵⁸ This bill would have provided for the District two Senators and as many House members as the District would receive if it were a state.⁵⁹ This bill had ten Senate co-sponsors, and was reported to the full Senate by the Committee on Governmental Affairs, which Senator Lieberman chaired.⁶⁰

In the 109th Congress, Senator Lieberman and Delegate Norton introduced, respectively, S. 195⁶¹ and H.R. 398,⁶² the No Taxation Without Representation Act of 2005, with the same provisions as the 2002 bill. Although the Senate and House bills attracted, respectively, fifteen and ninety-four cosponsors, they received no hearings.⁶³ When he introduced the bill, Senator Lieberman said that the lack of congressional representation for the District is “a shadow overhanging the democratic traditions of our Nation as a

notes 45–50 and accompanying text. The pursuit of representation through legislation, on the other hand, is numerically easier to achieve but subject to future repeal or amendment and on constitutional challenge.

⁵² United States territories have been represented by delegates since the Northwest Ordinance of 1787. See BETSY PALMER, CONG. RESEARCH SERV., TERRITORIAL DELEGATES TO THE U.S. CONGRESS: CURRENT ISSUES AND HISTORICAL BACKGROUND 1 (2006); see also *id.* (“Through most of the 19th century, territorial Delegates represented areas that were on the way to ultimate statehood.”). Americans living in the District have been represented by a delegate since 1970. See Pub. Pub. L. No. 91-405, Tit. II, § 202, 84 Stat. 848 (1970) (codified at 2 U.S.C. § 25(a) (2000)). House rules have determined whether delegates may vote in committee, or in the full House, but their vote has never been able to determine legislative outcomes. See S. REP. NO. 107-343, at 3 (2002).

⁵³ H.R. 4208, 105th Cong. (1998).

⁵⁴ *Id.* § 2.

⁵⁵ 1998 Bill Tracking H.R. 4208 (LEXIS).

⁵⁶ 105 CONG. REC. 5413 (1998) (Statement of Del. Norton).

⁵⁷ *Id.*

⁵⁸ S. 3054, 107th Cong. (2002); 148 CONG. REC. S9901 (daily ed. Oct. 3, 2002).

⁵⁹ S. 3054, 107th Cong. §§ 4, 5 (2002).

⁶⁰ S. REP. NO. 107-343, at 9 (2002).

⁶¹ S. 195, 109th Cong. (2005); 151 CONG. REC. S604 (2005) (daily ed. Jan. 26, 2005).

⁶² H.R. 398, 109th Cong. (2005); 151 CONG. REC. H234 (daily ed. Jan. 26, 2005).

⁶³ 2005 Bill Tracking H.R. 398 (LEXIS); 2005 Bill Tracking S. 195 (LEXIS).

whole. . . . The right to vote is a civic entitlement of every American citizen, no matter where he or she resides. It is democracy's most essential right."⁶⁴ He said that America's founders "placed with Congress the solemn responsibility of assuring that the rights of D.C. citizens would be protected in the future."⁶⁵

On the first day of the 110th Congress, Delegate Norton introduced H.R. 328, the District of Columbia Fair and Equal Voting Rights Act of 2007.⁶⁶ This bill pursued the same goal of District representation but was different from previous legislation in several important ways. First, and most obviously, it provided for representation of the District in the House but not in the Senate.⁶⁷ Second, it stated that the District "shall be considered a Congressional district" for purposes of representation,⁶⁸ whereas in the earlier legislation it was to be characterized "as a State."⁶⁹ Third, the 2007 bill provided that the District "may not receive more than one [House] Member under any reapportionment of Members."⁷⁰ Fourth, it directed the Clerk of the House to submit to the Speaker of the House a report "identifying the State . . . which is entitled to one additional Representative" under the apportionment formula used after the 2000 Census.⁷¹ Most observers of the census and reapportionment process believe that Utah would receive that additional seat.⁷²

Two months later, Delegate Norton introduced H.R. 1433, the District of Columbia Voting Rights Act of 2007, which superseded her previous bill.⁷³ In addition to the provisions of H.R. 328, this bill would have abolished the office of District of Columbia Delegate⁷⁴ and required that the new member granted to one of the states "be elected from the State at large."⁷⁵ The House Government Reform and Oversight Committee approved, by voice vote, an amendment that the District would not be considered a state for purposes of Senate representation⁷⁶ and voted 24–5 to approve the amended bill.⁷⁷ The House Judiciary Committee voted 21–13 to approve the bill after rejecting several amendments, including a provision that would

⁶⁴ 109 CONG. REC. 604 (2005) (daily ed. Jan. 26, 2005) (statement of Sen. Lieberman).

⁶⁵ *Id.*

⁶⁶ 153 CONG. REC. H251 (daily ed. Jan. 9, 2007).

⁶⁷ H.R. 328, 110th Cong. § 3(a) (2007).

⁶⁸ *Id.*

⁶⁹ *E.g.*, H.R. 398, 109th Cong. § 3 (2005).

⁷⁰ H.R. 328, 110th Cong. § 3(d) (2007).

⁷¹ *Id.* § 4(c)(2).

⁷² *See, e.g.*, S. REP. NO. 110-123, at 3 (2007) (stating that Utah was "the next state in line to receive an additional representative based on the 2000 census."). Utah would have needed just 855 more people in its "apportionment population" to gain an additional seat following the 2000 Census. *See* ROYCE CROCKER, CONG. RESEARCH SERV., DISTRICT OF COLUMBIA REPRESENTATION: EFFECT ON HOUSE APPORTIONMENT 4 tbl.2 (2007).

⁷³ 153 CONG. REC. H2838 (daily ed. Mar. 22, 2007) (statement of Del. Norton).

⁷⁴ H.R. 1433 § 5, 110th Cong. (2007).

⁷⁵ *Id.* § 4(c)(3)(A).

⁷⁶ H.R. REP. NO. 110-52, at 7 (2007).

⁷⁷ *Id.*

have allowed the Utah legislature to choose whether to elect its additional representative at-large or to create a new district.⁷⁸

I objected strongly to this bill's attempt to dictate to a state how it must elect a member to Congress. In addition, as I explained in testimony before the Senate Homeland Security and Governmental Affairs Committee on May 15, 2007,⁷⁹ I have constitutional concerns about electing an additional House member at-large. States with a single House member, such as Alaska or Wyoming, elect that member at-large because the entire state is a single congressional district. Using this approach in states with multiple members, however, means that each state resident would be represented by two House members, twice what residents in every other state enjoy. In addition, the Utah legislature indicated its desire and ability to elect an additional House member through the normal redistricting process by voting overwhelmingly to adopt a new redistricting map in December 2006.⁸⁰ As I said in that same testimony, "I see no reason for Congress to undermine this and impose upon Utah a scheme it has not chosen for itself."⁸¹

As a result, rather than trying to change the House-passed bill, I agreed to co-sponsor legislation with Senator Lieberman, who once again chaired the Committee on Governmental Affairs. This effort took the form of S. 1257, the District of Columbia House Voting Rights Act of 2007, which adheres to the basic provisions of H.R. 1433 but allows Utah to choose for itself how it will elect its additional House member.⁸² Committees of both the House and Senate held multiple hearings on this legislation.⁸³

III. CONGRESS HAS THE CONSTITUTIONAL POWER TO GRANT HOUSE REPRESENTATION TO THE DISTRICT

To be sure, "the fact that basic American political theory supports national and local franchise for District citizens does not establish the constitutional propriety of such franchise."⁸⁴ Professor Philip B. Kurland wisely reminds us that, in constitutional law as in life, "the right answer depends on the right question."⁸⁵ The constitutional question regarding S. 1257 is whether the Constitution allows Congress to provide representation for the District in the House of Representatives through legislation, rather than through a constitutional amendment.

⁷⁸ *Id.* at 34–38.

⁷⁹ *Providing Voting Rights Hearing*, *supra* note 25, at 2 (statement of Sen. Orrin G. Hatch).

⁸⁰ S.B. 5001, 56th Leg., 5th Spec. Sess. (Utah 2006).

⁸¹ *Providing Voting Rights Hearing*, *supra* note 25, at 2 (statement of Sen. Orrin G. Hatch).

⁸² *See* S. 1257 § 4(1), 110th Cong (2007).

⁸³ *See, e.g.*, S. REP. NO. 110-123, at 4–5 (2007).

⁸⁴ Franchino II, *supra* note 3, at 377.

⁸⁵ Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839, 839 (1986).

As a preliminary matter, it is clear that Congress possesses the constitutional authority to enlarge the House of Representatives. The Constitution's grant of legislative power in Article I directs Congress to determine the number and allocation of House seats, within certain constitutional constraints.⁸⁶ The Constitution establishes that the number of representatives "shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative."⁸⁷ Today, this means that the House must have a minimum of 50 members and, based on current population estimates, may have a maximum of just over 10,000 members.⁸⁸ Congress set the number of House seats at 435 in 1911,⁸⁹ and it remains at that number today.⁹⁰

Because this basic constitutional authority is clear, this Article addresses whether the Constitution's provision that the House of Representatives "shall be composed of members chosen every second year by the people of the several states,"⁹¹ referred to as the House Composition Clause, provides an additional limitation on Congress's authority to determine the number and allocation of House members. The refined question is thus: Did the framers of the Constitution intend this clause—by using the word "states"—to preclude Congress from providing District residents House representation?

For opponents of S. 1257, the word "states" begins and ends the constitutional debate. District residents may not be represented in the House, they say, because the District is not a state. Senate Minority Leader Mitch McConnell (R-Ky.), for example, has called S. 1257 "clearly and unambiguously unconstitutional," stating that it "contravenes what the framers wrote, what they intended, what the courts have always held, and the way Congress has always acted in the past."⁹² The Bush Administration's Statement of Administration Policy similarly asserts: "The Constitution limits representation in the House to Representatives of States The District of Columbia is

⁸⁶ See U.S. Const. art. I, § 2 ("The actual enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.") (emphasis added).

⁸⁷ *Id.*

⁸⁸ The U.S. Census Bureau estimates the U.S. population to be over 300 million people. See U.S. Census Bureau, U.S. and World Population Clocks, <http://www.census.gov/main/www/popclock.html> (last visited Apr. 12, 2007).

⁸⁹ Pub. L. No. 62-5, ch. 5, 37 Stat. 13 (1911).

⁹⁰ ROYCE CROCKER, CONG. RESEARCH SERV., THE HOUSE APPORTIONMENT FORMULA IN THEORY AND PRACTICE 2 (2000). Congress temporarily expanded the House to 437 members upon the admission of Alaska and Hawaii as states, but the number reverted back to 435 following the 1960 census. See U.S. Census Bureau, Congressional Apportionment—Historical Perspective, <http://www.census.gov/population/www/censusdata/apportionment/history.html> (last visited Apr. 12, 2007).

⁹¹ U.S. CONST. art. I, § 2.

⁹² 153 CONG. REC. S11,539 (daily ed. Sept. 17, 2007) (statement of Sen. McConnell).

not a State. Accordingly, congressional representation for the District of Columbia would require a constitutional amendment.”⁹³

Both the Senate and House should debate, openly and more often, whether the Constitution allows them to pass individual pieces of legislation. Such public debate would demonstrate to our fellow citizens our continuing commitment to the Constitution as both the foundation of our government and the source of limitations on it. I freely admit that there are legitimate arguments on both sides of the constitutional debate regarding legislation to grant House representation to the District. As I have listened and participated in debates and discussions during the 110th Congress, I have been impressed that thoughtful experts, Democrats and Republicans, liberals and conservatives, are indeed on both sides of this question. The considerations outlined below, however, have led me to believe that “those who drafted the Constitution did not, by guaranteeing the vote to state residents, intend to withhold the vote from District residents.”⁹⁴ Because America’s founders did not intend to prohibit Congress from providing House representation for the District through legislation, S. 1257 rests on a firm constitutional foundation.

The first consideration is that America’s founders grounded our entire political system on the principles of self-government and popular sovereignty. The Declaration of Independence asserts that government derives its “just powers from the consent of the governed.”⁹⁵ The Constitution guarantees republican government,⁹⁶ a system of government in which, as James Madison wrote, power comes from “the great body of the people.”⁹⁷ Alexander Hamilton famously explained the American system of representative self-government by saying: “Here, sir, the people govern; here, they act by their immediate representatives.”⁹⁸ Today, his words appear inscribed above an entrance to the U.S. House of Representatives in the Capitol,⁹⁹ a building Thomas Jefferson described as “dedicated to the sovereignty of the people.”¹⁰⁰

I believe that this principle of popular sovereignty is so fundamental to our Constitution, the existence of the franchise so central, that it ought to govern absent actual evidence that America’s founders intended that it be

⁹³ EXECUTIVE OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: S. 1257—DISTRICT OF COLUMBIA HOUSE VOTING RIGHTS ACT OF 2007, at 1 (2007), <http://www.whitehouse.gov/omb/legislative/sap/110-1/s1257sap-s.pdf>.

⁹⁴ Memorandum from Richard Bress and Kristen E. Murray to Walter Smith 5 (Feb. 3, 2003) (on file with author).

⁹⁵ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

⁹⁶ U.S. CONST. art. IV, § 4.

⁹⁷ THE FEDERALIST NO. 39, at 209 (James Madison).

⁹⁸ Alexander Hamilton, Remarks at the New York Ratifying Convention (June 27, 1788), in *SELECTED WRITINGS AND SPEECHES OF ALEXANDER HAMILTON* 228, 229 (Morton J. Frisch ed., 1985).

⁹⁹ Architect of the Capitol, Quotations and Inscription in the Capitol Complex, http://www.aoc.gov/cc/cc_quotations.cfm (last visited Feb. 22, 2008).

¹⁰⁰ Letter from Thomas Jefferson to Benjamin Latrobe (1812), in *THE JEFFERSONIAN CYCLOPEDIA* 48, 48 (John P. Foley ed., 1900).

withheld from one group of citizens. The Supreme Court said in 1964 that the Constitution “leaves no room for classification of people in a way that unnecessarily abridges” the right of participating in the election of those who make the laws by which we must live.¹⁰¹ This places a significant burden on those who would argue that the Constitution, by not providing directly for such representation itself, actually bars Congress from doing so. Repeating the dictionary definition of the word “states” does not meet that burden, and the remaining considerations discussed below convince me that this burden cannot be met.

Second, as noted above, the act of setting apart a district for the nation’s capital provides no evidence that America’s founders wanted to disenfranchise the Americans who would live there.¹⁰² Rather, “[i]t cannot be overemphasized that throughout the debates regarding the selection of the site and the adoption of the District clause, the desire for an area free from state control was paramount.”¹⁰³ Just as disenfranchisement was certainly not necessary to achieve that goal, correcting that error by providing today for House representation does not undermine the District’s continuing status as a jurisdiction separate from the states and under the legislative authority of Congress.¹⁰⁴

Third, far from indicating an intent to disenfranchise, the evidence shows that America’s founders intended that District residents retain the franchise and be represented in Congress. They demonstrated that intention, as well as their acceptance of legislation as an appropriate means to that end, by providing for congressional representation of District residents between 1790 and 1800 even though they no longer resided in a state.¹⁰⁵ The founders’ strong commitment to the franchise as the very heart of republican government makes it “inconceivable that they would have purposefully intended to deprive the residents of their capital city of this most basic right.”¹⁰⁶ And the fact that they provided for, and then negated, congressional representation for District residents by legislation leads to the conclusion that, as Representative Tom Davis (R-Va.) has put it, “[w]hat was done by statute in 1790, and then undone by statute in 1800, can be redone by statute today.”¹⁰⁷

¹⁰¹ *Wesberry v. Sanders*, 376 U.S. 1, 17–18 (1964).

¹⁰² See *supra* notes 18–19, 33–34 and accompanying text.

¹⁰³ *Franchino I*, *supra* note 2, at 213.

¹⁰⁴ *Raven-Hansen*, *supra* note 16, at 188 (“The question of the District’s subordination to congressional authority is logically unrelated to the composition of Congress.”).

¹⁰⁵ See *Voting Representation Hearing*, *supra* note 19, at 8 (statement of Viet D. Dinh and Adam Charnes) (“The terms of the cession and acceptance illustrate that, in effect, Congress exercised its authority under the District Clause to grant District residents voting rights coterminous with those of the ceding states when it accepted the land in 1790.”).

¹⁰⁶ Memorandum from Richard Bress and Kristen E. Murray to Walter Smith, *supra* note 94, at 7.

¹⁰⁷ H.R. REP. NO. 110-52, pt. 1, at 29 (2007).

Fourth, federal courts for nearly two centuries have held that constitutional, legislative, and treaty provisions framed in terms of “states” can nevertheless apply to the District. They have done so either by interpreting those provisions to include the District or by holding that Congress may extend to the District through legislation what the Constitution applies to the states. Article I, section 8, of the Constitution, for example, gives Congress power to “regulate commerce . . . among *the several states*.”¹⁰⁸ This is the same phrase, appearing in the same constitutional section, as the House Composition Clause.¹⁰⁹ And in *Stoutenburgh v. Hennick*,¹¹⁰ the Supreme Court long ago held that this reference to “the several states” applies equally to the District.¹¹¹

Similarly, the Sixth Amendment provides that in criminal prosecutions, “the accused shall enjoy the right to a speedy and public trial, by an impartial jury in *the state* and [judicial] district wherein the crime shall have been committed.”¹¹² In *Callan v. Wilson*,¹¹³ the Supreme Court held that this right applies within the District even though it is not a state.¹¹⁴

Federal courts also have held that Congress may, under its exclusive and plenary legislative authority over the District, treat the District like a state for certain purposes. For example, Article I, section 2, of the original Constitution stated that “direct taxes shall be apportioned among *the several states*.”¹¹⁵ This section again contains the same phrase as the House Composition Clause. Yet in *Loughborough v. Blake*,¹¹⁶ the Supreme Court held that Congress could indeed tax the District.¹¹⁷ Of course, the District was no more a state then for purposes of taxation than it is today for purposes of representation. Nonetheless, the Court said that “[i]f the general language of the constitution should be confined to the States, still the [District Clause] gives to Congress the power” to treat the District in the same way that the Constitution treats the states.¹¹⁸

Similarly, Article III, section 2, of the Constitution provides that federal courts may review lawsuits “between citizens of different *states*.”¹¹⁹ In *Hepburn & Dundas v. Ellzey*,¹²⁰ the Supreme Court held that this does not itself include the District.¹²¹ Significantly, however, Chief Justice Marshall found it “extraordinary” that federal courts would be open to citizens living

¹⁰⁸ U.S. CONST. art. I, § 8, cl. 3 (emphasis added).

¹⁰⁹ See U.S. CONST. art. I, § 2.

¹¹⁰ 129 U.S. 141 (1889).

¹¹¹ *Id.* at 148.

¹¹² U.S. CONST. amend. VI (emphasis added).

¹¹³ 127 U.S. 540 (1888).

¹¹⁴ See *id.* at 548–50.

¹¹⁵ U.S. CONST. art. I, § 2 (emphasis added).

¹¹⁶ 18 U.S. (5 Wheat) 317 (1820).

¹¹⁷ *Id.* at 325.

¹¹⁸ *Id.* at 322–24.

¹¹⁹ U.S. CONST. art. III, § 2 (emphasis added).

¹²⁰ 6 U.S. (2 Cranch) 445 (1805).

¹²¹ See *id.* at 452–53.

in states but not to citizens living in the District.¹²² And he observed that, while the Constitution did not itself extend diversity jurisdiction to the District, “this is a subject for legislative, not for judicial consideration.”¹²³

Indeed, in *National Mutual Insurance Co. v. Tidewater Transfer Co.*,¹²⁴ the Supreme Court upheld congressional legislation extending the federal courts’ diversity jurisdiction to the District.¹²⁵ Two members of the five-to-four majority would have overruled *Hepburn* outright,¹²⁶ while three others focused on Congress’s exclusive legislative authority over the District as the basis for their conclusion.¹²⁷ As the Court had done in *Loughborough* and again in *Hepburn*, the plurality held that while the Constitution did not itself extend diversity jurisdiction to the District, Congress could do so by treating the District as a state for this purpose.¹²⁸ Thus, “[t]he significance of *Tidewater* is that the five justices concurring in the result believed either that the District was a state under the terms of the Constitution or that the District Clause authorized Congress to enact legislation treating the District as a state.”¹²⁹

In *District of Columbia v. Carter*,¹³⁰ the Supreme Court held that since “the commands of the [Fourteenth] Amendment are addressed only to the State or to those acting under color of its authority” and “since the District of Columbia is not a ‘State’ within the meaning of the [Fourteenth] Amendment . . . neither the District nor its officers are subject to its restrictions.”¹³¹ Congress could not, therefore, use its authority to enforce the Fourteenth Amendment¹³² as the basis for legislation applying its restrictions on state authority to the District. The Court suggested, however, that Congress’s separate and exclusive legislative authority over the District would be a sufficient basis for such legislation.¹³³ In other words, just as it had done in *Loughborough*, *Hepburn*, and *Tidewater*, the Court held that Congress

¹²² *Id.* at 453.

¹²³ *Id.*

¹²⁴ 337 U.S. 582 (1949).

¹²⁵ *See id.* at 603–04 (upholding Act of April 20, 1940, ch. 117, 54 Stat. 143).

¹²⁶ *See id.* at 617–18 (Rutledge, J., concurring).

¹²⁷ *See id.* at 603.

¹²⁸ *See id.* at 588–89.

¹²⁹ *Voting Representation Hearing*, *supra* note 19, at 13 (statement Viet D. Dinh and Adam Charnes). For more extended analysis of this decision, see *Providing Voting Rights Hearing*, *supra* note 25, at 11–12 (statement of Viet D. Dinh). *See also* Franchino II, *supra* note 3, at 393–403; Memorandum from Richard P. Bress and Ali I. Ahmad to Walter Smith, *supra* note 41, at 3–4; Memorandum from Rick Bress and Kristen E. Murray to Walter Smith, *supra* note 94, at 9–10.

¹³⁰ 409 U.S. 418 (1973).

¹³¹ *Id.* at 423–24.

¹³² U.S. CONST. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).

¹³³ *See Carter*, 409 U.S. at 428–31. Congress used that authority for this purpose, amending 42 U.S.C. § 1983 in 1979 to cover the District. Pub. L. No. 96-170, 93 Stat. 1284 (1979). The constitutionality of this statute has never been challenged.

could, through legislation, apply to the District what the Constitution applies to states.

Another endorsement of this principle, and the most relevant for the present discussion, is the decision in *Adams v. Clinton*.¹³⁴ In *Adams*, District residents argued, as Delegate Norton had when she introduced her first bill on District representation, that the Constitution granted them the right to vote in congressional elections.¹³⁵ A three-judge panel of the district court disagreed, holding that the Constitution granted representation to residents of “states” and, as the Supreme Court had done in *Hepburn*, observed that the District is not a state.¹³⁶

The court did not, however, hold that the Constitution precludes Congress, acting under its extraordinary and plenary authority over the District, from providing for such representation through legislation. To the contrary, the court applied the Supreme Court’s reasoning in *Tidewater* that Congress in that case had used “its Article I power to legislate for the District” to provide for District residents what the Constitution had provided for state residents.¹³⁷ Following the Supreme Court’s example in *Loughborough*, *Hepburn*, *Tidewater*, and again in *Carter*, the court said that, while it lacked “authority to grant plaintiffs the relief they seek,” they could “plead their cause in other venues,”¹³⁸ including “the political process.”¹³⁹ The Supreme Court affirmed this decision,¹⁴⁰ suggesting that Congress can permissibly use its legislative authority to provide the District with congressional representation.

Some have read *Adams* too narrowly and failed to make the distinction, which the Supreme Court has made for nearly two centuries, between what the Constitution itself does directly and what Congress may do legislatively. One Congressional Research Service report, for example, characterizes *Adams* as deciding “whether, the Constitution, as it stands today, *allows* such representation.”¹⁴¹ The Bush administration’s Statement of Administration Policy on S. 1257 makes a similar argument, quoting from *Adams* the statement that “the Constitution does not *contemplate* that the District may serve as a state for purposes of the apportionment of congressional representa-

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

¹³⁵ *See id.* at 37–38.

¹³⁶ *Id.* at 55–56.

¹³⁷ *Id.* at 54–55.

¹³⁸ *Id.* at 72.

¹³⁹ *Id.* at 73.

¹⁴⁰ *Adams v. Clinton*, 531 U.S. 941 (2000).

¹⁴¹ KENNETH R. THOMAS, CONG. RESEARCH SERV., THE CONSTITUTIONALITY OF AWARDING THE DELEGATE FOR THE DISTRICT OF COLUMBIA A VOTE IN THE HOUSE OF REPRESENTATIVES OR THE COMMITTEE OF THE WHOLE 4 (2007). Mr. Thomas presented similar conclusions in testimony before the Senate Judiciary Committee on May 23, 2007. *Ending Taxation Without Representation: Hearing on S. 1257 Before the S. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Kenneth R. Thomas, Legislative Attorney, Cong. Research Serv.) (emphasis added).

tives.¹⁴² The holding in *Adams*, however, was far narrower than these statements suggest. The court denied relief on the basis that the Constitution does not itself grant such representation.¹⁴³ This conclusion is clearly correct, but it does not address whether Congress may grant House representation under its authority to legislate for the District. Former U.S. Solicitor General and U.S. Circuit Judge Kenneth Starr explained in Senate testimony that legislation to grant District residents congressional representation “presents an entirely and altogether different set of issues” from the claim rejected in *Adams*.¹⁴⁴ He explained that “[w]hile the Constitution may not affirmatively grant the District’s residents the right to vote in congressional elections, the Constitution *does* affirmatively grant Congress plenary power to govern the District’s affairs.”¹⁴⁵ Indeed, Congress has used its power under the District Clause “to enact hundreds of other statutes . . . under which the District is treated like a state”¹⁴⁶

These and other similar court decisions¹⁴⁷ suggest two important considerations for the present analysis. First, the word “states” in various constitutional provisions has not always been given its literal meaning, but has often been construed to include the District. Second, and more importantly, even when giving “states” its literal meaning in the constitutional text, courts have not held that this construction prohibits Congress from accomplishing through legislation what the Constitution does not itself grant. Decisions such as *Loughborough*, *Hepburn*, *Tidewater*, *Clinton*, and *Adams* support the proposition that even if the word “states” is not deemed to include the District, Congress may use its unique and plenary legislative authority over the District to provide for its residents what the Constitution provides for state residents.

These considerations have convinced me that neither a constitutional amendment nor statehood is necessary for the District’s residents to be granted representation in the House. I come to a different conclusion, however, with regard to granting the District representation in the Senate. Article I, section 3, of the Constitution provides that the Senate shall be composed

¹⁴² EXECUTIVE OFFICE OF THE PRESIDENT, *supra* note 93, at 1 (quoting *Adams*, 90 F. Supp. 2d at 46–47) (emphasis added).

¹⁴³ See *Adams*, 90 F. Supp. 2d at 72–73.

¹⁴⁴ *Voting Representation Hearing*, *supra* note 19, at 5–6 (statement of Kenneth W. Starr).

¹⁴⁵ *Id.*

¹⁴⁶ Memorandum from Richard Bress and Kristen E. Murray to Walter Smith, *supra* note 94, at 10; see also *id.* (“These statutes range from the Federal Election Campaign Act, the federal copyright statute, the Racketeer Influenced and Corrupt Organizations Act, to the federal civil rights and equal employment opportunity statute, and the federal crime victim compensation and assistance statute.”) (citations omitted).

¹⁴⁷ See, e.g., *Hobson v. Tobriner*, 255 F. Supp. 295, 297 (D.D.C. 1966) (“Although the District of Columbia is not regarded as a state for many purposes, it is clear that it is a part of the United States so as to afford the residents certain rights and privileges, such as trial by jury, presentment by grand jury, and the protections of due process of law.”); *Voting Representation Hearing*, *supra* note 19, at 15–17 (statement of Viet D. Dinh and Adam Charnes); *Hatch*, *supra* note 18, at 501 n.92.

of two Senators “from each State.”¹⁴⁸ The Seventeenth Amendment changed how those Senators would be chosen, so that today Senators are chosen “by the people” rather than “by the Legislature” of each state.¹⁴⁹ But that Amendment did not change the fundamental difference in the nature of House and Senate representation: the House was designed to represent people, whereas the Senate was designed to represent states.¹⁵⁰ Representative Davis argues that “a more historically correct reading recognizes that the Founders intended that [the House] represent all enfranchised people in America” and that “at the time the section was drafted, the residents of what would only later become the District of Columbia were among the people of the several states.”¹⁵¹ The difference in representation between the House and Senate was central to the so-called Great Compromise, which balanced the interests of large and small states in the construction of our bicameral national legislature,¹⁵² and it remains fundamental to the structure of our political system today. The District’s current status as a non-state, therefore, does not bar representation in the House, which is designed to represent population, but does bar representation in the Senate, which is designed to represent states.

Moreover, I have long believed that granting Senate representation for the District would interfere with the Constitution’s grant of “equal suffrage” for the states in the Senate.¹⁵³ In 1978, I argued that giving non-state entities a share of representation in the body designed to represent states would diminish that equal suffrage.¹⁵⁴ Others, such as Professor Raven-Hansen, have developed theories such as “nominal statehood” to support legislative provision for District representation in both the House and Senate.¹⁵⁵ Professor Raven-Hansen argues that “by the principle of nominal statehood, the District *is* a state for the purpose of representation,” and that granting the District representation in both houses therefore would not interfere with the

¹⁴⁸ U.S. CONST. art I, § 3.

¹⁴⁹ U.S. CONST. amend. XVII.

¹⁵⁰ See *Providing Voting Rights Hearing*, *supra* note 25, at 2 (statement of Sen. Orrin G. Hatch); *Voting Representation Hearing*, *supra* note 19, at 13 n.57 (statement of Viet D. Dinh and Adam Charnes); Hatch, *supra* note 18, at 504–05; see also *Wesberry v. Sanders*, 376 U.S. 1, 9 (1964) (“[I]t was population which was to be the basis of the House of Representatives.”). I disagree with some proponents of District representation that “this original sharp dichotomy between the people’s chamber and the states’ chamber has been muted, if not completely wiped away, by the Seventeenth Amendment.” Raskin, *supra* note 34, at 58–59.

¹⁵¹ H.R. REP. NO. 110-52, at 30 (2007).

¹⁵² See ROYCE CROCKER, CONG. RESEARCH SERV., *THE HOUSE OF REPRESENTATIVES APPOINTMENT FORMULA: AN ANALYSIS OF PROPOSALS FOR CHANGE AND THEIR IMPACT ON STATES* 3 (2001). This was “one of the great debates at the Constitutional Convention.” *Montana v. U.S. Dep’t of Commerce*, 775 F. Supp. 1358, 1368 (D. Mont. 1991) (O’Scannlain, J., concurring in part and dissenting in part).

¹⁵³ See U.S. CONST. art. V.

¹⁵⁴ 124 CONG. REC. 26,371 (1978) (statement of Sen. Hatch); see also BEST, *supra* note 16, at 43–51; STEPHEN MARKMAN, *STATEHOOD FOR THE DISTRICT OF COLUMBIA* 31 (1988); Hatch, *supra* note 18, at 515–17.

¹⁵⁵ See Raven-Hansen, *supra* note 16, at 189.

equal suffrage of the states.¹⁵⁶ But this sort of theory is insufficient for supporting District representation in the Senate, where *actual* statehood is what is constitutionally relevant. And legislation such as S. 1257, which grants only House representation and treats the District as a congressional district rather than as a state, avoids this constitutional conflict.

The courts have settled the question of whether the Constitution itself provides House representation for District residents.¹⁵⁷ It does not, and I do not dispute that conclusion. This observation, however, begins rather than ends the inquiry. The remaining question is the most important one: whether Congress may do what the Constitution does not. The considerations outlined above¹⁵⁸ convince me that the answer is yes. America's founders did not intend to suspend the principle of representative self-government for one group of citizens by permanently disenfranchising District residents. To the contrary, they provided for congressional representation even though these citizens no longer lived within a state. Indeed, "the intent of the Founding Fathers appears to favor national suffrage for the District."¹⁵⁹ Consistent with two centuries of judicial precedent, Congress may do what the Constitution does not by providing for House representation by legislation.

Candidly, my position regarding House representation has changed even though my opposition to Senate representation for the District remains the same. Most of the concerns about House Joint Resolution 554 that I expressed in 1978 are not relevant today because, as I will describe below, S. 1257 does not contain that proposed amendment's most problematic provisions. But during the floor debate on House Joint Resolution 554, I stated: "The Constitution refers only to 'States' as having representation in the Senate and the House of Representatives. There is no language to suggest that any other political entity could qualify for voting representation *in either Chamber*."¹⁶⁰ Upon further reflection, I have come to believe that my prior position failed sufficiently to account for the overarching constitutional principle of self-government, the specific actions of America's founders when they established the District, the relevant judicial precedents, the full extent

¹⁵⁶ *Id.*; see also BOYD, *supra* note 42, at 16 (setting forth a similar theory of "virtual statehood" for the District).

¹⁵⁷ See *Adams v. Clinton*, 90 F. Supp. 2d 35 (D.D.C. 2000), *aff'd*, 531 U.S. 941 (2000).

¹⁵⁸ See *supra* notes 95–108 and accompanying text. Other commentators and advocates have offered additional arguments that the Constitution allows Congress to provide congressional representation for the District through legislation. See, e.g., Frankel, *supra* note 16, at 1690–705; Memorandum from Walter Smith & L. Elise Dietrich to Del. Eleanor Holmes Norton, Anthony Williams, Mayor, District of Columbia, Linda Cropp, Chairman, D.C. City Council, and Robert Rigsby, Counsel, D.C. Corp. 7–8 (May 22, 2002), <http://www.dc.appleseed.org/projects/publications/smithsimplelegmemo052202.pdf>. Others have argued that the Constitution actually requires that District residents have the national franchise. See *generally*, e.g., Raskin, *supra* note 34 (arguing that the lack of District representation violates residents' rights to due process and equal protection).

¹⁵⁹ Franchino II, *supra* note 3, at 388, 411; see also *id.* ("'National representation' in the District existed during the transitional period 1790–1800.").

¹⁶⁰ 124 CONG. REC. 26,371 (1978) (statement of Sen. Hatch) (emphasis added).

of Congress's legislative authority over the District, and the distinction between the nature of representation in the House and the Senate. Properly weighing these considerations has led me now to believe that Congress has the power to provide House representation for District residents through legislation.

IV. CONGRESS SHOULD GIVE THE DISTRICT REPRESENTATION IN THE HOUSE

Having established that Congress *may* pass legislation such as S. 1257, the question remains whether it *should* do so. I believe that it should. I agree with the conclusion of the U.S. Court of Appeals in *Adams v. Clinton* that there is a "contradiction between the democratic ideals upon which this country was founded and the exclusion of District residents from Congressional representation."¹⁶¹ One of my predecessors as a Senator from Utah, George Sutherland, was later appointed to the Supreme Court and wrote for the Court in 1933:

The District was made up of portions of two of the original states of the Union, and was not taken out of the Union by the cession. Prior thereto its inhabitants were entitled to all the rights, guaranties, and immunities of the Constitution We think it is not reasonable to assume that the cession stripped them of these rights.¹⁶²

Certainly suffrage tops the list of rights.

This is not a new position for me. As I expressed three decades ago during debate on House Joint Resolution 554, "District residents should enjoy all the privileges of American citizenship."¹⁶³ These include "the privilege of participating in the electoral process."¹⁶⁴ District residents, I said then and continue to believe today, "should have voting rights."¹⁶⁵ Explaining my opposition to that amendment proposal in a more scholarly setting, I wrote similarly that I did not oppose House Joint Resolution 554 "out of opposition to providing the citizens of the District with a direct voice in the affairs of the national government."¹⁶⁶ In fact, I suggested as an alternative providing the District "with voting representation in the House of Repre-

¹⁶¹ 90 F. Supp. 2d at 72.

¹⁶² *O'Donoghue v. United States*, 289 U.S. 516, 540 (1933).

¹⁶³ 124 CONG. REC. 26,370 (1978) (statement of Sen. Hatch). During the 1978 debate, I made "very clear" that "I supported the intent of the amendment." *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 26,371.

¹⁶⁶ Hatch, *supra* note 18, at 480; see also *id.* at 533 ("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.").

sentatives alone.”¹⁶⁷ For me, the question has never been about the desirable ends, but about the appropriate means.

The most appropriate means would provide genuine congressional representation for District residents while maintaining other constitutional imperatives. I co-sponsored S. 1257 because I believe it meets this standard. This legislation would use Congress’s constitutional authority to provide House representation without disturbing the essential constitutional and political structure of our system of government.

In doing so, S. 1257 would avoid the problematic features of House Joint Resolution 554, which drew my opposition in 1978. During the 1978 floor debate I said that section 1 of that resolution was “at the heart of the difficulty.”¹⁶⁸ Section 1 read: “For the purpose 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.”¹⁶⁹ It thus would have provided for Senate, as well as House, representation. As explained above, I continue to oppose Senate representation for the District, and S. 1257 disclaims any basis for such representation. The Senate Homeland Security and Governmental Affairs Committee adopted an amendment to S. 1257, offered by Senator Susan Collins (R-Me.), stating that the District “shall not be considered a State for purposes of representation in the United States Senate.”¹⁷⁰

There can be no dispute that America’s founders intended for the District to be a political entity separate from the states. In addition, as I have explained in this Article, I believe that they did not intend that District residents be disenfranchised in establishing the District. I support both of these objectives today. For that reason, I continue to oppose both statehood and Senate representation for the District.¹⁷¹ Having reconsidered the factors outlined in this Article, I now support House representation for the District, a position that addresses the essential “political disability which has no constitutional rationale.”¹⁷²

While the Constitution guarantees each state at least one House member,¹⁷³ that number grows as a state’s population grows. Each congressional district, however, is represented by a single House member. Under S. 1257, the District would be treated not as a state but as a congressional district for purposes of House representation, guaranteeing and limiting that representa-

¹⁶⁷ *Id.* at 537.

¹⁶⁸ 124 CONG. REC. 26,370 (1978) (statement of Sen. Hatch).

¹⁶⁹ *Id.* at 26,372.

¹⁷⁰ S. REP. NO. 110-123, at 5 (2007).

¹⁷¹ See Hatch, *supra* note 18, at 504–07, 515–17 (arguing against Senate representation for the District).

¹⁷² Raven-Hansen, *supra* note 16, at 185 (referring to the disenfranchisement of District residents in Congress).

¹⁷³ U.S. CONST. art. 1, § 2.

tion to one member.¹⁷⁴ In addition, S. 1257 would make no change to the District's role in electing the President and Vice President¹⁷⁵ and would have no effect on its participation in the constitutional amendment process under Article V. In sum, S. 1257 is a narrowly focused bill that accomplishes a single important objective through a solidly constitutional means.

Nor has S. 1257 involved the procedural flaws that helped make House Joint Resolution 554 controversial. During the debate in 1978, I criticized the tactics that had been used in bringing the bill to the Senate floor.¹⁷⁶ These included being "asked to consider the flawed House version without having the opportunity to correct some of the provisions which make it unacceptable to a number of us."¹⁷⁷ Multiple House and Senate committees held public hearings on the present legislation, and S. 1257 itself was introduced precisely because the House version contained an important flaw, requiring that the new House seat for Utah be elected at-large.¹⁷⁸

Ultimately, therefore, I believe that S. 1257 meets the goal that I set forth in 1978. I said then that "I would like to see . . . remedied" the fact that District residents "may not vote for voting representatives" in Congress, but that House Joint Resolution 554 "is not the way to remedy it."¹⁷⁹ Having changed my view regarding the constitutionality of providing for House representation through legislation, I believe that the present legislation is the proper way to remedy an injustice that has lasted far too long. Without a clear constitutional command to the contrary, Americans in the District should be allowed to participate in selecting a representative, which the Supreme Court has called "the essence of a democratic society" and "the heart of representative government."¹⁸⁰

¹⁷⁴ See S. 1257 § 2, 110th Cong. (2007). This limitation to a single House member poses no conflict with the Supreme Court's requirement that the population of congressional districts be "as mathematically equal as reasonably possible." *White v. Weiser*, 412 U.S. 783, 790 (1973). Based on the current United States population of approximately 304 million, each congressional district has an average population of 699,000. U.S. Census Bureau, *supra* note 97. The District of Columbia's estimated population of about 588,000 is well below this level. See U.S. Census Bureau, National and State Population Estimates 2000 to 2007, <http://www.census.gov/popest/states/NST-ann-est.html> (last visited Apr. 12, 2008). However, the District's population exceeds that of Wyoming, which has one congressional district. See *id.*

¹⁷⁵ H.R.J. Res. 554, 95th Cong. (1978) would have repealed the Twenty-Third Amendment, which grants the District participation in electing the President and Vice President by appointing a number of electors "in no event more than the least populous State." U.S. CONST. amend. XXIII. While I continue to support House representation for the District, and have come to believe that legislation to that end is constitutional, I also continue to oppose the notion, as I argued three decades ago, that "all distinctions between the states and the District of Columbia [should] be removed." Hatch, *supra* note 18, at 501.

¹⁷⁶ 124 CONG. REC. 26,371 (1978) (statement of Sen. Hatch).

¹⁷⁷ *Id.*; see also Hatch, *supra* note 18, at 484 ("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 procedures [sic] invoked by the Senate Majority Leader . . .").

¹⁷⁸ See *supra* notes 65–67 and accompanying text.

¹⁷⁹ 124 CONG. REC. 26,371 (1978) (statement of Sen. Hatch).

¹⁸⁰ *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

This conclusion is reinforced by the fact that Congress today has provided that Americans living outside of the United States may vote in congressional elections. The Uniformed and Overseas Citizens Absentee Voting Act¹⁸¹ allows Americans to vote by absentee ballot in “the last place in which the person was domiciled before leaving the United States,”¹⁸² as Congress did for District residents between 1790 and 1800. As such, “the Act permits voting in federal elections by persons who are not citizens of any state.”¹⁸³ Similarly, the Supreme Court has held that residents of a federal enclave within Maryland have a constitutional right to congressional representation.¹⁸⁴ As has been noted, “[i]f residents of federal enclaves and Americans living abroad can thus be afforded voting representation, Congress should be able to extend the same to District residents.”¹⁸⁵ The right to vote in congressional elections “belong[s] to the voter in his or her capacity as a citizen of the United States”¹⁸⁶ and respects the “relationship between the people of the Nation and their National Government.”¹⁸⁷ That is as true about Americans living in the District as it is about Americans living in Utah. Legislation such as S. 1257, granting the District a full voting member of the House, supports both the imperative of self-government and the essential structure on which our political system is built. On Constitution Day, 2006, former U.S. Circuit Judges Kenneth Starr and Patricia Wald wrote in the *Washington Post* that such legislation “is consistent with fundamental constitutional principles; it is consistent with the language of Congress’s constitutional power; and it is consistent with the governing legal precedents.”¹⁸⁸

In conclusion, I offer the closing paragraph from a column published one year later in the *Washington Post* that I authored along with Sen. Lieberman, Rep. Davis, and Delegate Norton:

We do not believe that the nation’s Founders, fresh from fighting a war for representation, would have denied representation to the residents of the new capital they established. Some of these residents of Maryland and Virginia were undoubtedly veterans of the Revolutionary War, and residents of both states had voting representation. When accepting the land for the District, the First Congress honored a covenant to these first residents to observe

¹⁸¹ Pub. L. No. 99-410, 100 Stat. 924 (1986) (codified at 42 U.S.C. § 1973ff (2000)).

¹⁸² 42 U.S.C. § 1973ff-6.

¹⁸³ *Voting Representation Hearing*, *supra* note 19, at 18 (statement of Viet D. Dinh & Adam Charnes).

¹⁸⁴ *See Evans v. Cornman*, 398 U.S. 419, 419, 426 (1970).

¹⁸⁵ Memorandum from Richard Bress and Kristen E. Murray to Walter Smith, *supra* note 94, at 12.

¹⁸⁶ *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 844 (1995) (Kennedy, J., concurring).

¹⁸⁷ *Id.* at 845.

¹⁸⁸ Kenneth Starr & Patricia Wald, Op-Ed., *Congress Has the Authority to Do Right by D.C.*, WASH. POST, Sept. 17, 2006, at B8.

existing laws of the donor states. They pledged that, when jurisdiction passed to Congress, it would “by law provide” for preserving the residents’ rights. It is time to fulfill that promise by passing our historic bill.¹⁸⁹

The authors of this statement serve in different houses of Congress, are members of different political parties, and often have different political goals that reflect different ideologies. Yet we are the principal sponsors of S. 1257 because we believe Congress may and should provide House representation for the District.

¹⁸⁹ Orrin G. Hatch, Joe Lieberman, Tom Davis & Eleanor Holmes Norton, Op-Ed., *A Vote the District Deserves*, WASH. POST, Sept. 12, 2007, at A19.