

The problem of Congressional representation for the District of Columbia

The Framers of the Constitution of the United States could surely never have foreseen that one day in the then-distant future, their revolutionary cry of “no taxation without representation” would be recast as a sardonic bumper plate for residents of the District of Columbia. For that matter, it is unlikely that the Framers foresaw that the Federal District, which they authorized Congress to carve out of willing states as a permanent seat of Government, would one day grow to a population of some 550,520 residents.¹ None-the-less, grown it has, unrepresented in Congress it is, and it seems contrary to the enduring American ideals of democracy and fairness that our nation’s capital is populated by our nation’s least-enfranchised citizens. Indeed, until the ratification of the 23rd Amendment on March 29, 1961, the residents of the Federal District could not even vote for its most famous resident.

The seeming injustice of this situation has, naturally enough, spurred arguments that the Federal District should gain representation in the Congress of the United States. My purpose today is not to argue against the fairness of that proposition. In general, however, I dispute the notion that the Constitution always permits and requires what is fair, and in particular, in this essay, I dispute the notion that the Federal District *qua* the Federal District can be represented in Congress. In particular, I wish to take issue with arguments put forward in recent essays by Kenneth Starr & Patricia Wald, and by Viet Dinh & Adam Charnes.

I

I begin by briefly summarizing Starr & Wald's recent Washington Post op/ed on the subject,² and the far more substantive – but ultimately, no more persuasive – argument offered recently by Dinh & Charnes.³

¹ See <http://quickfacts.census.gov/qfd/states/11000.html>.

² K. Starr & P. Wald, *Congress Has the Authority to Do Right by D.C.* in THE WASHINGTON POST, 9/19/2006 (available online at <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/15/AR2006091500935.html>).

³ V. Dinh & A. Charnes, *The Authority of Congress to Enact Legislation to Provide the District of Columbia with Voting*

A. Starr & Wald's argument

Starr & Wald's argument is a will o' the wisp of a thing, which confines itself to three basic propositions. First, they assert that the plain import of the Constitution's text should be disregarded, because the framers' cannot be conclusively ascribed an intent to disenfranchise residents of the Federal district. "*There is nothing in our Constitution's history or its fundamental principles,*" they argue, "*suggesting that the Framers intended to deny the precious right to vote to those who live in the capital of the great democracy they founded.*" Faced with the thorny reality of a Constitution whose text says otherwise,⁴ they resort to arguing that it was all an accident, an unforeseen consequence:

It is not a surprise that our Constitution, ratified in 1789, contemplated that the right to vote would be enjoyed only by "the people of the several states" ... [I]n 1789, all U.S. citizens lived in a state. It was not until 1801, when the process Congress authorized by statute in 1791 to create the District out of lands ceded by Virginia and Maryland was completed, that District residents lost their federal voting rights. There is no reason to believe the Framers intended for this to happen.

Second, Starr & Wald quote language which they attribute to then-Judge Scalia's opinion in *United States v. Cohen*,⁵ that Congress' power over the federal district is "*extraordinary and plenary,*" in support of their assertion that Congress has latent power to grant representatives of the District of Columbia voting rights in Congress. This is a clever strategy – albeit one with a serious flaw, as I will discuss below⁶ – because it implies that perhaps Justice Scalia is aboard in this venture. The purpose of Starr &

Representation in the House of Representatives (2004) (available online at <http://www.dcvote.org/pdfs/congress/vietdinh112004.pdf>).

⁴ As Alexander Hamilton observed in his opinion on the Constitutionality of the Bank of the United States (available online at <http://www.yale.edu/lawweb/avalon/amerdoc/bank-ah.htm>), even if Starr & Wald's argument as to the intentions of the framers is correct, "*[n]othing is more common than for laws to express and elect more or less than was intended.*" Accord R. Bork, *THE TEMPTING OF AMERICA* (1990), p.144 ("*Law is a public act. Secret reservations or intentions count for nothing. All that counts is how the words used in the Constitution would have been understood at the time.*")

⁵ *United States v. Cohen*, 733 F.2d 128, 140 (CADC 1984) (*en banc*).

⁶ See *infra*, pp. __-__.

Wald's citation of it appears to be to support the idea that, since Congress' power over the Federal district is omnipotent (or, at very least, since "[i]t is hard to imagine a broader, more comprehensive congressional power than this"), it would be unreasonable to assume "that the power could not be used" to give the Federal government voting rights in Congress.

Their last, and perhaps most fanciful, argument is that "the most analogous legal precedent addressing Congress's authority over the District^[7] confirms that Congress can act now to give the vote to D.C. residents." It does no such thing, as we will see.

B. Dinh & Charnes' argument.

Dinh & Charnes' argument is a more comprehensive and better-reasoned retreat of the same arguments offered by Starr & Wald; better, but still ultimately unpersuasive. They begin by briefly recounting the familiar history of the Constitutional convention and the Federal Government's move to the newly-created District of Columbia in 1800, and conclude that Congress' "broad legislative authority" under the seat of government clause "extends to the granting of Congressional voting rights for District residents."

They reject the argument that the Constitution's explicit statements as to the composition of Congress foreclose this result, arguing that the Supreme Court has upheld the power of Congress "to afford the District certain rights and status appurtenant to states." Like Starr & Wald, they brush aside the structural limitations implied in the Constitution, and argue that "[t]here are no indications, textual or otherwise, to suggest that the Framers intended that Congressional authority under the district clause, extraordinary and plenary in all other respects, would not extend alto to grant District residents representation in Congress." As I will explain below,⁸ even assuming that Congress power is at its apogee when acting within the Federal District, Congress' power is never boundless.

⁷ *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949), according to Starr & Wald.

⁸ See *infra*, pp. __ - __.

II

Andrew Hyman has noted the glaring problem inherent in all arguments for giving Congressional representation to the District of Columbia:

If Washington D.C. is a "state" for purposes of [Congressional representation], then Congress never had any choice in the matter of representation, and so legislation on the subject is superfluous. If, however, Washington D.C. *is not* a "state" for purposes of this clause, then plainly Washington D.C. is not legally entitled to any representation in the House.⁹

While I fully join Hyman's criticism, I have several of my own to add, since my view is that the Federal District is not so much *unentitled* to representation in Congress, as affirmatively *forbidden* it. My objection to Starr *et al* essentially boils down to two major propositions and one ancillary proposition: (1) the District of Columbia is not a state; (2) only States may be represented in Congress, and (2a) Congress lacks authority – under Article I, at least – to change proposition (2).¹⁰

A. The original understanding of the District of Columbia.

While it might overstate the matter to say that tradition places a border around the Constitution's meaning, since we look to the original meaning of the Constitution to determine the scope of its provisions,¹¹ there is certainly a role for "*tradition[al] [understandings] in giving content ... to ambiguous constitutional text.*"¹² Although "[t]here seems to have been no consideration, at least none recorded, given at the Convention or in the ratifying conventions to the question of the governance of the citizens of the District,"¹³ we

⁹ A. Hyman, *More About Congressional Representation for Washington D.C.* at CONFIRM THEM (http://confirmthem.com/more_about_congressional_representation_for_washington_d_c), 9/18/2006 (emphasis in original).

¹⁰ There are also serious reasons to doubt that Congress has authority to grant the District statehood, either; however, since neither Starr nor Dinh raise that argument, I see no need to address the issue here.

¹¹ See generally A. Scalia, A MATTER OF INTERPRETATION; Bork, *supra* note 4; R. Barnett, *An Originalism for Non-Originalists*, 45 LOY. L. REV. 611 (1999).

¹² *Rutan v. Republican Party of Illinois*, 497 U.S. 62 at 96 n.1 (Scalia, dissenting).

¹³ J. Killian, G. Costello & K. Thomas, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS & INTERPRETATION (2002 ed.) (hereinafter "Killian & Costello"), p. 352, n. 1684 and accompanying text (citing III J.

are not wholly without indicia of the original meaning of the seat of government clause.

While it is surely true that the framers did not intend to disenfranchise vast multitudes of residents of the District of Columbia, the Constitution has many effects that the framers surely did not foresee. The framers were motivated to create a federal district by two principal factors: the desire that the government have a fixed and permanent residence, unlike the itinerant continental congress, and the conflicting desire that it not be located in anyone *else's* state, for fear of that state obtaining undue influence over the Federal government. The point is made unmistakably clear by Madison in the oft-cited passage from Federalist 43:

The indispensable necessity of complete authority at the seat of government, carries its own evidence with it. It is a power exercised by every legislature of the Union, I might say of the world, by virtue of its general supremacy. Without it, not only the public authority might be insulted and its proceedings interrupted with impunity; but a dependence of the members of the general government on the State comprehending the seat of the government, for protection in the exercise of their duty, might bring on the national councils an imputation of awe or influence, equally dishonorable to the government and dissatisfactory to the other members of the Confederacy. This consideration has the more weight, as the gradual accumulation of public improvements at the stationary residence of the government would be both too great a public pledge to be left in the hands of a single State, and would create so many obstacles to a removal of the government, as still further to abridge its *necessary independence*.¹⁴

The Federal government was intended to be independent of the states (indeed, overdependence of the general government upon the goodwill and acquiescence of the States was regarded at the time as the principal defect of the Articles),¹⁵ and thus it is that we have, for example, Federal

Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1215-16) (1833) (“[t]he objections raised in the ratifying conventions and elsewhere seemed to have consisted of prediction of the perils to the Nation of setting up the National Government in such a place”).

¹⁴ THE FEDERALIST, No. 43 (Madison) (emphasis added); Cf. THE ANTIFEDERALIST, No. 7, available online at <http://www.wepin.com/articles/afp/afp07.html> (the necessity of complete Congressional control over the seat of government was to “render[] [the Federal government] independent of the individual states”).

¹⁵ See, e.g., THE FEDERALIST, No. 15 (Hamilton) (“though in theory ... resolutions [by the Congress of the Confederation]

courts, a Federal police service, direct federal taxation,¹⁶ and, of course, the Federal district. The Framers might just have easily rendered the Federal government dependent on state co-operation for its functions,¹⁷ but they did not. Then as much as now, to render the seat of government of a federated Republic the dependency of a single state is unwise, and should not be entertained as a serious possibility.

It is also reasonable to look to evidence such as the debates in Congress surrounding the retrocession of those parts of the District of Columbia originally ceded by the State of Virginia.¹⁸ These reveal the common understanding of the operation of the seat of government clause, as it relates to the political rights of District residents, in the early years of the Republic.

Congress began worrying about and debating the question of whether it needed (and should thus retain) the entirety of the cession of Virginia and Maryland, and the consequences for the residents of the district, almost as soon as it moved into the Federal City.¹⁹ John Smilie, Republican of Pennsylvania, worried on February 2d, 1801, that *“the people of the District would be reduced to the state of subjects and deprived on their political rights.”*²⁰ John Dennis, Federalist of Maryland, dismissed Smilie's concerns. As Dennis saw it, one had to wonder *“how much they [the residents of the District] were heretofore represented in the two Legislatures [those of Virginia and Maryland] to which they sent delegates. They were so in name, but very little in essence from the comparatively small number they could send to the*

are laws, constitutionally binding on the members of the Union, ... in practice they are mere recommendations which the States observe or disregard at their option ... the concurrence of thirteen distinct sovereign wills is requisite, under the Confederation, to the complete execution of every important measure that proceeds from the Union”).

¹⁶ That is, the power to tax citizens rather than states, regardless of whether the amount of those taxes are apportioned among states according to population or not.

¹⁷ See, e.g., *Printz v. United States*, 521 U.S. 898, 976 (1997) (Breyer, dissenting).

¹⁸ Many legal scholars -- of varying stripes, but usually legal realists and positivists -- are leery of violating G.K. Chesterton's admonition that *“tradition means giving votes to ... our ancestors . . . it is the democracy of the dead.”* See generally A. Pritchard & T. Zywicki, *Finding the Constitution: An Economic Analysis of Tradition's Role in Constitutional Interpretation*, 77 N.C.L. REV. 409 (1999) at 415-19. That concern, however, is inapt here. Because Starr & Wald and Dinh & Charnes are arguing that Congress *does* have the Article I power, rather than that it *should* exercise its undenied Article V power, we are not using tradition to guide the decisions we make today, but rather, to understand the decisions that we, as a society, have *already* made in the Constitution, in defining the scope of Congress' powers and its membership.

¹⁹ See ANNALS OF CONGRESS, 6th Congress, 2d Session (1801), 991-.

²⁰ *Id.* at 992.

Legislatures."²¹ Thus, argued Dennis, the residents of the District might have lost *de jure* political power by their divorce from their former states, but they were gaining *de facto* political power "[f]rom their contiguity to, and residence among the members of the General Government"; the residents "knew, that though they might not be represented in the national body, their voice would be heard."²² In any event, announced Dennis, should experience prove him wrong, "if it should be necessary, the Constitution might be so altered as to give them a delegate to the General Legislature when their numbers should become sufficient."²³ It should be readily apparent from this exchange that Congress was aware of the disenfranchisement of residents of the district from the get-go, and from Dennis' remarks in particular, that the contemporary understanding was that the District could not be represented in Congress, *qua* the Federal District, without a Constitutional amendment.

In 1803, Representative John Bacon, Republican of Massachusetts, introduced bills retroceding parts of the district.²⁴ Apparently sharing both the concern about disenfranchisement and the universal understanding that Congress could not grant representation in its halls absent a Constitutional amendment, Bacon argued that retrocession was necessary, because, *inter alia*, absent retrocession, "[h]ere [in the District of Columbia] the citizens would be governed by laws, in the making of which they have no voice - by laws not made with their own consent, but by the United States for them."²⁵ His colleague Representative Smilie – whose concerns of two years prior, at least as pertained to representation, had been realized – concurred, and "express[ed] his regret at the degraded situation" of the residents of the District, "who were formerly in possession of the full rights of citizenship," but who were now "forever to be ultimately governed by a body over whom they had no control."²⁶ Lamented Smylie, "[u]nder our exercise of exclusive jurisdiction the citizens here [in the District] are deprived of all political rights, nor can we confer

²¹ Id. at 998. Dennis was in a position to know: before coming to Washington as a freshman in the 5th Congress in 1797, he served two terms in the Maryland House of Delegates. See <http://bioguide.congress.gov/scripts/biodisplay.pl?index=D000243>.

²² Ibid.

²³ Id. at 998-9 (emphasis added).

²⁴ See ANNALS OF CONGRESS, 7th Congress, 2d Session (1803), 486-91, 493-507.

²⁵ Id. at 488.

²⁶ Id. at 496.

them."²⁷

The issue rumbled on sporadically for forty years, while the population of the District grew.²⁸ On May 8th, 1846, Representative Robert Hunter, Whig of Virginia and Chairman of the House Committee on the District of Columbia, took the floor of the House "*propos[ing] to recede and relinquish to Virginia the county of Alexandria.*"²⁹ Hunter characterized the purpose of the seat of government clause as follows:

[T]he object of the clause in the Constitution which allows Congress to obtain by cession a district not exceeding ten miles square, over which they might exercise exclusive jurisdiction, was to give them a seat of government, which they might hold in their own right, and to put them in a position in which they might be independent of State hospitality and State legislation for a place of meeting, and the means of securing the departments of the government from ... intrusion.³⁰

Moreover, "*[i]t is obvious,*" Hunter argued, that Congress "*ought to have taken or keep no more territory or people under their exclusive jurisdiction than may be necessary and sufficient for all the purposes of a seat of government.*"³¹ Hunter could have stopped there and the import of his words would be plain enough for our purposes (one has only to wonder what understanding of the characteristics of the District of Columbia would render it "obvious" that as few people should be encompassed within its boundaries as possible), but he continued to make the point explicit in a magisterial exposition of the question of the state of the District as mandated by the Constitution, worth quoting at some length:

[T]here is yet a higher consideration, which should restrict the exercise of this discretion within the limits which I have mentioned ... which appeals to all that is most cherished in American sentiment: I mean *the obvious propriety of depriving no more of our*

²⁷ Id. at 487.

²⁸ See infra note __ (discussing population figures 1800-1850 and Congressional inquiry into retrocession).

²⁹ CONGRESSIONAL GLOBE, 29th Congress, 1st Session, 894 (1846); available online at <http://memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=017/llcg017.db&recNum=901>.

³⁰ Ibid.

³¹ Ibid.

people of political rights and privileges than may be indispensable for the purposes of safety and security in the seat of government ... There can be no higher obligation than that which rests upon American statesmen, to deprive no more of our people of political rights and privileges than may be actually necessary ... [H]ow shall we answer ... if without necessity we deprive a portion of our own people of th[o]se very rights, which in the face of the world we have declared to be inestimable?

...

Th[e] grant of exclusive jurisdiction here, and some omissions in the Constitution, place this Government in an anomalous and, in some degree, dangerous position ... It was organized as an agent of the people of the States. This is its grand characteristic; and yet as the local legislature of this District, it stands in an entirely different relation towards the states - a relation not only different, but possibly hostile to the great end of its institution, if the district under its control should comprehend large and various interests.

...

There are certain provisions in the Constitution designed to secure equal benefits and international comity ... amongst the States, which apply to all the State governments and yet do not in terms apply to us as the Legislature [of the District of Columbia], the government of a separate people in this District. "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several states." This provision does not apply in terms to the citizens of the District going to the States, or the citizens of the States removing to the District. The provision in relation to fugitives from justice, which applies to the States, does not embrace this District. The provision forbidding preferences to be given to the ports of one State over those of another, does not embrace this district.³²

The residents of the District, observed Hunter, "[f]rom their connexion with us ... have lost political rights and privileges, and all the social progress which the

³² Ibid. (emphases added).

*exercise of these rights can give.”*³³

In the ensuing debate,³⁴ Hunter’s views about the status of the residents and the authority of Congress vis-à-vis their representation, were not contradicted, and even his opponents seemed to share the same premises of Congressional power. Representative William Payne, Democrat of Alabama, arguing against the Hunter bill, appears to have shared the same assumptions as Hunter and made much the same points that I will argue below (and that Justice Black argued in *Reid v. Covert*): that it was mistaken to think that the seat of government clause rendered “*Congress omnipotent within the District of Columbia*” and able to “*perform any act within this District it deems proper, independently of the limitations of the Constitution.*” Payne observed that “*the Constitution gives to Congress 'exclusive' power of legislation, but not unlimited power [of legislation].*”³⁵ Hence, in addition to my list of no-goes,³⁶ Payne warned that Congress that “*cannot within this district take private property except for public use, and on paying just compensation therefore*[³⁷]; *it cannot abolish the right of habeas corpus, of trial by jury, or do any of those acts prohibited by the Constitution.*” In Payne’s view – self-evidently shared by Hunter – “*Congress must legislate exclusively within the District of Columbia - no other legislation can be admitted within it - but it must legislate under the provisions of the Constitution.*”³⁸

It simply could not be more apparent that it was clearly understood at the time of the founding, and no less so one half century later, that the District of Columbia was not considered a state, and that the solution to its lack of representation was retrocession. This question – of retroceding Alexandria and Georgetown to Virginia and Maryland respectively – engaged the attention of Congress sporadically from almost the moment they moved into the District of Columbia,³⁹ while the idea of voting

³³ Id. at 896.

³⁴ Id. at 778-781.

³⁵ Id. at 778 (emphasis added).

³⁶ See *infra*, p. __.

³⁷ Cf. *Kelo v. New London*, 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005).

³⁸ Cong. Globe, *supra* note __.

³⁹ See, e.g., ANNALS OF CONGRESS, 7th Congress, 2d Session (1803), 486-91, 493-507; U.S. SENATE JOURNAL, 18th Congress, 1st Session (1824), 311; CONGRESSIONAL GLOBE, 24th Congress, 1st Session (18_), 232, 238, 425-30; CONGRESSIONAL GLOBE, 25th Congress, 2d Session (1838), 525-37; CONGRESSIONAL GLOBE, 29th Congress, 1st Session (1836), 763-81, 1042-1046; CONGRESSIONAL GLOBE, 30th Congress, 1st Session (1848), 230, 269, 874;

representation for the District *qua* the District appears not once. Although the same equitable concerns that inform the present debate emerged almost at once, innovations such as statehood or formal voting representation in Congress were inconceivable until relatively recently.

B. The District of Columbia is not a state

1.

The foregoing history demonstrates that the Federal District was not considered to be a State, capable of voting representation in Congress, in the early part of the Republic's history. The continuing vitality of that understanding well into the 20th Century is readily apparent from the passage of the 23rd Amendment. Firstly, by its own terms, that amendment expressly contemplates that the District is not a state: it provides that the District may participate in the Electoral College to the extent of "*[a] number of electors ... equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a state.*"⁴⁰ Secondly, if the Federal District were, or ever had been, considered a "state" for the purposes of participation in the election of branches of the Federal Government, it would have been entirely nugatory to pass a Constitutional amendment granting the district that to which it had always been entitled. Indeed, the original understanding of the 23rd Amendment appears to be plainly that:

District citizens ... cannot now [the 23rd amendment being formally proposed by Congress on June 17, 1960] vote in national elections because the Constitution has restricted that privilege to *citizens who reside in States*. The resultant constitutional anomaly of imposing all the obligations of citizenship without the most fundamental of its privileges will be removed by the proposed constitutional

CONGRESSIONAL GLOBE, 34th Congress, 3d Session, 455-6 (1857); CONGRESSIONAL GLOBE, 40th Congress, 1st Session, 18-26 (1867). It is important not to overstate the case: the principal thrust of the debates were whether or not Congress had the power under the Constitution to retrocede, rather than whether it had any moral incumbency to do so. But it cannot have escaped the notice of members that the white male population (being the appropriate metric for the early nineteenth century) of the District had grown from circa 10,000 in 1800 to just short of 38,000 by 1850. See SEVENTH CENSUS OF THE UNITED STATES, 235 (available online at <http://www2.census.gov/prod2/decennial/documents/1850a-11.pdf>). As the population grew, as did the frequency of the question of retrocession arising. The reality of the disenfranchisement of a part of what was at the time America's voting class was, at the very least, a perceptibly growing one.

⁴⁰ U.S. Const., Amdt. 23, §1 (emphasis added).

amendment ... [It] would change the Constitution only to the minimum extent necessary to give the District appropriate participation in national elections. *It would not make the District of Columbia a State.* 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 of Columbia.⁴¹

2.

Dinh & Charnes attempt to go around the problem of an unbroken string of Congressional understanding which stretches from, at the very minimum, the Sixth Congress to the Eighty-sixth. But the Supreme Court has *never* held that the District of Columbia is, for *all* intents and purposes, a state. The best that Dinh & Charnes can manage is to cite *Hepburn & Dundas v. Ellzey*⁴² and the three-Justice plurality opinion from *National Mutual Insurance Co. of District of Columbia v. Tidewater Transfer Co.*⁴³

To cite the former in support of the proposition that Congress can grant Congressional voting representation to the District of Columbia is a gutsy move, to say the least; in that case, the Court explicitly considered the very provisions at issue here, and concluded that – precisely because the Constitution grants Congressional representation only to states, and the

⁴¹ H.R. Rep. No. 1698, 86th Cong., 2d Sess. 1, 2 (1960) (emphasis added). As a general matter, I reject the use of legislative history, principally because appeals to legislative history – as with purposive inquiries – are usually undertaken to go *around* the plain meaning of the text, rather than to shed light on it (see, e.g., *Church of the Holy Trinity v. United States*, 143 US 226 (1892), but also, on a more abstract level, because wherever law is produced in writing, “the law that results is what those words ordinarily mean,” Bork, *supra* note 4, at p.144, not what any individual legislator (or even Congress as a whole) intended. However, there are two caveats to note to this point, as was recently explained by Steven G. Calabresi and Daniel Lev in *The Legal Significance of Presidential Signing Statements*, 4 THE FORUM Issue 2 Art. 8 (2006) (available online at <http://www.bepress.com/forum/vol4/iss2/art8>), pp.5-6. First, not every person reading an article by someone who does not support the use of legislative history agrees with that opposition. Those readers who *do* support the use of legislative history ought to find it persuasive, and textualists’ objections should be ameliorated in this case insofar as in this instance, legislative history and text demand the same conclusion. Second: “*even under the Scalia approach to legislative history, the meaning of a statutory term ascribed by a committee report or signing statement might be useful evidence of the original public meaning of that term. Committee reports and signing statements are written in English and are addressed to an audience of English speaking Americans so they could well help shed light on the ordinary public meaning of statutory terms.*” *Ibid.* In other words, one can think of the committee report as “*circumstantial evidence of what the more technical words and phrases in the text might have meant to a reasonable listener,*” Barnett, *supra* note 11, at 622, provided that it is borne in mind that what is sought is the original meaning of the legislative text, not the subjective intent of any particular lawmaker or group of lawmakers.

⁴² *Hepburn & Dundas v. Ellzey*, 6 U.S. 445 (1805) (hereinafter *Hepburn*).

⁴³ *National Mutual Insurance Co. of District of Columbia v. Tidewater Transfer Co.*, 337 U.S. 582 (1949) (hereinafter *Tidewater*). This is the same case cited as “*the most analogous legal precedent addressing Congress’s authority over the District*” by Starr & Wald; see *supra* note 7 and accompanying text.

District of Columbia is not represented in Congress – “*the word state is used in the Constitution as designating a member of the union, and excludes from the term the signification attached to it by writers on the law of nations.*”⁴⁴ Hepburn’s implication seems entirely contrary to that for which Dinh & Charnes cite it: that, even if the District can be considered a state for *some* purposes, it certainly cannot be for purposes of Congressional representation.

To the extent that *Tidewater* can be taken to conclusively stand for *anything*,⁴⁵ it stands for the proposition that

in referring to the 'States' in the fateful instrument which amalgamated them into the 'United States,' the Founders obviously were not speaking of states in the abstract. They referred to those concrete organized societies which were thereby contributing to the federation by delegating some part of their sovereign powers and to those that should later be organized and admitted to the partnership in the method prescribed ... The District of Columbia being nonexistent in any form, much less as a state, at the time of the compact, certainly was not taken into the Union of states by it, nor has it since been admitted as a new state is required to be admitted.⁴⁶

Finally, even if *Hepburn* and *Tidewater* unambiguously stood for the proposition for which Dinh & Charnes cite them, they are in any event superceded by the 23rd Amendment, as discussed supra, pp. __-__. Just as “*we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition which it confirms*’,”⁴⁷ so we should interpret the 23rd Amendment in light of the undeniable presupposition which it

⁴⁴ *Hepburn*, supra, at 452-3. See also R. Berger, *Jack Rakove’s Rendition of Original Meaning*, 72 Ind. L. J. 619 (1997): [T]he common law rule, restated by Matthew Bacon’s *A New Abridgment of the Law* ... [was that] “[i]f a statute make use of a word the meaning of which is well known at the common law, the word shall be understood in the same sense it was understood at common law.” Hence Marshall declared [in *Gibbons v. Ogden*] that if a word was understood in a certain sense “when the Constitution was framed ... [t]he convention must have used the word in that sense.”

Text accompanying nn.21-22 (footnote omitted).

⁴⁵ In *Tidewater*, “[t]hree [Justices] thought the statute to be an appropriate exercise of the power of Congress to legislate for the District of Columbia ... [while] [t]wo others thought that *Hepburn v. Ellzey* had been erroneously decided and would have overruled it. But six Justices rejected the former rationale and seven Justices rejected the latter one.” Killian & Costello, supra note __, at 354 (footnotes omitted).

⁴⁶ *Tidewater*, supra, at 588. The plurality went on to hold that District is not a State for purposes of Article III, while that opinion’s dicta, if anything, suggests broader application for its principle.

⁴⁷ *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779) (1991).

confirms: that, absent Constitutional amendment, the District of Columbia is not a state for the purposes of participation in Congress or the Electoral College.

C. The power of Congress argument.

If the District of Columbia is not a State, Congress lacks power under Article I to grant it voting representation in Congress.

1.

We should perhaps begin by unmasking Starr & Wald's bid to gain credibility by associating their argument with Justice Scalia. As noted above,⁴⁸ Starr & Wald purport to quote Scalia's *Cohen* opinion,⁴⁹ but matters are not quite so simple. In the first instance, Judge Scalia said no such thing. The phrase "extraordinary and plenary" appears nowhere in Scalia's *Cohen* opinion; it *does* appear in *Cohen*, however, in Judge Wilkey's concurrence. Wilkey argued that:

Congress made this choice[,] and that it should be upheld is reinforced by the recognized *extraordinary and plenary* power which Congress is given over the District of Columbia. This enables Congress to do many things in the District of Columbia which it has no authority to do in the 50 states. There has never been any rule of law that Congress must treat people in the District of Columbia exactly the same as people are treated in the various states.⁵⁰

What Scalia *did* say in *Cohen* is considerably more ambiguous for the purposes Starr & Wald would put it to. In *Cohen*, the question presented was whether a law Congress had passed for the District of Columbia which "*automatic[ally] commit[ed] to mental institutions ... federal criminal defendants successfully asserting the insanity defense*"⁵¹ violated the so-called "*equal*

⁴⁸ See *supra*, text accompanying nn._-._.

⁴⁹ In point of fact, it appears to be Judge Starr's mistake, not Judge Wald's, insofar as this is not the first time that Judge Starr has attributed the words of Judge Wilkey's *Cohen* concurrence to Judge Scalia's majority opinion. See TESTIMONY OF THE HON. KENNETH W. STARR BEFORE THE HOUSE GOVERNMENT REFORM COMMITTEE, 6/23/2004 (available online at <http://www.dcvote.org/pdfs/kstarr062304.pdf>) at p.3 n.2 and accompanying text.

⁵⁰ *Cohen*, *supra*, 733 F.2d at 141 (Wilkey, concurring) (footnote omitted; emphasis added).

⁵¹ *Cohen*, *supra*, 733 F.2d at 129.

protection component of the due process clause of the Fifth Amendment ^[52], *merely because they are applicable only to persons charged in the District of Columbia.*" Scalia's opinion for an *en banc* court – which answers the question in the negative – is suffused with an understanding wholly contrary to that for which Starr & Wald cite it: that the District of Columbia is different.⁵³ When Congress legislates there, it does so under a different grant of power and in a different capacity to that which it exercises when legislating for the consumption of the states, and it does so precisely because the Federal District is *not* a state.

2.

Congress' power when it acts pursuant to the seat of government clause is at its absolute zenith; but Congress is never omnipotent, and even here, at the apogee of its power, its authority is limited.

Although “[t]he congress of the United States, being empowered by the constitution ‘to exercise exclusive legislation in all cases whatsoever’ over the seat of the national government, has the entire control over the District of Columbia for every purpose of government, national or local,” and may therefore “exercise within the District all legislative powers that the [l]egislature of a state might exercise within the state ... as it may think fit,” none-the-less, it may do these things *only* “so long as it does not contravene any provision of the constitution of the United States.”⁵⁴ It is undoubted that “the provisions of the constitution of the United States securing the right of trial by jury, whether in civil or in criminal cases, are applicable to the District of Columbia”⁵⁵; similarly, even when

⁵² As unpalatable as it may be, one must recall that as a circuit judge, Scalia was bound at the time by *Bolling v. Sharpe*, which held that such a component existed.

⁵³ For example: observing that Congress’ “responsibility for the general welfare of the citizenry in that location is especially grave because it is not shared,” *Cohen*, *supra*, at 138; rejecting Cohen’s assertion that “when the federal government has done as much as it can to achieve a particular goal through the exercise of ... its [seat of government clause] powers, it must yet further justify, under the Equal Protection Clause, its failure to pursue the same end under its other powers,” *ibid.*; “the Constitution ... provid[es] a separate federal power which reaches only” the Federal district, *id.* at 139; “[a]lthough it might have been a good means of buttressing federalism and of assuring the District of Columbia some of the benefits of statehood, the Constitution does not contain the principle that Congress cannot exercise its powers as a local sovereign where it has preempted the states from exercising similar local powers,” *id.* at 132 n.10.

⁵⁴ *Capital Traction Co. v. Hof*, 174 U.S. 1 (1899), citing *Kendall v. United States*, 12 Pet. 524, 619 (1838); *Mattingly v. District of Columbia*, 97 U.S. 687, 690 (1878); *Gibbons v. District of Columbia* 116 U.S. 404, 407 (1886).

⁵⁵ *Capital Traction Co.*, *supra*, citing *Webster v. Reid*, 11 How. 437, 460 (1850); *Callan v. Wilson*, 127 U.S. 540, 550, 8 S. Sup. Ct. 1301 (1888); *Thompson v. Utah*, 170 U.S. 343, 18 Sup. Ct. 620 (1898).

exercising its awesome authority over the District of Columbia, Congress may not pass a “*bill of attainder or ex post facto law*,”⁵⁶ create a “Grand Duke of Columbia,”⁵⁷ ban the printing press,⁵⁸ permit double jeopardy prosecutions,⁵⁹ or impose cruel and unusual punishments.⁶⁰ In short, even when operating in its own backyard, “[t]he United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution ... The rights and liberties which citizens of our country enjoy are not protected by custom and tradition alone, they have been jealously preserved from the encroachments of Government by express provisions of our written Constitution.”⁶¹

If it is conceded that Congress cannot act against the Constitution’s express prohibitions on its activities, both rights-bearing and structural, then – given that, “[a]part from the limitation on federal authority inherent in the delegated nature of Congress’ Article I powers, the principal means chosen by the Framers ... [to underpin] the federal system lies in the structure of the Federal Government itself”⁶² – it seems reasonable to extend that logic to encompass other structural aspects of the Constitution. There can be few issues more fundamental to the operation of the government than the structure and membership of the Congress itself, and the Constitution duly limits Congress’ control over its membership. For example, while Congress may judge the qualifications of its members,⁶³ it cannot alter what those qualifications are,⁶⁴ other than by way of its Article V prerogative to initiate

⁵⁶ U.S. Const., Art. I §9 Cl.3. <http://www.house.gov/house/Constitution/Constitution.html>.

⁵⁷ U.S. Const., Art. I §9 Cl. 8.

⁵⁸ U.S. Const., Amdt. 1.

⁵⁹ U.S. Const., Amdt. 5.

⁶⁰ U.S. Const., Amdt. 8.

⁶¹ *Reid v. Covert*, 354 U.S. 1, 5-7 (1957) (footnotes omitted) (emphasis added); accord *Hof*, supra; *Callan*, supra (“[t]here is nothing in the history of the constitution, or of the original amendments, to justify the assertion that the people of this District may be lawfully deprived of the benefit of any of the constitutional guaranties of life, liberty, and property; especially of the privilege of trial by jury in criminal cases,” id at 550).

⁶² *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550 (1985) (emphasis added); accord *National League of Cities v. Usery*, 426 U.S. 833 (1976) at 842 n.12 (rejecting the view that “guarantees of individual liberties are the only sort of constitutional restrictions which this Court will enforce ... against congressional action”).

⁶³ U.S. Const., Art. I §5.

⁶⁴ U.S. Const., Art. I §§2-3.

amendment proceedings.⁶⁵

Moreover, while the seat of government clause is one of the most sweeping grants of power to Congress in the Constitution, there is another narrow arena in which the Constitution grants Congress all-but plenary power, which is directly analogous to this case: the rules and proceedings clause,⁶⁶ which grants Congress almost limitless power to decide questions of its own operation. Under this grant of authority, for over two centuries, Congress has organized and re-organized itself. This power allows Congress to make almost any conceivable rules that it pleases for how it conducts its business,⁶⁷ but even this power is not unlimited: no one would contend, for example, that Congress could increase the number of Senators per state welcomed into its ranks.

If Congress cannot legislate to change the structure mandated by the Constitution, to shrink the Constitution's protections or change its overall plan, other than by way of the Article V process, then it is clearly true that D.C. cannot be given voting representation in Congress without amending the Constitution, any more so than can be a territory. Just as Art. I §9 is categorical about what Congress cannot do, so Article I is categorical about who and what will comprise the Congress. Congress may be comprised solely of the representatives of *states*, and none other. *"The House of Representatives shall be composed of members chosen every second year by the people of the several states"; "[n]o person shall be a Representative . . . who shall not, when elected, be an inhabitant of that state in which he shall be chosen"; "Representatives . . . shall be apportioned among the several states which may be included within this union"*.⁶⁸ *"The Senate of the United States shall be composed of two Senators from each state"; "[n]o person shall be a Senator . . . who shall*

⁶⁵ See THE FEDERALIST, No. 60 (Hamilton) (Congress' power over elections is "*expressly restricted to the regulation of the times, the places, [and] the manner of elections. The qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the legislature*") (emphasis in original). Accord *Powell v. McCormack*, 395 U.S. 486, 550 (1969) ("*in judging the qualifications of its members Congress is limited to the standing qualifications prescribed in the Constitution*"); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 798 (1995) ("*we reaffirm that the qualifications for service in Congress set forth in the text of the Constitution are fixed, at least in the sense that they may not be supplemented by Congress*") (internal quotation marks omitted); *id.* at 875-6 (Thomas, dissenting) ("*Congress has no power to prescribe qualifications for its own Members ... [Not because] the Qualifications Clauses deprive[s] Congress of the authority to set qualifications, but rather [because] nothing in the Constitution grants Congress this power. In the absence of such a grant, Congress may not act*").

⁶⁶ U.S. Const., Art. I, §5.

⁶⁷ See *Nixon v. United States*, 506 U.S. 224, 253 (1993) (Souter, concurring) ("*[i]t seems fair to conclude that the [impeachments] Clause contemplates that the Senate may determine, within broad boundaries, such subsidiary issues as the procedures for receipt and consideration of evidence necessary to satisfy its duty to 'try' impeachments*").

⁶⁸ U.S. Const., Art. I §2 (emphases added).

not, when elected, be an inhabitant of that state for which he shall be chosen).⁶⁹ §2 of the Fourteenth Amendment reiterates the point: *“Representatives shall be apportioned among the several states according to their respective numbers”* (emphasis added). It is plausible (although I think dubious) that Congress has authority to welcome into its membership non-voting delegates, and grant them speaking privileges as a matter of course, but while there may be more-or-less honorable ways around that problem, the issue of actual *voting* representation is clear. Under the Constitution, as presently amended, only *states* may be represented in Congress, and, as we have already seen, the District of Columbia's *sine qua non*, its very *raison d'être*, is precisely that it is *not* a state.

III

Starr & Wald frame the issue of giving D.C. congressional representation in terms of the right to vote: *“it is ... hard to imagine that the power [to exercise plenary power over the Federal district] could not be used to advance a fundamental principle of our Constitution -- that the right to vote should be extended to all citizens.”*⁷⁰ While, for reasons explained above, it is *not* within Congress' power to grant the District of Columbia, *qua* the District of Columbia, voting representation in Congress, in the most literal sense, Starr & Wald are nevertheless correct: it is certainly within Congress' power to grant voting rights to the *residents* of Washington, D.C. Fairness and equity would seem to demand that Congress should use that power.

In my view, retrocession of the bulk of the District's populated area to Maryland is the best solution. It is within the power of Congress to accomplish immediately, and it provides Congressional representation to the district's residence while sidestepping the thornier questions. Even on a level of practical politics, retrocession has a certain appeal. In the eleven Presidential elections since the ratification of the 23d Amendment, Maryland and the District of Columbia have only diverged only twice - in 1972 and 1988 - on which candidate they backed. Moreover, while it's true that voters often split tickets, if one takes the 2004 vote as a measure of popular temperament, retroceding the entire population of the District to Maryland would increase Maryland's GOP vote by a measly 21,000, and its Democratic vote by a resounding 203,000. This poses no threat whatsoever

⁶⁹ U.S. Const., Art. I §3 (emphases added).

⁷⁰ Starr & Wald, *supra* (emphasis added).

to the majorities of Maryland's senators, and would probably obliterate any possibility of another Republican winning the governorship in that State. All three of the Maryland Congressional districts adjacent to the Federal district - the Fourth, Fifth and Eighth - are presently occupied by Democrats. Thus, I would suggest that, as hard as it is to predict such matters, incorporating D.C.'s population into Maryland would barely change the status quo for the U.S. Congress, or for next Presidential election. Presumably, in the 2010 reapportionment, the 10% uptick in Maryland's population resulting from incorporating D.C. will increase its allotment of seats in the House of Representatives and electoral college, which gives both Republicans and democrats incentives to back this plan: it will increase Democratic representation in the House (which will happen whatever plan is adopted) but leaving the Senate untampered with.

Thus, as I see it, retrocession of the bulk of the district - while not ideal - is the most practical means of correcting the disenfranchisement of D.C. residents. It is the most likely plan to be ratified by Congress; it is also that which most aptly balances enfranchisement against the design of the Constitution. It will not fully satisfy everyone; the Democrats will not get the two extra Senators they would no doubt like and which would accrue from statehood, but on the other hand, they should like (and Republicans will not) that they will gain extra voting power in the House and electoral college. Nor is retrocession wholly unproblematic; it would render the 23rd Amendment an anomaly, in need of repeal, but I doubt that achieving that would pose a major problem.