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The Constitution Created the District of Columbia and Only the Constitution Can Make It a State

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KEY TAKEAWAYS

Statehood for D.C. would require a constitutional amendment.

The Framers of the Constitution envisioned a District of significant size and population that would serve as our nation's seat of government.

The Twenty-Third Amendment would have to be repealed or modified by constitutional amendment before D.C. could become a state. Simple legislation cannot accomplish this.

The campaign to convert most of the District of Columbia into a state began in the 1960s and remains active today. On April 22, 2021, the House of Representatives voted 216–208 along party lines to pass H.R. 51, the "Washington, D.C. Admission Act."[1] It would admit the District's populated portion—97 percent of its area—as a state and reduce the remainder—known only as the "Capital"—to a tiny enclave of federal buildings within that state. All but four Senate Democrats signed onto S. 51, the parallel Senate bill.[2]

America's Founders designed the seat of the national government to be a district that was, geographically and politically, outside any state and under Congress' exclusive control. They implemented this plan not through legislation, but in the Constitution itself,[3] which thereafter informed District advocates' goals and the means for achieving them. For most of

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American history, those advocates sought to provide for District residents' participation in national elections without changing the District's carefully crafted design. In other words, they sought suffrage, not statehood, through a constitutional amendment—not legislation.

Even after changing their goal from suffrage to statehood, District advocates continued to argue that statehood would require a constitutional amendment. Their choice of means changed only after an amendment for District representation in Congress, proposed in 1978, fell far short of the states needed for ratification.

This *Legal Memorandum* examines whether converting most of the District into a state may be accomplished by legislation or whether such a change requires a constitutional amendment. The answer requires a proper understanding of the District's unique status and Congress' authority over it, Congress' historical practice and the Justice Department's position regarding both suffrage and statehood, and a thorough look at the Twenty-Third Amendment and its application to this issue.

The District's Status and Congress' Authority

Two experiences convinced America's Founders that the new nation's capital should be a unique political jurisdiction, separate from and outside any state, under Congress' exclusive authority. First, Congress changed locations nearly a dozen times, meeting in eight different cities across five states between the Boston Tea Party in December 1773 and its first session under the new Constitution in March 1789.[4] Second, during the summer of 1783, recently released Revolutionary War soldiers seeking back pay disrupted Congress' meeting in Philadelphia, and Pennsylvania refused Congress' appeal for assistance.[5] This incident "emphasized to Congress the need for a site of its own, independent of any state control."[6]

The Constitution was ratified on June 21, 1788, providing for Congress' "exclusive" legislative control over a "district," composed of land provided "by Cession of Particular States" to become the "Seat of the Government of the United States." During the next year, the Maryland[7] and Virginia[8] legislatures enacted statutes providing up to 10 square miles of their territory for this purpose. In July 1790, Congress enacted the Residence Act,[9] identifying a stretch of the Potomac River for the District of Columbia and authorizing President George Washington to appoint a three-member commission for choosing the specific location. The Residence Act designated the first Monday of December 1800 for the formal establishment of the District as the seat of the national government.

A Unique District. The Founders could have provided for a capital comprised only of a group of government buildings. Instead, they established a district that would not only include the capital but also be a "major center of culture and commerce."[10] The district established by the Constitution, it turned out, was several times larger than the initial proposal by a congressional committee.[11] This understanding of the District's unique status went unchallenged for most of American history. In 1963, for example, then–Attorney General Robert Kennedy argued against reducing the District to a small enclave. The Founders, he said, "contemplated a Federal city, of substantial population and area, which would be the capital and a showplace of the new Nation."[12]

Congress' Authority "Over" the District. The Constitution gives Congress "exclusive" legislative authority "over" the District. The Supreme Court has held that "the word 'exclusive' was employed to eliminate any possibility that the legislative power of Congress over the District was to be concurrent with that of the ceding states."[13] Congress "may exercise within the district all legislative powers that the legislature of a state may exercise within the state."[14] Deputy Assistant Attorney General John Elwood testified in a 2007 hearing that the District's power to legislate "over" the District concerns its "internal governance"[15] or "*internal operation*."[16] In other words, the Constitution established what the District *is*, and Congress has authority to determine what the District *does*.

Enfranchisement for District Residents

The Residence Act provided that state law would continue to govern "until the time fixed for the removal of the government thereto, and until Congress shall otherwise by law provide."[17] This included the right to vote in congressional and presidential elections. That suffrage under state law ended when the District of Columbia Organic Act,[18] enacted in February 1801, formally placed the District under Congress' control and organized its territory—but did not provide for continued suffrage.[19] This issue was so important that some District residents even urged Congress not to pass the Organic Act until their suffrage was protected.[20]

Congressional Representation

A campaign to restore that suffrage by giving the District congressional representation began almost immediately. Both historical practice and the position of the Justice Department during Administrations of both

political parties agree that such representation would require a constitutional amendment.[21]

Historical Practice. The Founders demonstrated their understanding that congressional representation for the District would require a constitutional amendment even before the Constitution was ratified. In the New York ratifying convention, for example, Alexander Hamilton proposed an amendment allowing Congress to provide such representation when the District's population reached a particular threshold.[22] In 1801, less than a year after Congress assumed jurisdiction over the District, Augustus Woodward, a prominent jurist, academic, and urban planner, published a pamphlet proposing that the District be granted one Senator and a number of House members in proportion to its population.[23] Like Hamilton, he acknowledged that achieving this goal "will require an amendment to the Constitution of the United States."[24] Professor Jonathan Turley writes that "[i]n the late eighteenth and early nineteenth centuries, the political status of the District was viewed as fixed and immutable absent a constitutional amendment or retrocession."[25]

Senator Henry Blair (R–NH) introduced the first proposal to enfranchise District residents in May 1888. It was "identical in its intent to that of the Woodward proposal"[26] and used the same means that Woodward advocated: a constitutional amendment. Scores of similar resolutions followed. District advocates repeatedly emphasized that, by seeking to restore suffrage through a constitutional amendment, they were respecting and preserving the District's unique status. For example:

- In a February 1916 Senate hearing on a constitutional amendment providing for suffrage, leading District advocate Theodore Noyes emphasized that it "does not propose the admission of the District of Columbia into the Union as a sovereign State" or change "in the smallest degree" Congress' authority over the District.[27]

- In a 1926 House of Representatives hearing, no one challenged the view that restoring suffrage "would have to be done by a constitutional amendment."[28]

- In a May 1938 House hearing on a similar measure, George E. Allen, Commissioner of the District of Columbia, argued in a submitted statement that "Congress is impotent without a constitutional amendment to grant [District residents such] relief."[29]

- A 1945 House Judiciary Subcommittee report on District representation concluded that a "[c]onstitutional amendment is necessary."[30]

- The House Judiciary Committee's 1972 report on a constitutional amendment to provide the District both House and Senate representation concluded: "If the citizens of the District are to have voting representation in the Congress, *a constitutional amendment is essential; statutory action alone will not suffice*."[31]

District advocates abandoned their long-standing position that representation required a constitutional amendment only after the one amendment designed to achieve that goal, proposed by Congress in August 1978, fell far short of the requisite number of states needed for ratification by its seven-year deadline.[32] Even the first legislative proposal for suffrage did not attempt to change the District's status. It would have allowed District residents to vote and to serve in Congress representing the District *as if they were Maryland residents,*[33] but not as District residents. Delegate Eleanor Holmes Norton (D–DC) introduced House Resolution 4208 in July 1998, but it provided only that District residents "shall have full voting representation in the Congress."[34] Norton did not introduce legislation to provide for District representation in the House or Senate until 2004.[35]

Department of Justice Position. In addition to long-standing congressional practice, the Justice Department has consistently concluded that congressional representation for the District requires a constitutional amendment.

- **Carter Administration.** On April 17, 1978, Assistant Attorney General John Harmon testified before the Senate Judiciary Committee, affirming the Administration's "strong support…for the principle of full voting representation [in Congress] for the District of Columbia,"[36] but arguing that any method of achieving this goal, including statehood, would require a constitutional amendment.[37]

- **Reagan Administration.** In April 1987, the Department of Justice's Office of Legal Policy prepared a report for Attorney General Edwin Meese III regarding statehood for the District. As Harmon had done, it argued that any method of providing congressional representation for the District would require a constitutional amendment.[38]

- **George W. Bush Administration.** On May 23, 2007, the Senate Judiciary Committee held a hearing on S. 1257, the District of Columbia House Voting Rights Act, which would give the District one House seat. Deputy Assistant Attorney General John P. Elwood testified that "[i]n the absence of a constitutional amendment...the explicit provisions of the Constitution do not permit Congress to grant congressional representation to the District through legislation."[39]

- **Obama Administration.** The Justice Department's Office of Legal Counsel (OLC) prepared an opinion for Attorney General Eric Holder, dated February 25, 2009, concluding that legislation to give the District House representation "is clearly unconstitutional."[40] The next day, Holder issued his own opinion on this issue for the White House Counsel, concluding that "[a]lthough it presents a close constitutional question, in my view...the balance tips in favor of finding this proposed legislation constitutional."[41] Holder sided with "compelling" arguments by scholars[42] and the lack of "a clear constitutional prohibition" on Congress providing suffrage by legislation.[43] In doing so, however, he described the OLC's previous position as "strong," citing Elwood's testimony on behalf of a Republican administration but not Harmon's testimony for a Democratic one. Moreover, he did not repudiate the previous OLC opinions that had taken a contrary view.

In *Adams v. Clinton*, a group of District residents and the District itself filed suit in June 1998, arguing that the District's unique status, including its lack of congressional representation and Congress' exclusive jurisdiction, violate the Constitution. Three months later, another group of District residents filed a similar suit and, after consolidating the cases, a three-judge U.S. District Court heard oral arguments. After dismissing some of the claims and rejecting the argument that the remaining claims raised a nonjusticiable political question and finding that the plaintiffs had standing, the court addressed the merits. The court held that the District could not be treated as a state for purposes of apportioning congressional representation[44] and rejected the plaintiffs' various constitutional arguments.[45]

Ironically, by seeking a *judicial* remedy based on *constitutional* arguments, the plaintiffs implicitly conceded that the District's status or political identity is established by the Constitution. In fact, the court held that "it *is* the Constitution itself that is the source"[46] of District residents' inability to vote in congressional elections. As such, the Constitution would have to be amended to remedy that inability.

In an October 2007 report, the Congressional Research Service concluded that "case law which does exist would seem to indicate that… congressional power over the District of Columbia does not represent a sufficient power to grant congressional representation.… [I]t would appear likely that Congress does not have authority to grant voting representation… to the District of Columbia."[47]

The Statehood Campaign

The Constitution established the entire District as the seat of the federal government and gave Congress exclusive legislative authority "over" that District—that is, regarding its internal governance or operation. Historical practice and the consistent Justice Department conclusion establish that Congress' legislative authority over the District does not extend to changing what the District is. If treating the District *as if it were a state* for purposes of suffrage in national elections requires a constitutional amendment, then the much more far-reaching goal of converting nearly all of the District into a state—with the seat of government wholly contained within it—certainly does.

Historical Practice. The policy of statehood for the District, and how it might be achieved, had been discussed in Congress long before advocates launched a public statehood campaign. The clear consensus was that this goal should not be pursued and, if it were, would require changing the Constitution in multiple ways. The House Judiciary Committee report on the Twenty-Third Amendment, for example, argued that making the District a state by legislation would "do violence to the basic constitutional principle which was adopted by the framers of the Constitution in 1787 when they made provision for carving out the 'seat of Government' from the States and set it aside as a permanent Federal district."[48]

The conclusion that D.C. statehood would require amending the Constitution, therefore, is an obvious inference from the similar conclusion regarding congressional representation. Before changing their goal from suffrage to statehood, however, District advocates themselves consistently argued that statehood would require a constitutional amendment. The House Judiciary Committee report on the Twenty-Third Amendment, referenced above, asserted that making the District a separate state or retroceding its territory to Maryland would raise a "serious constitutional question."[49] Either step would amount to "divestiture by Congress of its exclusive authority over the District."

District advocates, initially at least, maintained their view that a constitutional amendment was necessary even after shifting their goal from suffrage to statehood. Representative Henry Gonzalez (D–TX), for example, introduced House Joint Resolution 772 in August 1967, which would convert the entire District into the State of Columbia, repealing both the Twenty-Third Amendment and Congress' legislative authority over the District.[50]

Significantly, advocates of the 1978 constitutional amendment to give the District congressional representation opposed statehood. During one hearing, for example, Senator Edward Kennedy (D–MA) addressed what he called the "statehood fallacy,"[51] arguing that "statehood may well be an impossible alternative, given the practical and constitutional questions involved in changing the historical status of the Nation's Capital."[52] Other advocates of the 1978 amendment circulated a pamphlet, which was endorsed by the District's first congressional delegate, Walter Fauntroy, titled "Democracy Denied." It argued that statehood "would defeat the purpose of having a federal city, i.e., the creation of a district over which Congress would have exclusive control."[53] Statehood that left intact only a small federal enclave within the new state would raise "substantial" and "enormous problems," including application of the Twenty-Third Amendment.[54] In a January 1978 publication, Fauntroy again argued that statehood "would be in direct defiance of the prescriptions of the Founding Fathers."[55]

Justice Department Position. The U.S. Justice Department has long argued that statehood for some or all of the District would require a constitutional amendment.

- **Kennedy Administration.** In 1963, a House District of Columbia Subcommittee held hearings on a group of bills that would provide "some form of home rule for the District of Columbia."[56] House Resolution 5564 would reduce the "seat of government" to a "Federal enclave" of less than three square miles by giving back to Maryland the remainder of what it had ceded in 1790.[57] This is the same result that current legislation would achieve by making the remainder a state. Then–Attorney General Robert Kennedy submitted to the subcommittee a memorandum arguing that a small federal enclave "clearly does not meet the concept of the 'permanent seat of government' which the framers held."[58]

- **Carter Administration.** Assistant Attorney General Patricia Wald (who later served as Chief Judge of the U.S. Court of Appeals for the District of Columbia) testified before the House Judiciary Subcommittee

on Civil and Constitutional Rights in October 1977 regarding congressional representation and statehood for the District. She contended that statehood "cannot...be achieved without constitutional amendment."[59] The Founders, Wald testified, "meant for the District not to be located within the borders of any State," and "[c]onferring statehood on the District without amending the Constitution would also raise questions about the effects upon the 23rd Amendment."[60]

- **Reagan Administration.** In April 1987, a House District of Columbia Subcommittee held a hearing on House Resolution 51, a bill for admission of the state of "New Columbia" into the Union.[61] Like H.R. 51 today, it would reduce the District to what it called the National Capital Service Area, comprised only of the "principal Federal monuments" and specific buildings "located adjacent to the Mall and the Capitol Building." Assistant Attorney General Stephen Markman (who later served as a justice on the Michigan Supreme Court) testified that the bill raised "very serious constitutional questions" and concluded that "[g]ranting statehood to the District would defeat the purpose of having a Federal city, would be in direct defiance of the intent of the founders, and we believe would require an amendment to the Constitution."[62]

The Twenty-Third Amendment

Historical practice and the consistent position of the Justice Department regarding both congressional representation and statehood clearly establish that changing the District's unique political status requires a constitutional amendment. The Twenty-Third Amendment reinforces this understanding by providing for participation in the presidential election process while maintaining that status.

Need for the Amendment. The District's participation in the Electoral College was included in Augustus Woodward's original 1801 proposal[63] and Senator Blair's 1888 resolution.[64] The long-standing argument that Americans living in the United States had been disenfranchised gained popularity as the District's population grew, peaking in the 1950 census at more than 800,000. The District exceeded the population of more than a dozen states[65] by the time Senator Estes Kefauver (D–TN) introduced Senate Joint Resolution 39 in January 1959.[66]

As introduced, Kefauver's resolution did not address the District at all, proposing a constitutional amendment allowing state governors to temporarily fill vacancies in the House of Representatives created by national

disasters.[67] In February 1960, the Senate voted 70–18 to pass the resolution with two additions: granting the District House representation and electoral votes in presidential elections, which was proposed by Senator Kenneth Keating (R–NY), and eliminating any property qualification, such as a poll tax, as a prerequisite for voting in federal elections, which was proposed by Senator Spessard Holland (D–FL).[68]

It soon became obvious that, unlike the other provisions, the proposal for District participation in presidential elections was not only uncontroversial but had no real opposition at all. The House of Representatives, therefore, stripped out the other provisions and passed the District provision by voice vote as its own measure, House Joint Resolution 757.[69] The Senate adopted the revised resolution by voice vote two days later and, within just nine months, the necessary three-fourths of the states had ratified it.[70]

Consistent with the 160-year history of enfranchisement efforts, the Twenty-Third Amendment addressed a specific issue in a way that deliberately preserved the District's unique status as the seat of the federal government under Congress' exclusive control.[71] As Theodore Noyes had argued in 1916,[72] the House Judiciary Committee report emphasized that it "would not give the District of Columbia any other attributes of a State or change the constitutional powers of the Congress to legislate with respect to the District." In fact, the report rejected the alternatives of statehood and retrocession, which would amount to "divestiture by the Congress of its exclusive authority over the District of Columbia."[73] The Twenty-Third Amendment would instead "give the District appropriate participation in national elections" while preserving "the unique status of the district as the seat of Federal Government under the exclusive legislative control of Congress."[74]

What the Amendment Does. The Twenty-Third Amendment, ratified in March 1961, provides for the District of Columbia to participate in the presidential election process. Section 1 of the Amendment provides that "The District constituting the seat of Government shall appoint" the number of electors to which it would be entitled "if it were a State," but no more "than the least populous State." Each state's electoral vote total is equal to the number of its Senate and House Members; seven states—with an average population of 819,000—have the minimum of three electoral votes.

But relative to other states, the population of the District has actually been *decreasing* over time. When Attorney General Robert F. Kennedy offered his thoughts to Congress in 1963, he noted that the District's population at that time exceeded that of 11 states: Alaska, Delaware, Hawaii, Idaho, Montana, Nevada, New Hampshire, North Dakota, South Dakota, Vermont,

and Wyoming.[75] The District's population of 690,000 in the 2020 census, however, exceeded that of just two states, Vermont and Wyoming.[76] In fact, at least 19 cities currently have a population larger than the District's.[77]

Impact of the Amendment on Statehood Debate. Three phrases in Section 1 of the Twenty-Third Amendment are particularly relevant to the statehood debate:

1. "The District Constituting the seat of Government of the United States,"
2. "shall appoint," and
3. "in such manner as Congress may direct."

The latter two are straightforward. The Twenty-Third Amendment requires that "The District Constituting the seat of Government of the United States shall appoint" electors for President and Vice President. Statehood proposals, such as H.R. 51, would reduce the District's population nearly to zero, creating the problem of a handful of people controlling electoral votes in presidential elections. Some statehood advocates, therefore, have argued that Congress' authority to determine the manner in which these electors are appointed allows it to simply refuse to appoint electors for this tiny group of District residents. The straightforward text of the Twenty-Third Amendment, however, forecloses that option.

The Amendment's unambiguous "shall appoint" language is mandatory, not permissive. The phrase "in such manner as Congress may direct" simply indicates that, under the Twenty-Third Amendment, Congress plays the same role that a state legislature plays under the Electors Clause (Article I, Section 1, Clause 2), which provides that each state shall appoint electors "in such Manner as the Legislature thereof may direct."

The first phrase remains the most salient to the D.C. statehood debate and raises this essential question: Does the Twenty-Third Amendment's phrase "The District Constituting the seat of Government of the United States" fix the boundaries and status of the District as of the date of that Amendment's ratification even if other provisions, such as the District Clause of the Constitution, have not? The likely answer is "yes."

"The District Constituting the Seat of Government of the United States." As noted above, the Constitution's District Clause vests Congress with exclusive legislation "in all Cases whatsoever, over such District (not exceeding ten Miles square)." Proponents of the District legislatively

achieving statehood argue that, while the Constitution sets a maximum size for the District of 10 square miles, Congress otherwise has the authority to change its size and boundaries.

Congress could initially have accepted a tract of land smaller than "ten Miles square" to be the seat of government. Once Congress exercised its constitutional authority to select a tract of land to be the "District Constituting the seat of Government," however, it likely exhausted its authority to significantly alter the boundaries of this District. Its legislative authority "over" the District, as noted above, was understood to be limited to the governance of the now-established District, rather than an ongoing authority to alter its configuration or political status.

As Attorney General Robert F. Kennedy said, "While Congress' power to legislate for the District is a continuing power, its power to create the District by acceptance of cession contemplates a single act. The Constitution makes no provision for revocation of the act of acceptance or for retrocession."[78] The District Clause, in other words, makes clear that "Congress is here given exclusive jurisdiction over the district which was to 'become the seat of government of the United States,' not merely over the seat of government, wherever that might happen to be.... [O]nce the cession was made and this 'district' became the seat of government, the authority of Congress over its size and location seems to have been exhausted."[79]

Statehood advocates point out that, in 1846, Congress returned nearly one-third of the District to Virginia—the land it had originally contributed for the District's formation. Some have argued that this return, or retrocession, of land to Virginia is a precedent for the proposition that Congress did not exhaust its authority under the District Clause when it originally accepted the land for, and set the boundaries of, the District. That could, even potentially, be a reasonable argument only if that retrocession was clearly legitimate. As the Kennedy, Carter, and Reagan Justice Departments pointed out, however, the retrocession to Virginia was controversial at the time, has remained so, and the Supreme Court has never ruled on its constitutionality.[80]

As evidence of this ongoing controversy, the House of Representatives would later pass bills stating that the retrocession had been unconstitutional.[81] In 1910, George Washington University Law Professor Hannis Taylor argued that such action was unconstitutional, and President (and future Chief Justice) William Howard Taft also found the retrocession to be problematic.[82]

Size and Status of District Definitively Set. But even if one believes the controversial proposition that Congress could statutorily alter the boundaries of the District by simple legislation pursuant to the powers provided to it by the District Clause, the ratification of the Twenty-Third Amendment undercuts this supposed authority.

Then–Attorney General Kennedy told Congress in 1963—only two years after the Twenty-Third Amendment's ratification—that the "argument that a Federal district constituting the seat of government is a permanent part of our constitutional system is substantially strengthened by the adoption of the 23d amendment."[83] He went on to list several ways in which the proposal then being considered, which would have legislatively returned most of the District to Maryland with only a small area similar to today's proposed National Capital Service Area left, was fundamentally inconsistent with the Twenty-Third Amendment. Kennedy said:

> It is inconceivable that Congress would have proposed, or the States would have ratified, a constitutional amendment which would confer three electoral votes on a District of Columbia which has a population of 75 families or which had no population at all. It is equally inconceivable that Congress would have set in motion the cumbersome and arduous process of constitutional amendment, on a factual assumption which it anticipated might be utterly destroyed 3 years later.

This make sense and supports his position that "a persuasive argument can be made that the adoption of the 23d amendment has given constitutional status to the existence of a federally owned 'District constituting the seat of government of the United States,' having a substantial area and population...so that a constitutional amendment repealing the 23d amendment would be required to abolish that district."[84]

Those who support the District becoming a state by simple legislation frequently cite legal scholar Viet Dinh's testimony, in which he disagrees that the Twenty-Third Amendment poses any problem to statehood by simple legislation.

In his testimony on a 2014 D.C. statehood bill, the New Columbia Admission Act, Dinh said that while "the Twenty-Third Amendment will pose grave policy concerns if the New Columbia Admission Act is adopted, the amendment does not *prohibit* the Act."[85] He went on to say that "[n]othing in the Twenty-Third Amendment prohibits the admission of New Columbia. Because the New Columbia Admission Act will preserve a federal 'District constituting the seat of Government of the United States,' the Twenty-Third Amendment plainly can still operate according to its terms."

According to Dinh, this is because the "amendment, like the District Clause, says nothing about minimal geographic or population limits on the federal district."[86] He said: "Of course, the Twenty-Third Amendment was passed against the factual backdrop of a District that included a substantial

number of residents disenfranchised from presidential elections. But that does not mean that Congress lacks the power to alter that factual premise through legislation rather than constitutional amendment."[87]

Dinh proposes that "[o]bjections to New Columbia based on the Twenty-Third Amendment ignore the difference between a statute that alters the premise for a constitutional amendment and legislation that violates a constitutional prohibition included in an amendment."[88] The analogies he offered to illustrate his point, however, are imperfect at best.

First, Dinh said that "it would not violate the Constitution if the least populous state in the Union divided itself into two states, one of which contained very few residents, and Congress admitted the new state into the Union. This might be bad policy, but it would be constitutional."[89]

No one, however, would suggest that the very definition of a state would change under Dinh's state-splitting hypothetical. The Framers explicitly contemplated admitting new states to the Union, even states composed of land exclusively from other states, when drafting the Constitution, and they included provisions to govern such admissions.[90] The Framers also understood that there would be states with large populations, states with small populations, and states with populations in between. In other words, Dinh's correct statement that this "might be bad policy" but "it would be constitutional" is largely irrelevant because the size of states is not the issue. Admitting states of different sizes is obviously consistent with the text, structure, and history of the Constitution. Admitting a state created not from another state, but from the District that was intended to remain separate from the states, is not.

Dinh's next analogy, that "a statute repealing the income tax is not unconstitutional because it renders superfluous the Sixteenth Amendment, which authorizes a federal income tax,"[91] is similarly inapposite. The Sixteenth Amendment to the Constitution separately provides that Congress "shall have power to lay and collect taxes on incomes."[92] In other words, Congress may adopt such a measure, but is not required to do so. Rather than making the Sixteenth Amendment superfluous, as Dinh suggested, legislation eliminating the income tax would simply be a different exercise of the power the Sixteenth Amendment provides. The key difference is between the *permissive* language the Amendment actually uses ("shall have the power to") and *mandatory* language ("shall") that it does not.

"The Legislature." A better analogy to illustrate why Dinh's conclusion is faulty would be how the Framers used the word "legislature" in 17 provisions of the Constitution.[93] The constitutional meaning of "legislature" has been before the U.S. Supreme Court in recent years, where some have argued that its meaning can essentially be altered by something less than

a constitutional amendment.[94] In one decision authored by Justice Ruth Bader Ginsburg and joined by Justices Anthony Kennedy, Stephen Breyer, Sonia Sotomayor, and Elena Kagan, the Court held that "the Legislature" as used in the Elections Clause could actually mean "the people" of the state.[95] This is a perplexing result that has led to confusion and continuing litigation—some of the same problems that Congress would invite by attempting to alter the District's size and status by simple legislation.[96]

In dissenting from, and criticizing, the majority's ratification of this re-write of the clear term, "legislature," Chief Justice John Roberts, joined by Justices Antonin Scalia, Clarence Thomas, and Samuel Alito, said:

> Just over a century ago, Arizona became the second state in the Union to ratify the Seventeenth Amendment. That Amendment transferred power to choose United States Senators from "the Legislature" of each State, Art. I, §3, to "the people thereof." The Amendment resulted from an arduous, decades-long campaign in which reformers across the country worked hard to garner approval from Congress and three-quarters of the States.
>
> What chumps! Didn't they realize that all they had to do was interpret the constitutional term "the Legislature" to mean "the people"? The Court today performs just such a magic trick with the Elections Clause. Art. I, §4. That Clause vests congressional redistricting authority in "the Legislature" of each State. An Arizona ballot initiative transferred that authority from "the Legislature" to an "Independent Redistricting Commission." The majority approves this deliberate constitutional evasion by doing what the proponents for the Seventeenth Amendment dared not: revising "the Legislature" to mean "the people."[97]

The "District." Yet this type of "magic trick" is exactly what proponents of altering the size and status of the District would do. They would grant Congress this awesome authority by simply reinterpreting the meaning of the "District" to mean something different from what the Framers of the Constitution and those who ratified the Constitution understood it to mean. Under this theory, Congress could pass a piece of legislation and suddenly most of what currently constitutes the District, which in turn constitutes the seat of government, would become a state with a voting House Member, two Senators, and at least three Electoral College votes—without any constitutional amendment. Remaining would be a very small "District" that none of the Framers would have envisioned or recognized as a federal "District" that would effectively serve as the seat of government without the need to depend on any state for its operations and security.

As Roberts explained, the Framers used the term "legislature" in a specific way as it was generally understood at the time of the Constitution's ratification. Those who advocated for the direct election of senators understood it that way too, so they pursued, and ultimately achieved, an amendment to the Constitution to achieve their goals. But Roberts emphasized that such action would have been unnecessary if the Court's more recent interpretation of that word was correct.

Similarly, the Framers used the term "District," which would constitute the seat of government, in a specific way. Because suffrage advocates also understood it that way, they pursued amendments to the Constitution to achieve their goals. They succeeded in their goal of gaining presidential and vice presidential electors for District residents, but they did not succeed in gaining representation in the House of Representatives and Senate for District residents. Nonetheless, they initially pursued both via constitutional amendments. Such action would have been unnecessary if Dinh's view of the Twenty-Third Amendment's meaning is correct.

Conclusion

Congress does not have the authority to statutorily alter the size or status of "The District constituting the seat of Government of the United States" without a constitutional amendment. The consistent position—until recently—of both advocates for District suffrage and of Justice Departments of both political parties is that such a change would require a constitutional amendment.

Despite claims to the contrary, the Twenty-Third Amendment, which granted District residents the right to participate in the election of the President and Vice President, strengthens the argument that a constitutional amendment to transform the bulk of the current District of Columbia into a new state would require a constitutional amendment.[98] Claims to the contrary are unavailing and fly in the face of the text, structure, and history of the Constitution.

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Endnotes

1. *See H.R. 51, Washington, D.C. Admission Act: Hearing on H.R. 51 Before the H. Comm. on Oversight and Reform*, 117th Cong. (2021) (testimony of Zack Smith discussing the constitutional and practical problems with this bill), *available at* https://docs.house.gov/meetings/GO/GO00/20210322/111360/HHRG-117-GO00-Wstate-SmithZ-20210322.pdf. *See* H.R. Res. 51, 117th Cong. (2021).
2. S. Res. 51, 117th Cong. (2021).
3. U.S. Const., art. I, § 8, cl. 17: "The Congress shall have Power...To 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 Government of the United States." *See also* Lee Casey, *Enclave Clause*, Heritage Guide to the Constitution, https://www.heritage.org/constitution/#!/articles/1/essays/57/enclave-clause.
4. *See* H.P. Caemmerer, Washington: The National Capital, S. Doc. No. 332 at 10 (3d Sess., 1932).
5. *Id*. at 5; *see also* Orrin G. Hatch, *Should the Capital Vote in Congress? A Critical Analysis of the Proposed D.C. Representation Amendment*, 7 Ford. L. Rev. 479, 485 n. 20 (1979).
6. Roy P. Franchino, *The Constitutionality of Home Rule and National Representation for the District of Columbia*, 49 Geo. L.J. 207, 209 (1957–58).
7. 1788 Md. Laws 354, An Act to Cede to Congress a District of Ten Miles Square in this State of the Seat of Government of the United States, https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000204/html/am204--354.html.
8. 1789 Va. Acts, An Act for the Cession of Ten Miles Square, or Any Lesser Quantity of Territory Within this State, to the United States, in Congress Assembled, for the Permanent Seat of the General Government (Dec. 3, 1789), https://founders.archives.gov/documents/Washington/05-07-02-0090-0002 (discussing the cession act).
9. An Act for Establishing the Temporary and Permanent Seat of the Government of the United States, 1st Cong., Ch. 28 (1790), https://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=001/llsl001.db&recNum=253.
10. Hatch, *supra* note 5, at 488–89. The District's population tripled in its first four decades and, even after the land ceded by Virginia was returned in 1846, continued to grow, exceeding 278,000 by the turn of the 20th century.
11. Office of Legal Policy, *Report to the Attorney General on the Question of Statehood for the District of Columbia*, (Apr. 3, 1987), at 2–3, https://www.ojp.gov/pdffiles1/Digitization/115093NCJRS.pdf.
12. Memo from the Attorney General to Representative Basil L. Whitener on Constitutionality of Retroceding the District of Columbia to Maryland (Dec. 13, 1963) (hereinafter "Kennedy Memorandum"), reprinted in Office of Legal Policy, *supra* note 11, at 129.
13. District of Columbia v. John R. Thompson Co., 346 U.S. 100,109 (1953).
14. Capital Traction Co. v. Hof, 174 U.S. 1, 5 (1899). *See also* Gibbons v. District of Columbia, 116 U.S. 404, 407 (1886) (Congress may legislate for the District "in like manner as the legislature of a state"); Palmore v. United States, 411 U.S. 389, 397 (1973) (Congress may "exercise all the police and regulatory powers which a state legislature or municipal government would have in legislating for state or local purposes."); Sims v. Rives, 84 F.2d 871, 877 (D.C. Cir. 1936) (In legislating for the District of Columbia, Congress acts "with substantially the powers that a state legislature has in legislating for a state.").
15. *Ending Taxation Without Representation: The Constitutionality of S. 1257, Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 129 (2007).
16. *Id*. at 132 (emphasis in original). *See also* Neild v. District of Columbia, 110 F.2d 246, 249 (D.C. Cir. 1940) (Congress has "jurisdiction to provide for the general welfare of citizens *within* the District of Columbia") (emphasis added); Jonathan Turley, *Too Clever By Half: The Unconstitutionality of Partial Representation of the District of Columbia in Congress*, 76 Geo. Wash. L. Rev. 305, 319 (2008) (The District Clause "confers on Congress a power to dictate the *internal conditions and operations* of the federal enclave.") (emphasis added); *id*. at 325 (The District Clause concerns the authority of Congress over the *internal affairs* of the seat of government.") (emphasis added).
17. *See* Franchino, *supra* note 6, at 214 ("residents of the ceded land retained the right to vote in congressional elections in Maryland and Virginia.").
18. 2 Stat. § 103.
19. Some scholars argue that this was merely an oversight. *See* Peter Raven-Hansen, *Congressional Representation for the District of Columbia: A Constitutional Analysis*, 12 Harv. J. on Legis. 167, 172 (1975). Others argue that the Founders intended this result. *See*, *e.g.*, Turley, *supra* note 16, at 332–40 (2008); Mark S. Scarberry, *Historical Considerations and Congressional Representation for the District of Columbia: Constitutionality of the D.C. House Voting Rights Bill in Light of Section Two of the Fourteenth Amendment and the History of the Creation of the District*, 60 Ala. L. Rev. 783, 864–86 (2009). *See also* Office of Legal Policy, *supra* note 11, at 42, 52–53. One federal court concluded that the available evidence "indicates a contemporary understanding that residents of the District would not have a vote in the national Congress." Adams v. Clinton, 90 F.Supp.2d 35, 51 (D. D.C. 2000) (three-judge panel).
20. *See Adams*, 90 F.Supp.2d at 51–52.
21. *See* Eugene Boyd, Cong. Rsch. Serv., District of Columbia Voting Representation in Congress: An Analysis of Legislative Proposals, RL33830 (2010), at 3, https://digital.library.unt.edu/ark:/67531/metadc811576/.
22. *See Adams*, 90 F.Supp.2d 51; Turley, *supra* note 16, at 336–39.

23. *See* Boyd, *supra* note 21, at 3.
24. *Adams*, 90 F.Supp.2d at 53.
25. Turley, *supra* note 16, at 341.
26. Boyd, *supra* note 21, at 4.
27. *Hearings Before the S. Subcomm. of the Comm. on the District of Columbia on Representation of the District of Columbia in Congress*, 64th Cong. 5 (1916). *See also H. Comm. on the Judiciary*, *Representation of the District of Columbia in Congress and the Electoral College*, 66th Cong. 63, 67 (1921).
28. *Hearing Before the H. Comm. on the Judiciary on National Representation for the Residents of the District of Columbia*, 69th Cong. 16, (1926) (organizational statement), *id*. at 21 (statement by Theodore W. Noyes).
29. *Hearings Before the H. Comm. on the Judiciary on National Representation and Suffrage for the Residents of the District of Columbia*, 75th Cong. 5 (1938).
30. *Hearings Before Subcomm. No. 1 of the H. Comm. of the Judiciary on National Representation and Suffrage for the Residents of the District of Columbia*, 79th Cong. 16 (1945).
31. Providing Representation of the District of Columbia in Congress, Rep. No. 92–889 (2d Sess.1972) (emphasis added). Less than three months after his election as the District's first congressional delegate, Walter Fauntroy (D–DC) introduced a measure to give the District such representation; it, too, was a resolution to propose a constitutional amendment.
32. Representative Dana Rohrabacher (R–CA) introduced similar legislation between the 108th and the 112th Congresses. Also in March 1990, Representative Ralph Regula (R–OH) introduced House Resolution 4195 to retrocede to Maryland all of the District except the "National Capital Service Area," which would include "the principal Federal monuments, the White House, the Capitol Building, the United States Supreme Court Building, and the federal…buildings located adjacent to the Mall and the Capitol Building." Regula introduced identical bills in the next several Congresses.
33. Representative Stan Parris (R–VA) introduced H.R. Res. 4193, the National Capital Civil Rights Restoration Act, in March 1990. It was referred to the House Committees on the Judiciary and on the District of Columbia but received no hearings.
34. This bill was referred to the House Committee on the Judiciary but received no hearings.
35. *See*, *e.g*., H.R. Res. 4640, 108th Cong. (2004) (District "considered a Congressional district for purposes of representation in the House of Representatives"); H.R. Res. 5388, 109th Cong. (2006) (same); H.R. Res. 328 and H.R. Res. 1905, 110th Cong. (2007) (same); H.R. Res. 157 and S. Res. 160, 111th Cong. (2009) (same). Norton also introduced bills to treat the District "as a state for purposes of representation in the House of Representatives and the Senate." *See*, *e.g*., H.R. Res. 5410, 109th Cong. (2006); H.R. Res. 266, 112th Cong. (2011).
36. *Hearings Before the S. Subcomm. on the Const. on District of Columbia Representation in Cong.*, 95th Cong. 16 (1978).
37. *Id*. at 17–19.
38. Office of Legal Policy, *supra* note 11, at 69–71.
39. *Hearing Before the Senate Committee on the Judiciary on Ending Taxation Without Representation: The Constitutionality of S. 1257*, 110th Cong. 129 (2007).
40. Views on Legislation Making the District of Columbia a Congressional District, 33 Op. O.L.C. 156, 157 (2009).
41. Constitutionality of the D.C. House Voting Rights Act of 2009, 33 Op. O.L.C. 38, 38 (2009) (Holder, Att'y Gen.).
42. *Id*. at 39.
43. *Id*. at 40.
44. *Id*. at 56.
45. On appeal, the U.S. Supreme Court affirmed the district court without an opinion. Adams v. Clinton, 531 U.S. 941 (2000). In October 2021, the Supreme Court reaffirmed its decision in *Adams*, again without oral argument or a written opinion. *See* Meagan Flynn and Julie Zauzmer Well, *Supreme Court Agrees D.C. Not Entitled to Congressional Voting Representation*, Wash. Post, Oct. 4, 2021.
46. *Adams*, 90 F.Supp.2d at 62 (emphasis in original).
47. Kenneth R. Thomas, Cong. Rsch. Serv. RL 33824, The Constitutionality of Awarding the Delegate for the District of Columbia a Vote in the House of Representatives or the Committee of the Whole, 25–26 (2007).
48. Granting Representation in the Electoral College to the District of Columbia, H. Judiciary Comm. Rep. No. 1698, to Accompany S.J. 39 3 (1960). *See also* Granting Representation in the Electoral College to the District of Columbia, H. Judiciary Comm. Rep. No. 1770 3 (1960).
49. H.R. Rep. 1698, *supra* note 48.
50. Gonzalez introduced an identical measure, H.R.J. Res. 702, 99th Cong. (1986).
51. See *supra* note 36, at 89.
52. *Id*. at 90.

53. *Id*. at 70.
54. *Id*. at 80.
55. *Id*. at 83.
56. *Hearings Before Subcomm. No. 6 of the H. Comm. on the District of Columbia: Home Rule*, 88th Cong. (1964).
57. H.R. Res. 5564, 88th Cong. (1963).
58. Reprinted in Office of Legal Policy, *supra* note 11, at 130.
59. *Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary Representation for the District of Columbia*, 95th Cong. 126 (1977).
60. *Id*.
61. H.R. Res. 51, 100th Cong. (1987).
62. *See* Office of Legal Policy, *supra* note 11, at 69.
63. *See* Boyd, *supra* note 21, at 22.
64. *See also* S.J. Res. 132, introduced in the 57th Congress on December 2, 1902, by Senator Gerald Gallinger (R–NH).
65. Amendments to the Constitution: A Brief Legislative History, S. Judiciary Subcomm. on the Const., S. Prt. 99–87, at 76 (1985). *See also* Granting Representation in the Electoral College to the District of Columbia, H. Judiciary Comm. Rep. No. 1698, to Accompany S.J. 39 2 (1960).
66. S.J. Res. No. 39 (1959).
67. *See* Virginia A. McMurtry, Cong. Rsch. Srv., Legislative History of the 23rd Amendment and of Related Efforts to Grant Voting Representation for the District of Columbia in the House of Representatives During the 86th Congress 2 (1977).
68. *See* Amendments to the Constitution, *supra* note 65, at 76.
69. H.J. Res. 757, 86th Cong. (1960).
70. *Hearings*, *supra* note 36, at 77.
71. Granting Representation, Rep. No. 1698, *supra* note 48, at 3 (emphasis added). *See also* Granting Representation, Rep. No. 1770, *supra* note 48.
72. *See Hearings*, *supra* note 27 and accompanying text.
73. Granting Representation, Rep. No. 1698, *supra* note 48, at 2.
74. *Id*. at 3.
75. Kennedy Memorandum, *supra* note 12, at 341 n. 1.
76. U.S. Census Bureau, *Historical Population Change Data (1910–2020)*, (Apr. 26, 2021), https://www.census.gov/data/tables/time-series/dec/popchange-data-text.html.
77. According to information from the U.S. Census, as of July 2019, Washington, D.C., is the 20th most populated city in the United States with 705,749 residents. The 19 cities that have a higher population than Washington, D.C., are New York City, New York, 8,336,817; Los Angeles, California, 3,979,576; Chicago, Illinois, 2,693,976; Houston, Texas, 2,320,268; Phoenix, Arizona, 1,680,992; Philadelphia, Pennsylvania, 1,584,064; San Antonio, Texas, 1,547,253; San Diego, California, 1,423,851; Dallas, Texas, 1,343,573; San Jose, California, 1,021,795; Austin, Texas, 978,908; Jacksonville, Florida, 911,507; Fort Worth, Texas, 909,585; Columbus, Ohio, 898,553; Charlotte, North Carolina, 885,708; San Francisco, California, 881,549; Indianapolis, Indiana, 876,384; Seattle, Washington, 753,675; and Denver, Colorado, 727,211. *See* U.S. Census Bureau, Population Division, Annual Estimates of the Resident Population for Incorporated Places of 50,000 or More, Ranked by July 1, 2019, Population: April 1, 2010 to July 1, 2019 (2019).
78. Kennedy Memorandum, *supra* note 12, at 345.
79. Office of Legal Policy, *supra* note 11, at 18.
80. *See* Phillips v. Payne, 92 U.S. 130 (1875) (declining to rule on the constitutionality of the retrocession).
81. Office of Legal Policy, *supra* note 11, at 20–21 n. 78 (stating that "in 1867 the House of Representatives passed a bill, by a vote of 111–28, repealing the 1846 Act on the stated ground that it was unconstitutional. The bill, however, was never reported out of the Senate Judiciary Committee").
82. S. Doc. No. 61–286 (1910) (opinion of Hannis Taylor as to the Constitutionality of the Act of Retrocession of 1846); *see also* Mark Richards, *The Debates Over the Retrocession of the District of Columbia, 1801–2004*, Wash. History 1, 22–24 (Spring/Summer 2004).
83. 4Kennedy Memorandum, *supra* note 12, at 348.
84. *Id.* at 351.
85. *New Columbia Admission Act: Hearing on New Columbia Admission Act Before the S. Comm. on Homeland Sec. and Governmental Affairs*, 113th Cong. 11 (2014) (statement of Viet D. Dihn), https://www.hsgac.senate.gov/imo/media/doc/Testimony-Dinh-2014-09-15-REVISED.pdf.
86. *Id.*

87. *Id.*
88. *Id.*
89. *Id.*
90. U.S. Const. art. IV, § 3, cl. 1 (The Admissions Clause) ("New States may be admitted by the Congress into this Union; but no new States 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 Legislature of the States concerned as well as of the Congress.")
91. *Id.* at 11–12.
92. U.S. Const. amend. XVI.
93. Ariz. State Leg. v. Ariz. Ind. Redis. Comm'n, 576 U.S. 787 (2015) (appendix to opinion of Roberts, CJ dissenting).
94. *Id.*
95. *Id.*
96. *See* testimony of Zack Smith, *supra* note 1.
97. Ariz. Ind. Redis. Comm'n, 576 U.S. (Roberts, CJ, dissenting).
98. *See* Zack Smith, *Does D.C. Statehood Require a Constitutional Amendment?: You Better Believe It*, 83 Ohio St. L.J. Online 17 (2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4034744.