

# ARTICLES

## Federalism and Equal Citizenship: The Constitutional Case for D.C. Statehood

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*As the question of D.C. statehood commands national attention, the legal discourse remains stilted. The constitutional question we should be debating is not whether statehood is permitted but whether it is required.*

*Commentators have been focusing on the wrong constitutional provisions. The Founding document and the Twenty-Third Amendment do not resolve D.C.'s status. The Reconstruction Amendments—and the principle of federated, equal citizenship they articulate—do. The Fourteenth Amendment's Citizenship Clause, as glossed by subsequent amendments, not only establishes birthright national citizenship and decouples it from race and caste but also makes state citizenship a constitutive component of equal national citizenship. Because the Founding architecture of federalism has remained in place as political rights have become integral to U.S. citizenship, national citizenship must be realized in part through the states. All Americans living in the United States, including in the District of Columbia, are constitutionally entitled to claim state citizenship where they reside.*

*Beyond realizing a constitutional obligation, Congress's admission of D.C. to the Union would serve American federalism. Many of federalism's normative values—from creating spheres of minority rule, to satisfying local preferences, to providing laboratories of experimentation—are not well-realized in practice. But the very features of D.C. that have long impeded its recognition as a self-governing political community introduce new possibilities for achieving these values. As a plurality Black state, D.C. would provide a novel forum for federalism to empower people of color. And as the nation's first city-state, D.C. would facilitate subsidiarity by merging federalism and localism.*

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## INTRODUCTION

Two hundred twenty years after Washington, D.C. became the United States' seat of government and local residents lost the franchise, D.C. statehood has become a prominent part of the national conversation. The House of Representatives voted in April 2021 to carve out a federal enclave as the U.S. capital and to grant statehood to the surrounding area of Washington, Douglass Commonwealth.<sup>1</sup> Upon the Bill's enactment, 700,000 District residents would enjoy both local self-rule and representation in Congress. As the Washington, D.C. Admission Act stalls in the Senate, politicians and pundits have questioned its legality, arguing that Congress may not grant statehood through simple legislation but must instead propose a constitutional amendment.<sup>2</sup> Statehood proponents have rushed to answer the constitutional objections.<sup>3</sup>

This framing of the national conversation is stilted. The real constitutional question about D.C. statehood is not whether it is permitted but whether it is required. Should a conscientious member of Congress, committed to fulfilling her oath to support the Constitution of the United States, believe herself bound to vote for D.C. statehood? Although this question is closer than whether statehood is constitutionally permissible, the answer is yes.

It has long been recognized that the nation's capital jettisons principles of American federalism and representative democracy. As D.C. residents seek to regulate local issues, a national legislature in which they lack any representation overrides their decisions.<sup>4</sup> That a majority of D.C.'s residents are people of color makes such domination a "primary civil rights and social justice question" as well.<sup>5</sup> Those who defend this state of affairs must invert their usual commitments. Self-professed champions of federalism insist upon the unchecked prerogatives

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1. Washington, D.C. Admission Act, H.R. 51, 117th Cong. (as passed by House of Representatives, Apr. 22, 2021).

2. See, e.g., R. HEWITT PATE, D.C. STATEHOOD: NOT WITHOUT A CONSTITUTIONAL AMENDMENT (1993); Zachary Evans, *Manchin Says D.C. Statehood Requires Constitutional Amendment, Not Senate Vote*, NAT'L REV. (Apr. 30, 2021, 7:41 PM), <https://www.nationalreview.com/news/manchin-says-d-c-statehood-requires-constitutional-amendment-not-senate-vote/> [https://perma.cc/A5M5-PZN3].

3. See, e.g., Letter from Scholars of the United States Constitution to Congressional Leaders (May 22, 2021), <https://www.scribd.com/document/509015647/Letter-to-Congressional-Leaders-on-Constitutionality-of-Statehood-for-Washington-D-C-May-2021>.

4. Among other local legislation, Congress has blocked a needle exchange program to combat HIV/AIDS, a ballot measure legalizing the sale of marijuana, and the use of D.C. funds to provide abortion coverage for low-income women. See, e.g., Karl Evers-Hillstrom & Aris Folley, *Congress Overrides DC Voters, Keeps Sales of Marijuana Illegal in District*, HILL (Mar. 11, 2022, 9:00 AM), <https://thehill.com/homenews/house/597816-congress-overrides-dc-voters-keeps-sales-of-marijuana-illegal-in-district/> [https://perma.cc/W2C5-BEQV]; Letter from the ACLU to Elijah Cummings, Chairman, U.S. H. Comm. on Oversight & Reform & Jim Jordan, Ranking Member, U.S. H. Comm. on Oversight & Reform (Sept. 19, 2019), <https://www.aclu.org/letter/aclu-statement-dc-statehood-hearing> [https://perma.cc/FPY6-H782]; see also Philip G. Schrag, *The Future of District of Columbia Home Rule*, 39 CATH. U. L. REV. 311, 314 (1990) ("By legislating for the District, members of Congress can take a highly visible stand without actually restricting the activities of any voters in their home districts.").

5. Jesse L. Jackson, *Foreword: The State of New Columbia – A Call for Justice and Freedom*, 39 CATH. U. L. REV. 307, 310 (1990).

of the federal government. Advocates of self-determination abroad justify its denial in the shadow of the White House. Defenders of citizenship as a unique repository of rights and privileges make an exception for citizens living near the seat of American government.

Meanwhile, those who indict D.C.'s status as a civil rights tragedy, a departure from democratic principles, even an international law violation, encounter the refrain: this is what the Constitution requires. When proposals have been made to grant D.C. congressional representation or more autonomous self-government, for example, sympathetic jurists and scholars have lamented that D.C.'s residents cannot enjoy the rights that the Constitution confers through the states because D.C. is not a state.<sup>6</sup>

This response, however, gets the point exactly backward. Rather than insist on the fundamental importance of statehood to deny D.C. residents full citizenship, the centrality of federalism to equal citizenship is reason for D.C.'s admission to the Union.

The Constitution has always channeled representative government through the states, both directly as a means of local self-rule and indirectly as the basis of national representation. For the Founding century, this approach accorded with an understanding of state citizenship as primary. But Reconstruction marked an inversion of the state-federal relationship and the transformation of state citizenship into a constitutive feature of American citizenship. Once the Constitution—through both the Reconstruction Amendments<sup>7</sup> and later amendments recognizing the “right of citizens of the United States” to vote<sup>8</sup>—established birthright national citizenship and tethered political rights to this status, it also required state citizenship as a component of national citizenship. The full meaning of the Fourteenth Amendment’s Citizenship Clause is thus informed by both the federalism of 1789 and the citizenship of the Civil Rights Movement. To unite the Founding’s reliance on states as sites of representation with the twentieth century’s tying of citizenship to the franchise, the Fourteenth Amendment’s

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6. See, e.g., *Adams v. Clinton*, 90 F. Supp. 2d 35, 72 (D.D.C. 2000) (per curiam) (“[M]any courts have found a contradiction between the democratic ideals upon which this country was founded and the exclusion of District residents from congressional representation. All, however, have concluded that it is the Constitution . . . that create[s] the contradiction.”); Views on Legis. Making the Dist. of Columbia a Cong. Dist., 33 Op. O.L.C. 156, 159–60 (2009) [hereinafter OLC D.C. Representation Opinion] (“Congress may not by statute give the District of Columbia voting representation in the House[] . . . [because] the District is not a ‘State’ within the meaning of the Composition Clause.”); Jonathan Turley, *Too Clever by Half: The Unconstitutionality of Partial Representation of the District of Columbia in Congress*, 76 GEO. WASH. L. REV. 305, 350 (2008). See generally LUIS FUENTES-ROHWER & GUY-URIEL CHARLES, THE US CONSTITUTION MEETS DEMOCRATIC THEORY: THE PUZZLING CASES OF PUERTO RICO AND D.C. 7 (2020) (footnotes omitted), <https://www.acslaw.org/wp-content/uploads/2020/03/Puerto-Rico-DC-Statehood-Final-Draft-March-27.pdf> [<https://perma.cc/6KDL-6AGV>] (“The argument against voting rights for District residents is difficult to reconcile with democratic theory, in which self-government is essential to democratic legitimacy and effectuated through periodic elections. . . . [But reformers] have been unable to overcome the fundamental textual problem that the District is not considered a state for voting purposes.”).

7. U.S. CONST. amends. XIII, XIV, XV.

8. *Id.* amends. XIX, XXIV, XXVI.

guarantee of equal citizenship must be a guarantee of federated citizenship. Washington, D.C. is the only place in the continental United States where this guarantee has yet to be realized.<sup>9</sup>

Although D.C. statehood is a constitutional imperative, it is not a judicially enforceable one.<sup>10</sup> Courts have thus been right to reject arguments that D.C. must be treated as a state in the absence of a congressional act. This is not to suggest that D.C.'s status has been straightforward for the judiciary. Can a D.C. resident sue and be sued in federal court despite Article III's express reference to "Citizens of different States"?<sup>11</sup> Does congressional regulation of commerce "among the several States"<sup>12</sup> extend to D.C.? Yes, and yes.<sup>13</sup> But are D.C. residents guaranteed representation in Congress? No, because D.C. is not a state.<sup>14</sup> While these and

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9. Although portions of the constitutional argument we advance in this Article have implications for Puerto Rico and other ostensibly "unincorporated" territories, we address only D.C. The constitutional objections to D.C. statehood are grounded in its status as the seat of government and do not pertain to territories. At the same time, there are not questions about D.C. residents' consent to statehood or their constitutional citizenship. *See, e.g.*, *Downes v. Bidwell*, 182 U.S. 244, 261 (1901) (arguing that, unlike Puerto Rico, D.C. "had been subject to the Constitution, and was a part of the United States," and the "Constitution had attached to it irrevocably"); Aaron C. Davis, *District Voters Overwhelmingly Approve Referendum to Make D.C. the 51st State*, WASH. POST. (Nov. 8, 2016), [https://www.washingtonpost.com/local/dc-politics/district-voters-overwhelmingly-approve-referendum-to-make-dc-the-51st-state/2016/11/08/ff2ca5fe-a213-11e6-8d63-3e0a660f1f04\\_story.html](https://www.washingtonpost.com/local/dc-politics/district-voters-overwhelmingly-approve-referendum-to-make-dc-the-51st-state/2016/11/08/ff2ca5fe-a213-11e6-8d63-3e0a660f1f04_story.html). It is important to note that we agree with critics of the irredeemably racist *Insular Cases*. *See, e.g.*, Christina Duffy Ponsa-Kraus, *The Insular Cases Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 YALE L.J. (forthcoming 2022) (manuscript at 6–7) (available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4016666](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4016666) [<https://perma.cc/H9EE-E7W2>]) (arguing against the rehabilitation of the *Insular Cases*, including *Downes*, because they are "racist-imperialist" and have created an ongoing "crisis of political legitimacy in the unincorporated territories"). Our point here is simply that the legal arguments for territorial statehood require distinct analysis. *See generally* SAM ERMAN, *ALMOST CITIZENS: PUERTO RICO, THE U.S. CONSTITUTION, AND EMPIRE* (2019) (exploring constitutional debates about Puerto Rico's status).

10. As others have observed, "Congress' admission of new states is the paradigmatic political question," and courts traditionally refrain from adjudicating questions the Constitution exclusively commits to a coordinate branch. *Equality for the District of Columbia: Discussing the Implications of S. 132, the New Columbia Admission Act of 2013: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affs.*, 113th Cong. 75 (2014) (statement of Viet D. Dinh, Founding Partner, Bancroft PLLC) [hereinafter *Dinh Testimony*]; *see id.* ("It is difficult to imagine judicially manageable standards for assessing the admission of [D.C. as a state]. And any decision would express disrespect for the political branches while risking the embarrassment and uncertainty of multiple branches' conflicting judgments on a state's existence.").

11. U.S. CONST. art. III, § 2, cl. 1.

12. *Id.* art. I, § 8, cl. 3.

13. *See Nat'l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 600 (1949) (affirming congressional power to treat D.C. as a state for purposes of diversity jurisdiction); *Stoutenburgh v. Hennick*, 129 U.S. 141, 148 (1889) (affirming congressional power to treat D.C. as a state for purposes of interstate commerce). Congress sometimes—but not always—treats D.C. as a state in legislation that does not directly implement constitutional provisions as well. *See, e.g.*, 28 U.S.C. § 1257(b) (providing, for purposes of certiorari to the Supreme Court, that "the term 'highest court of a State' includes the District of Columbia Court of Appeals"); 28 U.S.C. § 1343(b)(1) (providing, for purposes of civil rights lawsuits, that "the District of Columbia shall be considered to be a State").

14. *See, e.g.*, *Adams v. Clinton*, 90 F. Supp. 2d 35, 65–68 (D.D.C. 2000) (per curiam) (rejecting an argument that D.C. residents have a constitutional right to elect congressional representatives); OLC D.C. Representation Opinion, *supra* note 6 (concluding that Congress cannot treat D.C. as a state for

other tensions in the case law underscore D.C.'s problematic status, the judiciary is correct that statehood is a quintessential political question. Courts cannot require Congress to grant D.C. statehood any more than they can countermand a grant of statehood Congress makes. The decision to admit a new state is a congressional one.

When attention turns to Congress, however, arguments become permissive: many scholars and commentators have correctly argued that Congress may grant D.C. statehood, but they have not recognized Congress's constitutional obligation to do so. One reason is simply that "we have forgotten the very idea of affirmative legislative constitutional duties."<sup>15</sup> Another is that the constitutional debate about D.C.'s status focuses on the Founding Era.<sup>16</sup> As in discussions of federalism more generally, discussions of D.C. statehood anachronistically displace the work of Reconstruction with the Constitutional Convention.<sup>17</sup> The Founding document did establish the nation's architecture of federalism as well as D.C.-specific requirements that continue to inform questions of statehood, but D.C.'s status can only be properly analyzed in light of the Fourteenth Amendment and the constitutional transformations it initiated. Congress bears a responsibility to reconcile these constitutional guarantees.<sup>18</sup>

After Part I describes critical Founding commitments, Part II explores how the remaking of these commitments through the Reconstruction Amendments and their citizenship-perfecting progeny has imposed a constitutional obligation on Congress to admit D.C. as a state. Because constitutional development did not end with Reconstruction, Part III considers a possible objection to statehood located, paradoxically, in the Twenty-Third Amendment's conferral of presidential electors on the District. The Amendment does not pose a constitutional barrier to admission, but the current admissions bill should be altered: Congress should assign the Electoral College votes the Amendment confers on the "District constituting the seat of Government of the United States"<sup>19</sup> to the winner of the national

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purposes of congressional representation). *See also* *District of Columbia v. Carter*, 409 U.S. 418, 420 (1973) ("Whether the District of Columbia constitutes a 'State or Territory' within the meaning of any particular statutory or constitutional provision depends upon the character and aim of the specific provision involved.").

15. JOSEPH FISHKIN & WILLIAM E. FORBATH, *THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY* 84 (2022) (arguing that we should recover the tradition of affirmative legislative constitutional duties).

16. *See, e.g.*, Peter Raven-Hansen, *The Constitutionality of D.C. Statehood*, 60 *GEO. WASH. L. REV.* 160, 163 (1991).

17. *See, e.g.*, Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 *COLUM. L. REV.* 1992, 2001, 2015 (2003) (describing the Supreme Court's "federalism revival" of the 1990s as a "chillingly amnesic reproduction of antebellum conceptions of state sovereignty").

18. *See generally* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 *HARV. L. REV.* 1212 (1978) (arguing for congressional enforcement of constitutional norms that the federal judiciary does not enforce due to institutional concerns); *see also* FISHKIN & FORBATH, *supra* note 15, at 84 (arguing for congressional constitutional duties); Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 *STAN. L. REV.* 585, 587 (1975) (arguing for a congressional duty to assess the constitutionality of proposed legislation).

19. U.S. CONST. amend. XXIII.



popular vote. Such a decision would not only conform to the text of the Twenty-Third Amendment but also appropriately recognize the District as a capital city belonging to the entire American people.

Turning to political questions attending statehood, Part IV first addresses familiar arguments that admitting D.C. to the Union would be a partisan power grab. It then inverts the Article's focus on what American federalism has to say about D.C. statehood, asking instead what D.C. statehood might teach us about contemporary American federalism. Many of the normative values associated with federalism are not well-realized in practice, but the very features of Washington, D.C. that have long impeded its recognition as a self-governing political community—in particular, the perception of the District as “too black” and “too urban”<sup>20</sup>—introduce new possibilities for achieving these values. As a plurality Black state, D.C. would provide a novel opportunity for American federalism to instantiate minority rule. And as the nation's first city-state, D.C. would yoke federalism to localism in ways that could facilitate meaningful subsidiarity and democratic experimentation.

### I. FOUNDING COMMITMENTS

When it comes to D.C. statehood, the most important point about the eighteenth-century Constitution is frequently elided: it no longer defines the terms of the Union. In this Article, we focus on amendments that have transformed the constitutional order and, with it, the question of statehood. If it is wrong to orient contemporary discussions of the District exclusively around the pre-Reconstruction Constitution, however, it remains instructive to begin there.

Critical Founding commitments—in particular, the establishment of federalism to ensure both local self-government and national representation—persist to this day and underscore the District's anomalous status.<sup>21</sup> As Representative Ebenezer Elmer of New Jersey lamented shortly after D.C. became the capital: “We have most happily combined the democratic representative with the federal principle in the Union of the States. But the inhabitants of this territory, under the exclusive legislation of Congress, partake of neither the one nor the other.”<sup>22</sup> Although this tension grew pronounced as Washington, D.C. gained population and political identity, it was not practically anomalous when Representative Elmer spoke. At the time, the nation was a mere seventeen states, with much of the country's landmass organized as not-yet-state territories. Understandings of citizenship were also limited, and there was a widespread norm of non-enfranchisement even for those recognized as citizens.

The District thus arose as the seat of government for a nation in which the federal representative principle was more a prospective than a realized constitutional

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20. 124 CONG. REC. 26345 (1978) (statement of Sen. Edward Kennedy).

21. See Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1201 (1996) (defining an “anomalous zone” as “a geographical area in which certain legal rules, otherwise regarded as embodying fundamental policies of the larger legal system, are locally suspended”).

22. 14 ANNALS OF CONG. 910 (1805).

practice. Just as territories would only later be made states and citizens would only later be enfranchised as a matter of course, nothing in D.C.'s establishment as a non-state of non-voting citizens precluded future statehood and enfranchisement. This Part describes Founding Era federalism and citizenship both to contextualize D.C.'s creation and to explicate the original constitutional commitments that remain pertinent to the question of statehood.

#### A. FEDERALISM AND THE SEAT OF GOVERNMENT

It would be difficult to overstate the significance of federalism to the constitutional design. Together with the separation of powers, it was the animating structural principle of the original document. States would be autonomous governments, sovereigns with a direct connection to their people and a responsibility for the majority of American governance. They would also provide the mechanism for national representation, with the selection of the President, Senators, and Representatives all channeled through the states. These interrelated understandings of federalism—as local self-government and as the basis for national representation—permeate the constitutional design. They also underscore the tensions inherent in the creation of the District. As the Founders well recognized, the proposed seat of government fit uneasily into the constitutional plan insofar as it rendered Congress a local legislature and denied political representation to all of the Americans residing there.

##### 1. “Splitting the Atom of Sovereignty”<sup>23</sup>

Federalism appears in the Constitution, first, as an organizing principle for self-government. Even as the Constitution established a national government, it recognized states as separate sovereigns with their own particular relationship to their inhabitants.<sup>24</sup> While federal powers were enumerated in the Constitution, state powers were plenary, limited only by the small number of Union-preserving restrictions imposed by Article I, Section Ten and Article IV.<sup>25</sup> The Tenth Amendment, which indicates that powers not constitutionally delegated to the United States or prohibited to the states “are reserved to the States respectively, or to the people”<sup>26</sup> serves as a textual locus for these commitments.

Although the Founders' federalism has changed dramatically—both in its practical operation and in its legal contours—since the eighteenth century, the commitment to states as sites of self-rule distinct from the federal government remains to this day. Indeed, this aspect of American federalism underlies most celebrations of the institution. Even as, to put it quite mildly, federalism in

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23. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) (“Federalism was our Nation’s own discovery. The Framers split the atom of sovereignty.”).

24. See generally ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* (2010) (analyzing the Founding belief that multiple independent levels of government could exist within a single polity).

25. U.S. CONST. art. I, § 10; *id.* art. IV.

26. *Id.* amend. X.



practice has often failed to live up to the values associated with it,<sup>27</sup> the status of states as separate governments, responsible directly to their residents, underlies accounts of federalism as a guarantor of individual liberty and checks and balances,<sup>28</sup> a facilitator of locally-responsive democratic government,<sup>29</sup> and a seedbed of experimentation.<sup>30</sup>

In addition to preserving the states as autonomous governments, the Constitution also structures national government around the states. The representative bodies of the United States are populated through state-based elections. Thus, the Composition Clause provides that “[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature”;<sup>31</sup> these representatives are to be “apportioned among the several States.”<sup>32</sup> The Senate is “composed of two Senators from each State”—elected directly by the states’ people after the Seventeenth Amendment.<sup>33</sup> The President, too, is selected through state channels: “Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress.”<sup>34</sup>

Despite fundamental transformations of the franchise and federalism alike since the Founding, the national government is still composed through state-based

27. See *infra* Part II (discussing Reconstruction); *infra* Part IV (discussing contemporary federalism).

28. See, e.g., *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1477 (2018) (internal quotations omitted) (“[T]he Constitution divides authority between federal and state governments for the protection of individuals. . . . [A] healthy balance of power between the States and the Federal Government [reduces] the risk of tyranny and abuse from either front.” (alterations in original) (quoting *New York v. United States*, 505 U.S. 144, 181–82 (1992))).

29. See, e.g., DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* 91–92 (1995) (“[O]ne of the stronger arguments for a decentralized political structure is that, to the extent the electorate is small, and elected representatives are thus more immediately accountable to individuals and their concerns, government is brought closer to the people, and democratic ideals are more fully realized.”).

30. See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”). See generally Akhil Reed Amar, *Five Views of Federalism: “Converse-1983” in Context*, 47 *VAND. L. REV.* 1229, 1233–36 (1994) (discussing the role of states as laboratories); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 *COLUM. L. REV.* 1, 9 (1988) (describing the ability of state governments to “pioneer[] new social and economic programs” as a benefit of American federalism).

31. U.S. CONST. art. I, § 2, cl. 1.

32. *Id.* art. I, § 2, cl. 3; see also *id.* art. I, § 2, cl. 2 (“No person shall be a Representative who shall not . . . be an Inhabitant of that State in which he shall be chosen.”); *id.* amend. XIV, § 2 (retaining apportionment “among the several States”).

33. *Id.* amend. XVII, cl. 1 (“The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.”); see also *id.* art. I, § 4, cl. 1 (providing that the “Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof,” subject to congressional alteration).

34. *Id.* art. II, § 1, cl. 2; see also *id.* amend. XII (modifying Electoral College operations but retaining state functions); *id.* amend. XXIII, § 1 (treating D.C. as “if it were a State” for Electoral College purposes); *infra* Part III (discussing the Twenty-Third Amendment).

elections. There is not a single office filled through a national vote. Representation in the national government remains deeply tied to the “structure of statehood.”<sup>35</sup>

## 2. Creating the District of Columbia

Given the constitutional emphasis on states as both units of local self-government and building blocks of national representation, the proposal to create a federal city lacking both statehood and any representation in the federal government aroused some concern during the Constitutional Convention and ratification process. In New York, for instance, Delegate Thomas Tredwell argued that it “departs from every principle of freedom, as far as the distance of the two polar stars from each other; for, subjecting the inhabitants of that district to the exclusive legislation of Congress, in whose appointment they have no share or vote, is laying a foundation on which may be erected . . . tyranny.”<sup>36</sup> Some offered amendments that would bring the District more in line with principles of representative federalism. Following a territorial model, for instance, Alexander Hamilton and others proposed furnishing congressional representation when the District’s population reached a certain size.<sup>37</sup>

These objections and proposals did not bear fruit. As ratified, the District Clause provides simply: “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 the Government of the United States.”<sup>38</sup> In part, concerns about a lack of representation were muted because no such district had been named; at the time of ratification, Washington, D.C. had not yet been selected as the capital, so only hypothetical Americans were being disenfranchised. Some also insisted that the denial of representation was recompensed by the privilege

35. *Adams v. Clinton*, 90 F. Supp. 2d 35, 47 (D.D.C. 2000) (per curiam); cf. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403 (1819) (“No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States.”).

36. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 402 (Jonathan Elliot ed., 2d ed. 1836) (statement of Rep. Thomas Tredwell) [hereinafter 2 ELLIOT’S DEBATES].

37. 5 THE PAPERS OF ALEXANDER HAMILTON 189 (Harold C. Syrett & Jacob E. Cooke eds., 1962) (footnotes omitted) (Alexander Hamilton) (proposing “[t]hat When the Number of Persons in the District of Territory to be laid out for the Seat of the Government of the United States, shall according to the Rule for the Apportionment of Representatives and direct Taxes Amount to [ ] such District shall cease to be parcel of the State granting the Same, and Provision shall be made by Congress for their having a District Representation in that Body”); see also Letter from Samuel Osgood to Samuel Adams (Jan. 5, 1788), reprinted in 5 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES: MASSACHUSETTS 618, 621 (John P. Kaminski et al. eds., 1998) (proposing representation for D.C. residents in the House); 2 ELLIOT’S DEBATES, *supra* note 36, at 410 (Melancton Smith) (proposing an amendment to recognize D.C. residents’ rights and obligations). See generally AUGUSTUS B. WOODWARD, CONSIDERATIONS ON THE GOVERNMENT OF THE TERRITORY OF COLUMBIA: AS THEY RECENTLY APPEARED IN THE NATIONAL INTELLIGENCER, UNDER THE SIGNATURE OF EPAMINONDAS 8 (Washington, Samuel Harrison Smith 1801) (arguing for representation for D.C. residents).

38. U.S. CONST. art. I, § 8, cl. 17.

of living in the capital city or that proximity to Congress might itself constitute representation.<sup>39</sup> Above all, concerns about District residents were eclipsed by the felt need to protect a fledgling federal government. The Philadelphia Mutiny—a mob of Revolutionary War veterans that surrounded Congress during its meeting in Philadelphia in 1783 to demand compensation for their services<sup>40</sup>—was fresh in the Framers’ minds. Recalling Pennsylvania’s failure to come to Congress’s aid, the Framers sought to guard against this sort of threat and a more general dependence of the federal government on any state.<sup>41</sup>

Although it was clear at the time of ratification that the “Seat of the Government of the United States”<sup>42</sup> was not itself a state, it was not clear that this district would lack self-government altogether. Writing as Publius, James Madison predicted that the states ceding territory to compose the District would “no doubt provide in the compact for the rights and the consent of the citizens inhabiting it”; that these inhabitants “will have had their voice in the election of the government which is to exercise authority over them”; and that “a municipal legislature for local purposes, derived from their own suffrages, will of course be allowed them.”<sup>43</sup> When Maryland and Virginia ceded land, however, neither state

39. See, e.g., 10 ANNALS OF CONG. 998 (1801) (statement of Rep. John Dennis) (“From their contiguity to, and residence among the members of the General Government, they knew, that though they might not be represented in the national body, their voice would be heard.”); *Location of the Capital*, [4 September] 1789, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Madison/01-12-02-0247> [<https://perma.cc/RVP2-GGYL>] (last visited Apr. 2, 2022) (“Those who are most adjacent to the seat of legislation, will always possess advantages over others. An earlier knowledge of the laws; a greater influence in enacting them; better opportunities for anticipating them, and a thousand other circumstances, will give a superiority to those who are thus situated.”).

40. That, at least, was the lore. The soldiers were assembling around Pennsylvania’s statehouse to demand pay from the state’s executive council, but Alexander Hamilton convened a special session of the Confederation Congress, which was housed on the same grounds, so that the demonstration would appear to be against Congress. See William C. diGiacomantonio, “*To Sell Their Birthright for a Mess of Potage*”: *The Origins of D.C. Governance and the Organic Act of 1801*, 12 WASH. HIST. 31, 31–32 (2000).

41. See generally 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 219–20 (Jonathan Elliot ed., 2d ed. 1836) (statement of James Iredell) (“What would be the consequence if the seat of the government of the United States, with all the archives of America, was in the power of any one particular state? Would not this be most unsafe and humiliating? Do we not all remember that, in the year 1783, a band of soldiers went and insulted Congress? The sovereignty of the United States was treated with indignity. They applied for protection to the state they resided in, but could obtain none. It is to be hoped such a disgraceful scene will never happen again; but that, for the future, the national government will be able to protect itself.”); THE FEDERALIST NO. 43, at 272 (James Madison) (Clinton Rossiter ed., 1961) (“The indispensable necessity of complete authority at the seat of government carries its own evidence with it. . . . Without it not only the public authority might be insulted and its proceedings interrupted with impunity, but a dependence of the members of the general government on the State comprehending the seat of 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.”).

42. U.S. CONST. art. I, § 8, cl. 17.

43. THE FEDERALIST NO. 43, *supra* note 41, at 272–73. Many have debated whether Madison’s statement that the District’s inhabitants “will have had their voice in the election of” Congress referred only to the first generation of inhabitants or suggested that these residents would receive ongoing

took care to protect its citizens who would now inhabit the federal city.<sup>44</sup> District residents did continue to vote in Maryland and Virginia, including for representatives in Congress, between 1790 and 1800 while the nation's temporary capital remained in Philadelphia. But once the District became the seat of government through the 1801 Organic Act,<sup>45</sup> D.C.'s residents could no longer vote for federal representatives.<sup>46</sup>

#### B. THE NOT-SO-ANOMALOUS DISTRICT

Although incongruous with principles of self-government and federal representation set forth in the Constitution, the District's status as a non-state of non-voting American citizens was not, in fact, discordant with respect to eighteenth- and early nineteenth-century practice. Today, Washington, D.C. is the only place in the continental United States where American citizens lack both state self-government and federal representation in Congress. But when the Constitution was ratified, when D.C. was named the seat of the federal government, and for many decades thereafter, much of the land of the United States was organized as territories; the District was one of many jurisdictions in the country that did not (yet) enjoy statehood. Moreover, it would be at least a century from the Founding before citizenship became coupled with the franchise; D.C. residents were akin to the majority of American citizens insofar as they could not vote. That propertied white men were denied political rights registered as a contemporary concern, but the condition of D.C. residents was not broadly anomalous.

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representation in Congress. *Compare, e.g.*, STEPHEN J. MARKMAN, STATEHOOD FOR THE DISTRICT OF COLUMBIA: IS IT CONSTITUTIONAL? IS IT WISE? IS IT NECESSARY? 39 (1988) (arguing that the "plain meaning of the language Madison uses" is that only the first generation of District residents will vote), *with Adams v. Clinton*, 90 F. Supp. 2d 35, 91 (D.D.C. 2000) (per curiam) (Oberdorfer, J., dissenting) ("Interpreting Madison's statement that the inhabitants of the Seat of Government 'will have had their voice in the election of the government which is to exert authority over them' as a concession that those inhabitants would permanently lose their voice in congressional elections is in substantial tension with—in fact, seems to contradict—the natural reading of other contributions to *The Federalist* by Madison. A basic principle of Madison's conception of the House of Representatives was that, under the Constitution, the authority of the sitting Congress over the People derives from the most recent election and continues only until the next one." (quoting *THE FEDERALIST* NO. 43, *supra* note 41)).

44. *See* An Act to Cede to Congress a District of Ten Miles Square in This State for the Seat of the Government of the United States, 1788 Md. Laws 354; 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, 1789 Va. Acts 53; *see also* diGiacomantonio, *supra* note 40, at 35 ("Of the five states that offered to cede land for the federal district (New Jersey, Pennsylvania, Delaware, Maryland, and Virginia), none attached provisos to their cession protecting residents.").

45. An Act Concerning the District of Columbia (District of Columbia Organic Act of 1801), ch. 15, 2 Stat. 103 (1801).

46. D.C. residents also lost the ability to vote for President until the Twenty-Third Amendment was ratified in 1961. *See infra* Part III. Meanwhile, their ability to elect any form of local government has fluctuated. With respect to the "municipal legislature" Madison anticipated, Georgetown and Alexandria retained their municipal governments after the District of Columbia Organic Act of 1801, 2 Stat. at 107. Washington City, meanwhile, received limited home rule through a mayor appointed by the President and an elected council that could enact local legislation subject to congressional veto. An Act to Incorporate the Inhabitants of the City of Washington, in the District of Columbia, ch. 53, 2 Stat. 195, 196 (1802). After the Civil War, District residents lost home rule altogether for a century. *See infra* Section II.B.

## 1. Territories

When the Constitution was ratified, its dual federalism was partly aspirational. Thirteen states entered the Union in conformity with the constitutional framework provided for self-government and federal representation. But there were also many states that had yet to be recognized as such, territories that were to be admitted by Congress as states at a future time. This arrangement was by no means preordained. Given statehood's significance, the Constitution might have required constitutional amendment to change the existing body of states. Or, in keeping with proposals rejected at the Constitutional Convention, it might have required a supermajority vote of the national legislature to do so.<sup>47</sup> Instead, the Constitution took care to describe critical features of statehood while leaving the population of this category to Congress's political judgments.<sup>48</sup> Although federalism was the backbone of the constitutional design, and statehood carried with it prescribed powers and status, the category "state" was fluid.

The Constitution, moreover, had little to say about the territories beyond establishing Congress's regulatory authority, a grant that immediately followed its power to admit new states.<sup>49</sup> Provisions concerning territorial governance were instead found principally in the Northwest Ordinance of 1787.<sup>50</sup> The Ordinance established—for the territory that subsequently became Ohio, Indiana, Illinois, Michigan, and Wisconsin<sup>51</sup>—a system of colonial governments with the prospect of statehood. Settlers were promised a popularly elected general assembly once they had 5,000 free adult male inhabitants and then statehood "on an equal footing with the original States" when they reached 60,000 free inhabitants.<sup>52</sup> Beyond underscoring that a substantial number of American citizens lived in non-states, the early development of the territories yielded two related understandings of federalism with resonance for Washington, D.C.

First, federal control over an area did not foreclose, or even conflict with, future statehood. To the contrary, federal control over the territories facilitated statehood. As Professor Peter Onuf has described, "statehood was immanent in the American concept of territory"; "[s]ettlers could look forward to full incorporation in the union precisely because the national domain was first organized into

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47. A rejected proposal would have required a two-thirds vote of the House and Senate to admit a new state. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 446–47, 454–56 (Max Farrand ed., 1911).

48. U.S. CONST. art. IV, § 3, cl. 1 ("New States may be admitted by the Congress into this Union. . . .").

49. *Id.* art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . .").

50. An Act to Provide for the Government of the Territory Northwest of the River Ohio, ch. 8, 1 Stat. 50 (1789) [hereinafter Northwest Ordinance]. The Ordinance preceded the Constitution but was reaffirmed by the First Congress. *See id.* at 50–51; Matthew J. Hegreness, Note, *An Organic Law Theory of the Fourteenth Amendment: The Northwest Ordinance as the Source of Rights, Privileges, and Immunities*, 120 YALE L.J. 1820, 1836–38 (2011).

51. The Ordinance's provisions were also extended to other future states including Mississippi, Louisiana, Tennessee, Arkansas, Alabama, Kansas, Missouri, Nebraska, Washington, and Oregon. *See* Hegreness, *supra* note 50, at 1845–54.

52. Northwest Ordinance, *supra* note 50, at 51, 53.



‘colonies’ or ‘territories.’”<sup>53</sup> This had not always been the expectation; many thought westward expansion would occur in a more bottom-up, organic manner and political integration into the Union would follow. Recognizing that a lack of federal control hindered settlement objectives, however, policymakers inverted the expected relationship: “Congress could not leave frontier settlers to manage their own affairs until they were ready to join the union. Instead, the establishment of an effective territorial government was prerequisite to land sales and settlement.”<sup>54</sup> By the time the Constitution was ratified, it was widely recognized that Congress would govern territories that would then become states.<sup>55</sup> As Onuf summarizes “the constitutional *ideal*” of the American territorial system: “Territories would not be held in perpetual dependency but could look forward to statehood and membership in the union.”<sup>56</sup>

Second, and related, the gradual admission of territories as states established the sweep of the congressional admission prerogative. In early debates, many assumed that the Northwest Ordinance set forth binding conditions,<sup>57</sup> but Congress treated statehood as a matter of its discretion, and its gloss on Article IV shaped the nation’s development.<sup>58</sup> The admission of new states became accepted as a matter of political judgment—as fierce sectional and partisan debates over statehood throughout American history have underscored.<sup>59</sup> Congressional decisions have been limited only by Article IV’s restrictions on

53. PETER S. ONUF, *STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE* xxx (Univ. of Notre Dame Press 2019) (1987).

54. ONUF, *supra* note 53, at 45. This top-down settlement process was closely bound up in the racial formation of the nation. The Northwest Ordinance imposed a colonial structure to “Americanize” the territories, and the federal government adopted land policies to move white settlers across the country, stressing democratic and constitutional principles “while engineering a dominant racial demography.” PAUL FRYMER, *BUILDING AN AMERICAN EMPIRE: THE ERA OF TERRITORIAL AND POLITICAL EXPANSION* 55, 276 (2017); *see also id.* at 10 (noting that land policies encouraged westward movement by white settlers, with the federal government often moving “populations in a manner that enabled the nation to simultaneously claim fidelity to democratic principles while maintaining racial hierarchies that promoted white supremacy”). It was for these white settlers that the federal government offered a temporary period of colonial government as a precursor to self-government.

55. ONUF, *supra* note 53, at 45; *see also* Gregory Ablavsky, *Administrative Constitutionalism and the Northwest Ordinance*, 167 U. PA. L. REV. 1631, 1653–54 (2019) (noting the expectation that territories would eventually become states and James Monroe’s description of “the promise of future statehood as the ‘remarkable & important difference’ between the Ordinance and British imperial precedent” (quoting Letter from James Monroe to Thomas Jefferson (May 11, 1786) (available at <https://founders.archives.gov/documents/Jefferson/01-09-02-0419> [<https://perma.cc/KGE3-GQUQ>]) (alteration in original)).

56. ONUF, *supra* note 53, at 108; *see also* *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 446–48 (1857) (enslaved party) (arguing that territories must become states because the power of Congress “to obtain and hold colonies and dependent territories, over which they might legislate without restriction, would be inconsistent with [the federal government’s] own existence in its present form”), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

57. *See, e.g.*, Northwest Ordinance, *supra* note 50, at 53 (providing for statehood upon reaching 60,000 inhabitants). *See generally* ONUF, *supra* note 53, at 88–109 (describing debates about whether the Northwest Ordinance controlled Congress’s decisions to admit new states).

58. *See* U.S. CONST. art. IV, § 3, cl. 1 (“New States may be admitted by the Congress into this Union. . .”).

59. *See infra* Section IV.A.



altering extant states<sup>60</sup> and its requirement that the “United States shall guarantee to every State in this Union a Republican Form of Government.”<sup>61</sup> Beyond those Union-preserving measures, the Constitution leaves Congress a free hand in admitting new states.

Early territorial governance did not have direct bearing on Washington, D.C. The District was established by a separate clause of the Constitution, and it had a unique status as the seat of the national government.<sup>62</sup> The distinction between territories and the District can be overstated—in later decades, D.C. was sometimes treated as a territory,<sup>63</sup> while territories were sometimes organized as “Districts”<sup>64</sup>—but it remains true that D.C. was “*sui generis* in our governmental structure.”<sup>65</sup>

The territorial history does underscore, however, that Washington, D.C. was not unusual insofar as it was a non-state and, further, that nothing inherent in federal control or non-state origination precludes statehood. The reality of the Founding Era was a plethora of not-yet-states despite the more rigid framework of dual federalism the Constitution established. On that continental canvas, D.C.’s status was unremarkable. Indeed, the sparse population of the District placed it well below the Northwest Ordinance’s threshold for statehood,<sup>66</sup> and it would be difficult to describe 1801 Washington, D.C. as a distinct political community; it had just been created through a federal act joining together ceded lands from Maryland and Virginia.<sup>67</sup> This act of border-drawing could—and did—subsequently generate a political community, but as in the territories themselves, the community could only be called into existence by the top-down act of political creation.<sup>68</sup>

60. See U.S. CONST. art. IV, § 3, cl. 1 (“[N]o new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.”).

61. *Id.* art. IV, § 4; see Charles O. Lerche, Jr., *The Guarantee of a Republican Form of Government and the Admission of New States*, 11 J. POL. 578, 578 (1949) (“In no area has the guarantee been so widely invoked as in the admission of new states into the Union.”); see also Northwest Ordinance, *supra* note 50, at 53 (providing that governments of new states be “republican”).

62. U.S. CONST. art. I, § 8, cl. 17.

63. See An Act to Provide a Government for the District of Columbia, ch. 62, 16 Stat. 419, 419 (1871), *repealed by* An Act for the Government of the District of Columbia, and For Other Purposes, ch. 337, 18 Stat. 116 (1874), and An Act Providing a Permanent Form of Government for the District of Columbia, ch. 180, 20 Stat. 102 (1878); see also, e.g., *Grant v. Cooke*, 7 D.C. (2 Mackey) 165, 194 (1871) (“There can be no doubt that the [1871] government of D.C.] was formed after the model of the existing territorial governments, and is analogous to them in its general provisions.”).

64. See, e.g., William S. Hanable, *The State of Alaska*, in *THE UNITING STATES: THE STORY OF STATEHOOD FOR THE FIFTY UNITED STATES* 55, 62 (Benjamin F. Shearer ed., 2004) (noting that Alaska was organized as the “District of Alaska” in 1884 and the northern part of Louisiana was organized as the “District of Louisiana” in 1804).

65. *District of Columbia v. Carter*, 409 U.S. 418, 432 (1973).

66. D.C.’s population in 1800 was less than one-fifth the population of the smallest state (Delaware), and less than one-fourth of the Northwest Ordinance’s proposed population threshold for admission. See *Adams v. Clinton*, 90 F. Supp. 2d 35, 81 & nn.30–31 (D.D.C. 2000) (per curiam) (Oberdorfer, J., dissenting).

67. *District of Columbia Organic Act of 1801*, ch. 15, 2 Stat. 103 (1801).

68. *Cf.* ONUF, *supra* note 53, at 91 (footnote omitted) (“Fixed boundaries . . . created communities capable of enjoying and enforcing claims to political rights that, in the American federal system, could only be exercised collectively.”).

## 2. Early American Citizenship

The legal rights and obligations of the individuals residing in the territories were closely related to the territories' status, and, here too, Washington, D.C. was not at first exceptional. Even as the federal government built territorial policy around an assumption of settlement by American citizens (or, frequently, European immigrants expected to quickly naturalize<sup>69</sup>) and “manufacture[d] white majorities on the land,”<sup>70</sup> it temporarily denied these prized settlers rights of political participation. At first, territorial residents would lack a local assembly as well as representation in Congress, and only upon a territory's admission to statehood would its residents again “enjoy the full benefits of American citizenship.”<sup>71</sup> Like those who chose to live in the nation's capital and enjoy whatever privileges might attend that residence, the settlers of the Northwest Territory were seen as consenting to a suspension of political rights they would otherwise enjoy in exchange for economic opportunities.<sup>72</sup>

Even describing such political participation in terms of citizenship risks positing a more solid category of American citizenship than existed in the Founding Era. Until the Civil War, national citizenship was a thin and variegated concept. The Constitution itself contained no definition of American citizenship or the rights, privileges, or obligations associated with it.<sup>73</sup> In particular, the yoking of

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69. Federal land policy became a form of immigration policy: offers of free or cheap land “were explicitly intended to encourage European emigration,” and Congress provided in the Nationalization Acts of 1790 and 1802 a quick path to citizenship for “free white persons.” FRYMER, *supra* note 54, at 60; *see also* JASON E. PIERCE, MAKING THE WHITE MAN'S WEST: WHITENESS AND THE CREATION OF THE AMERICAN WEST 14, 19 (2016) (describing the construction of white racial identity in the American West); AZIZ RANA, THE TWO FACES OF AMERICAN FREEDOM 114–20 (2010) (describing how settler ideals of freedom were politically joined to the subordination of marginalized groups).

70. FRYMER, *supra* note 54, at 28.

71. ONUF, *supra* note 53, at 59. The statehood process and the status-based citizenship arrangements were mutually constitutive; “a majority white population” was treated as “a necessary condition for statehood.” FRYMER, *supra* note 54, at 28. But there was also contemporary debate about the contours of citizenship in the territories. For instance, the Northwest Territory's first Governor, Arthur St. Clair, maintained that because the Territory had no representation in Congress or local self-government, its inhabitants “ceased to be citizens of the United States and became their subjects.” ONUF, *supra* note 53, at 71 (quoting Governor Arthur St. Clair). His opponents argued instead that “settlers remained citizens, even while agreeing not to exercise their political rights for a limited time.” *Id.* at 70.

72. *See, e.g.*, ONUF, *supra* note 53, at 74. *But see id.* at 73 (“[T]he attainment of true citizenship was immanent in the temporarily defective citizenship claimed by territorial ‘citizens.’”).

73. *See, e.g.*, William J. Novak, *The Legal Transformation of Citizenship in Nineteenth-Century America*, in THE DEMOCRATIC EXPERIMENT: NEW DIRECTIONS IN AMERICAN POLITICAL HISTORY 85, 92 (Meg Jacobs et al. eds., 2003) (“Whereas modern citizenship involves a single, formal, and undifferentiated legal status—membership in a central nation-state—that confers universal and internal transjurisdictional rights upon its holders, nineteenth-century American governance was precisely about differentiation, jurisdictional autonomy, and local control.”); *see also* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 583 (1857) (enslaved party) (Curtis, J., dissenting) (describing as “untenable” the assumption that “no one can be deemed a citizen of the United States who is not entitled to enjoy all the privileges and franchises which are conferred on any citizen”), *superseded by constitutional amendment*, U.S. CONST. amend. XIV. *See generally* JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870 (rev. ed. 2005) (describing the gradual transformation of citizenship in the United States before the Civil War); ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY (1997) (examining political struggles over American citizenship).

citizenship to the franchise had yet to occur; even comparatively robust state citizenship did not entitle one to vote.<sup>74</sup>

That residents of the territories and District of Columbia lacked the franchise thus imposed a geographical condition on their political participation akin to familiar ascriptive qualifications. In an 1805 case considering whether a citizen of D.C. was a citizen of a state within the meaning of Article III of the Constitution, for example, the plaintiff's lawyer noted: "It is true that the citizens of Columbia are not entitled to the elective franchise in as full a manner as the citizens of states. They have no vote in the choice of president, vice-president, senators and representatives in congress."<sup>75</sup> He then proceeded to draw a geographical analogy to sex, age, and property ownership:

But in this they are not singular. More than seven eighths of the free white inhabitants of Virginia are in the same situation. Of the white population of Virginia one half are females—half of the males probably are under age—and not more than one half of the residue are freeholders and entitled to vote at elections. The same case happens in some degree in all the states. A great majority are not entitled to vote.<sup>76</sup>

American citizens residing in D.C. were not alone in their want of the franchise; this was the norm for many years after the Founding. The franchise, moreover, was itself less central to Founding Era political participation than it would become in later decades. Other channels for political participation—in particular, petitioning and assembly—were open to D.C. residents as they were to state citizens.<sup>77</sup>

In contrast to the highly anomalous condition of D.C. today, neither the District's non-state status nor its citizens' non-enfranchised status rendered it anomalous in the first decades of the United States. The District's establishment as the seat of the federal government distinguished it from the states as well as

74. See generally ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 22–42 (rev. ed. 2009) (tracing the expansion of the right to vote in the states from 1790 to 1850).

75. *Hepburn v. Ellzey*, 6 U.S. (2 Cranch) 445, 451 (1805) (plaintiff's argument).

76. *Id.* at 451–52 (plaintiff's argument). Chief Justice Marshall's opinion declared that "the members of the American confederacy only are the states contemplated in the constitution" and that, although "it is extraordinary that the courts of the United States, which are open to aliens, and to the citizens of every state in the union, should be closed" to residents of D.C., it would take congressional legislation rather than constitutional interpretation to extend diversity jurisdiction to them. *Id.* at 452–53.

77. See generally Nikolas Bowie, *The Constitutional Right of Self-Government*, 130 *YALE L.J.* 1652 (2021) (arguing that the historical right to assemble provided a means of participation in lawmaking); Maggie McKinley, *Lobbying and the Petition Clause*, 68 *STAN. L. REV.* 1131 (2016) (exploring the history of the right to petition as a way for minority voices to participate in lawmaking). In the abolitionist movement of the early nineteenth century, a large-scale petition campaign drew petitions from D.C. as well as the states. Underscoring limits of this form of political participation, however, in 1836, Congress passed the Pinckney Resolutions resolving not to consider petitions "relating in any way, or to any extent whatsoever, to the subject of slavery, or the abolition of slavery." *CONG. GLOBE*, 24th Cong., 1st Sess. 383 (1836).

from the territories that were its closer analogues, but nothing in its founding form precluded future prospects of self-government and political representation.

### C. STATEHOOD AND THE FOUNDING CONSTITUTION

If the creation of the District as a non-state entity did not preclude statehood, did any provision of the Founding Constitution prohibit Congress from admitting D.C. as a state? The twenty-first-century question of D.C. statehood cannot be settled by the eighteenth-century Constitution. The Reconstruction Amendments and their progeny have remade American federalism and transformed the question of D.C.'s status.<sup>78</sup> But the original Articles and Bill of Rights have important bearing on statehood. What did the Founding Constitution mean for D.C. statehood in the years before Reconstruction, and do any of the original provisions foreclose statehood today?

The best answer to this question is that the Constitution of the Founding neither required nor prohibited statehood for D.C., at least in the form it has been proposed: admitting the population-rich area of Washington, D.C. as a state while retaining a purely federal enclave—including the Capitol, White House, and Supreme Court buildings—as the seat of the federal government.<sup>79</sup> It was only with the Reconstruction Amendments that the Constitution came to impose an obligation on Congress to grant D.C.'s residents statehood.<sup>80</sup> As commentators including Viet Dinh and Peter Raven-Hansen have explained, however, the Founding Constitution never prohibited Congress from admitting D.C. as a state.<sup>81</sup>

The Admissions Clause gives Congress broad authority,<sup>82</sup> and Congress has admitted thirty-seven states to the Union through simple legislation.<sup>83</sup> The principal objections to statehood for D.C. thus come not from a want of congressional authority but instead from perceived limits concerning the federal seat of government.<sup>84</sup> First, opponents cite the District Clause.<sup>85</sup> This Clause provides for a federal area over which Congress has exclusive authority, but it would not be violated by a statehood act that left in place a seat of government subject to exclusive federal control. At the Constitutional Convention, delegates considered a clause that would have authorized Congress “to fix and *permanently* establish the

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78. See *infra* Part II.

79. See, e.g., Washington, D.C. Admission Act, H.R. 51, 117th Cong. (as passed by House of Representatives, Apr. 22, 2021).

80. See *infra* Part II.

81. See Dinh Testimony, *supra* note 10, at 76; Raven-Hansen, *supra* note 16, at 168.

82. U.S. CONST. art. IV, § 3, cl. 1.

83. See, e.g., Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 AM. J. LEGAL HIST. 119, 125 (2004).

84. Perhaps the most significant objection comes from the Twenty-Third Amendment, ratified in 1961. We consider that argument below, *infra* Part III, and address here only arguments based on the Founding Era.

85. U.S. CONST. art. I, § 8, cl. 17 (empowering Congress “[t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States”).

seat of Government,” but they removed this language.<sup>86</sup> As ratified, the Clause sets no restriction other than an upper limit of “ten Miles square” on the District’s size.<sup>87</sup>

Moreover, Congress has already altered the size and shape of the District. The First Congress made a small change to the southern boundary of the District, and all of the Framers then serving in Congress voted in favor, expressing no reservation about moving the established borders.<sup>88</sup> Still more significantly, in 1846, Congress passed legislation providing for the retrocession to Virginia of the substantial portion of the District originally ceded by that state.<sup>89</sup> The House Committee on D.C. deliberated about its constitutional authority to change the size of the District, recognizing that this would shrink the territory of the District by a third, and concluded that it was empowered to do so.<sup>90</sup> When the Supreme Court was belatedly asked to hold the retrocession unconstitutional, it declined to do so.<sup>91</sup>

Looking beyond the text and historical practice, some nonetheless contend that the Framers intended the District to have a fixed form to render it independent from the states.<sup>92</sup> Even assuming such arguments are constitutionally cognizable,<sup>93</sup> they are not compelling. They would apply more powerfully to a proposal to eliminate an exclusive federal seat of government altogether—but the text of the Clause would also speak directly to such a proposal. To the extent statehood

86. Raven-Hansen, *supra* note 16, at 168 (quoting JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 420 (Gaillard Hund & James Brown Scott eds., 1920)). As Raven-Hansen notes, Congress accepted the cessions of Maryland and Virginia “for the *permanent* seat of the government,” but the legislation was not of constitutional stature and could be altered by a subsequent act. *Id.* (quoting An Act for Establishing the Temporary and Permanent Seat of the Government of the United States, ch. 28, § 1, 1 Stat. 130, 130 (1790)).

87. U.S. CONST. art. I, § 8, cl. 17.

88. *See* Raven-Hansen, *supra* note 16, at 169–70.

89. An Act to Retrocede the County of Alexandria, in the District of Columbia, to the State of Virginia, ch. 35, 9 Stat. 35 (1846).

90. *See* H.R. REP. NO. 29-325, at 1, 3–4 (1846) (“The true construction of [the District Clause] would seem to be that Congress may retain and exercise exclusive jurisdiction over a district not exceeding ten miles square; and whether those limits may enlarge or diminish that district, or change the site, upon considerations relating to the seat of government, and connected with the wants for that purpose, the limitation upon their power in this respect is, that they shall not hold more than ten miles square for this purpose; and the end is, to attain what is desirable in relation to the seat of government.”).

91. *Phillips v. Payne*, 92 U.S. 130, 133–34 (1875) (noting that Virginia had been in possession of the territory for more than 25 years since the retrocession and neither the state nor the United States objected, so the retrocession was “conclusive of the rights of the parties before [the Court]”).

92. *See, e.g.,* OFF. OF LEGAL POL’Y, DOJ, REPORT TO THE ATTORNEY GENERAL: THE QUESTION OF STATEHOOD FOR THE DISTRICT OF COLUMBIA 55 (1987), <https://www.ojp.gov/pdffiles1/Digitization/115093NCJRS.pdf> [<https://perma.cc/6JZV-KD6C>] (“Thus, a federal enclave was created to ensure the independence of the new government. . . . The basic concern that the federal government be independent of the states, and that no one state be given more than an equal share of influence over it, is as valid today as it was . . . at the Convention.”); Raven-Hansen, *supra* note 16, at 167–77 (addressing the “fixed form” and “fixed function” objections to D.C. statehood).

93. *But see* Dinh Testimony, *supra* note 10, at 83 (“The need for independence from state control or dependence undoubtedly influenced the Constitution’s provision for a federal district, and it should inform Congress’ policy judgment. . . . But it is just that: a policy concern.”).

for D.C. would entail shrinking but not eliminating the federal seat of government, Congress could well determine that specific measures the Founders endorsed to protect the fledgling federal government had become unnecessary over time. Indeed, the buffer of the District's land seems no match for the growth of the federal government's fiscal, military, and regulatory capacities as a means of protection.<sup>94</sup> Moreover, the violent storming of the Capitol on January 6, 2021 underscores that states might defend as well as threaten Congress and that the "double security" of federalism and the separation of powers the Founders elsewhere endorsed might in fact furnish superior protection for any branch of the federal government as well as the American people.<sup>95</sup>

Focusing on the Founding Era, some have also argued that Congress may only grant statehood with the consent of Maryland, which initially ceded the land. Because the Constitution prohibits new states from being formed within extant states absent their consent, the argument goes, Maryland's legislature would have to agree to D.C. statehood.<sup>96</sup> When Maryland acted in 1791, however, it "for ever ceded and relinquished to the congress and government of the United States, in full and absolute right, and exclusive jurisdiction" the territory, which the United States then accepted.<sup>97</sup> As Raven-Hansen has explained, Maryland's conferral contained no reverter or condition subsequent, and the federal government's acceptance of the land extinguished Maryland's interests.<sup>98</sup> It is Congress—not Maryland—that has the prerogative to choose to carve a state out of the territory over which it exercises sovereign control.<sup>99</sup>

In brief, the Constitution of the Founding did not prohibit Congress from granting statehood to the people of Washington, D.C. Pursuant to the Admissions Clause, Congress could have chosen at any point in the nation's history to reduce the size of the federal seat of government and admit the balance of the District as a new state, with a republican form of government, on equal footing with the other states. Nothing in the District Clause or Maryland's initial cession would have stood in the way of this congressional prerogative. It was only after the Civil War and the remaking of American federalism and citizenship alike, however, that Congress acquired an as-yet unfulfilled obligation to do so.

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94. See, e.g., Turley, *supra* note 6, at 314 ("[T]he federal government now has a large security force and is not dependent on the states. . . . [T]he position of the federal government vis-à-vis the states has flipped, with the federal government now the dominant party in this relationship."); see also H.R. REP. NO. 117-19, at 31 (2021) ("Federal facilities are located in every state and around the world. These facilities rely on state and foreign governments for services and protection. For example, the headquarters of the Department of Defense, the Central Intelligence Agency, and the National Security Agency are located outside of the federal district. Indeed, ninety-two percent of federal employees are located outside of the federal district and 85 percent are located outside of the national capital region.").

95. THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961).

96. See OFF. OF LEGAL POL'Y, DOJ, *supra* note 92, at iii.

97. 1791 Md. Laws 573.

98. See Raven-Hansen, *supra* note 16, at 179–82.

99. See Dinh Testimony, *supra* note 10, at 82 ("Just as a state may consent to the creation of a new state from within its borders, so too should Congress be permitted to carve a state from the District of Columbia, over which it enjoys sovereign control."); see also *id.* at 86 ("Maryland has no residual authority over the land.").



## II. RECONSTRUCTION, EQUAL CITIZENSHIP, AND THE DISTRICT

The Reconstruction Amendments altered the architecture of the Constitution in ways that unsettled the status of the District of Columbia. Most notably, the Fourteenth Amendment established birthright national citizenship, made this national citizenship primary and state citizenship derivative, and decoupled citizenship from race and notions of caste.<sup>100</sup> These three intertwined features are widely appreciated.<sup>101</sup> But there is a further implication with particular import for D.C: the Reconstruction Constitution makes state citizenship a constitutive component of equal national citizenship. The Constitution requires that all American citizens living in the United States be able to claim state citizenship where they reside.

Below, we excavate the claim that equal citizenship must be federated citizenship. We begin with the text and history of the Fourteenth Amendment's Citizenship Clause.<sup>102</sup> We then engage in more holistic interpretation, considering how the Clause's guarantee of equal citizenship is informed by both the federalism of the Founding Constitution and the citizenship recognized by later amendments, including the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth.<sup>103</sup> In

100. U.S. CONST. amend. XIV.

101. *See, e.g.*, 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 198 (1998) (“[T]he Fourteenth Amendment[] declar[es] the primacy of national citizenship and treat[s] state citizenship as derivative.”); AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 381 (2005) (“[A]ll Americans were in fact citizens of the nation first and foremost, with a status and set of birthrights explicitly affirmed in a national Constitution.”); CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 51–52 (1969) (arguing for the structural significance of the Fourteenth Amendment’s “national rule that every person born in the country or naturalized shall be a citizen both of the nation and of his state”); J.M. Balkin, *The Constitution of Status*, 106 *YALE L.J.* 2313, 2347 (1997) (“The citizenship clause is a second Declaration of Independence, announcing that equal citizenship would henceforth be available to all regardless of race or prior condition of servitude.”); Kenneth L. Karst, *The Supreme Court 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 *HARV. L. REV.* 1, 17 (1977) (arguing that the Framers of the Amendment “saw themselves as adopting a principle of equal citizenship, [which was] ‘capable of growth’”).

102. U.S. CONST. amend. XIV, § 1.

103. *Id.* amends. XV, XIX, XXIV, XXVI. Our approach thus tracks Vicki Jackson’s “holistic” interpretation, Reva Siegel’s “synthetic” interpretation, Akhil Amar’s “intratextual” interpretation, Michael Dorf’s “incorporationist” interpretation, and Justice Ruth Bader Ginsburg’s “dynamic” interpretation, among other prominent examples. Although these approaches differ in their particulars, all seek to “synthesize more recent amendments into an understanding of what the Constitution as a whole requires.” Vicki C. Jackson, *Holistic Interpretation: Fitzpatrick v. Bitzer and Our Bifurcated Constitution*, 53 *STAN L. REV.* 1259, 1281 & n.95 (2001); *see* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 *HARV. L. REV.* 947, 949 (2002); Akhil Reed Amar, *Intratextualism*, 112 *HARV. L. REV.* 747, 748 (1999) [hereinafter Amar, *Intratextualism*]; Akhil Reed Amar, *The Supreme Court 1999 Term—Foreword: The Document and the Doctrine*, 114 *HARV. L. REV.* 26, 62–63 (2000); Michael C. Dorf, *Equal Protection Incorporation*, 88 *VA. L. REV.* 951, 952–53 (2002); Ruth Bader Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 *WASH. U. L. Q.* 161, 161.

Although, as will be apparent from this description, our approach to constitutional interpretation is non-originalist, there is also support for a principle of equal, federated citizenship as a matter of the Citizenship Clause’s original public meaning. *See, e.g.*, Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, 3 *J. LEGAL ANALYSIS* 165, 165, 254 (2011) (exploring the “contribution of abolitionist constitutionalism to the original public meaning of . . . the Fourteenth Amendment” and concluding, among other things, that the Citizenship Clause “incorporated

particular, we describe how Fourteenth Amendment citizenship must be integrated with the Founding reliance on states as the sites of both local self-government and national representation. If equal citizenship entails full membership in the political community, then equal citizenship must be federated citizenship.

The Fourteenth Amendment alone did not tether citizenship to political participation; only with subsequent amendments, as well as constitutional interpretations and broader social and historical developments, were citizenship and political participation bound together. We thus start with Reconstruction and then look forward to determine the content of citizenship. The meaning of equal citizenship has been most critically elaborated through amendments recognizing the “right of citizens of the United States” to vote<sup>104</sup> and the broader struggle for the franchise that has connected citizenship to self-government in the republican tradition.<sup>105</sup> Understood as part of a coherent document, the Citizenship Clause guarantees equal U.S. citizenship that entails state as well as national citizenship and attendant rights of political participation through the structure of federalism.

Because the guarantee of federated, equal citizenship depends on constitutional amendments and understandings that unfolded for more than a century after the Civil War, it is unsurprising that D.C. statehood was not entertained during Reconstruction. The history is more complicated than the absence of a statehood bill might suggest, however, insofar as the struggle for self-government in the District informed the broader transformation of American citizenship. During the Civil War, President Lincoln and the Republican Congress dismantled slavery and Black Codes in D.C. before the Emancipation Proclamation and Thirteenth Amendment,<sup>106</sup> and during Reconstruction, the city became a proving ground for

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the abolitionist conception of birthright national citizenship”); Ryan C. Williams, *Originalism and the Other Desegregation Decision*, 99 VA. L. REV. 493, 499, 502 (2013) (examining “the original public meaning of the Fourteenth Amendment’s Citizenship Clause” and concluding that the Clause requires equal citizenship). There is not evidence that the Reconstruction Congress intended D.C. to be a state, but that is unremarkable. Many now-uncontroversial understandings of the Fourteenth Amendment—from the Equal Protection Clause’s prohibition on segregated schools and anti-miscegenation laws to its recognition of women’s jury service—do not conform to the expected applications of the Framers, and even most species of originalism do not demand such forecasting. *See, e.g.*, Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 3–4 (2011) (“[E]ven if one accepts that legislative history has some value—and we do—it does not follow that the original meaning of a clause or text is defined by the Framers’ original expected applications. . . . [T]he text of the Fourteenth Amendment was meant, as an original matter, to forbid class-based legislation and any law that creates a system of caste.”). *See generally* Lawrence B. Solum, *Originalist Theory and Precedent: A Public Meaning Approach*, 33 CONST. COMMENT. 451 (2018) (discussing the doctrine of public meaning originalism).

104. U.S. CONST. amends. XV, XIX, XXIV, XXVI.

105. *See, e.g.*, JUDITH N. SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION 2 (1991) (“The ballot has always been a certificate of full membership in society, and its value depends primarily on its capacity to confer a minimum of social dignity.”); Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 IND. L.J. 1289, 1333 (2011) (“The right to vote is partly constitutive of what it means to be a full citizen.”).

106. An Act for the Release of Certain Persons Held to Service or Labor in the District of Columbia, ch. 54, 12 Stat. 376 (1862).

multiracial democracy.<sup>107</sup> Black Washingtonians forcefully argued that citizenship required political equality, and Congress recognized Black male suffrage in D.C. before the ratification of the Fourteenth and Fifteenth Amendments.<sup>108</sup> Although egalitarian citizenship was quickly eviscerated, it was first pursued in the District itself.

#### A. CITIZENSHIP TRANSFORMED

The Civil War and Reconstruction Era transformed the constitutional order with respect to both the federal structure and individual rights, as well as the relationship between the two. The Thirteenth Amendment abolished slavery and involuntary servitude.<sup>109</sup> In response to Southern states' Black Codes, the Reconstruction Congress passed the Civil Rights Act of 1866,<sup>110</sup> which provided an "authoritative definition of citizenship"<sup>111</sup> not linked to race or previous enslavement and guaranteed civil rights to American citizens as such. Soon after, Congress constitutionalized equal citizenship in the Fourteenth Amendment and ensured federal legislative power to enforce both equal citizenship and the non-citizenship-dependent guarantees of equal protection and due process.<sup>112</sup> The Fifteenth Amendment then more closely tethered American citizenship to political rights by prohibiting the denial of the vote based on "race, color, or previous condition of servitude."<sup>113</sup>

The guarantees of the Fourteenth Amendment have particular significance for statehood. The Citizenship Clause, which marked the triumph of abolitionist arguments, declares: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."<sup>114</sup> With deceptive simplicity, this Clause established a national American citizenship severed from race, caste, and state determinations of membership in the polity. Even as the Amendment privileged national, egalitarian citizenship, however, it did not eliminate or curtail state citizenship. Instead, it recognized Americans as both citizens of the United States and citizens of states.

107. See CHRIS MYERS ASCH & GEORGE DEREK MUSGROVE, *CHOCOLATE CITY: A HISTORY OF RACE AND DEMOCRACY IN THE NATION'S CAPITAL* 115 (2017); Robert Harrison, *An Experimental Station for Lawmaking: Congress and the District of Columbia, 1862–1878*, 53 *CIV. WAR HIST.* 29, 30 (2007).

108. See Harrison, *supra* note 107.

109. U.S. CONST. amend. XIII. Many abolitionists argued that the Thirteenth Amendment conferred immediate citizenship, civil rights, and political rights on newly freed slaves. See Rebecca E. Zietlow, *The Ideological Origins of the Thirteenth Amendment*, 49 *HOUS. L. REV.* 393, 407–09, 432–33 (2012).

110. Pub. L. No. 39-31, 14 Stat. 27 (1866) (current version 42 U.S.C. §§ 1981–82).

111. Alexander M. Bickel, *Citizenship in the American Constitution*, 15 *ARIZ. L. REV.* 369, 372 (1973); see 14 Stat. at 27 ("[A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States. . . ."); CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866) (statement of Rep. James Wilson) (noting, in debate over the Civil Rights Act, "It is in vain we look into the Constitution of the United States for a definition of the term 'citizen.' It speaks of citizens, but in no express terms defines what it means by it.").

112. See U.S. CONST. amend. XIV, §§ 1, 5.

113. *Id.* amend. XV, § 1.

114. *Id.* amend. XIV, § 1, cl. 1.

In constitutionalizing equal citizenship, the Fourteenth Amendment thus recognized a double citizenship. By preserving state citizenship as a federal constitutional matter, the Citizenship Clause also inaugurated a transformation of state citizenship into a constitutive component of equal national citizenship. After describing the recognition of national citizenship in Section II.A.1, we consider in Section II.A.2 how the Reconstruction project forged a new constitutional arrangement in which state citizenship became a component of national citizenship.

### 1. The Triumph of National Citizenship Claims

Although the Fourteenth Amendment furnishes the Constitution's first definition of American citizenship, the idea of equal, national membership had deep roots in anti-slavery activism. Famous abolitionists and "ordinary black people" alike insisted on an "equal citizenship that contradicted the dominant jurisprudence favoring slaveholders."<sup>115</sup> While some demanded a new constitution, many pressed their claims under the Founding document.<sup>116</sup> For instance, abolitionist Lysander Spooner provided a theory of national citizenship grounded in the Constitution's preamble: "'We, *the people* of the United States'" did not say "'we, the *white* people,' or 'we, the *free* people,'" he insisted, so all people inhabiting the United States should be considered citizens.<sup>117</sup> Spooner further argued that state governments had no power to determine who was a citizen of the "*United States* government";<sup>118</sup> such a power would invert the constitutional order, placing state above nation. Indeed, he continued, any formerly enslaved persons would become American citizens upon a state's abolition of slavery, meaning they were "equally citizens now—else it would follow that the State governments had an arbitrary power of making citizens of the United States."<sup>119</sup> Anticipating the Fourteenth Amendment's Citizenship Clause, Spooner declared: "[A]ll the native born inhabitants of the country are at least competent to become

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115. Dorothy E. Roberts, *The Supreme Court 2018 Term—Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 58 (2019). See generally MARTHA S. JONES, *BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA* (2018) (uncovering the roots of the Citizenship Clause in Black Americans' efforts in local courts, municipal offices, and churches to claim legal citizenship).

116. See, e.g., JOEL TIFFANY, *A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY: TOGETHER WITH THE POWERS AND DUTIES OF THE FEDERAL GOVERNMENT, IN RELATION TO THAT SUBJECT* 97–99, 120 (1849); Frederick Douglass, "*The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery?*," in *ANTISLAVERY POLITICAL WRITINGS, 1833–1860: A READER* 144, 153–54 (C. Bradley Thompson ed., 2004); WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848*, at 265–71 (1977); Barnett, *supra* note 103, at 165; see also JONES, *supra* note 115, at 4–5 (describing arguments offered by abolitionist William Yates prior to the Civil War that the Constitution and other laws required citizenship for free Black Americans). See generally STEPHEN KANTROWITZ, *MORE THAN FREEDOM: FIGHTING FOR BLACK CITIZENSHIP IN A WHITE REPUBLIC, 1829–1889* (2012) (tracing Black Americans' struggle to claim full citizenship in the nineteenth century).

117. LYSANDER SPOONER, *THE UNCONSTITUTIONALITY OF SLAVERY* 90 (1860 ed. 1860).

118. *Id.* at 92.

119. *Id.* at 93.

citizens of the United States . . . [.] State governments have no power, by slave laws or any other, to withhold the rights of citizenship from them.”<sup>120</sup>

Such arguments were infamously rejected by the Supreme Court in *Dred Scott*.<sup>121</sup> In his opinion for the Court, Justice Taney asked whether a Black man,

whose ancestors were imported into this country, and sold as slaves, [can] become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen?<sup>122</sup>

Answering in the negative, Taney linked the proslavery Constitution of the Founding to state power over citizenship determinations. His opinion held that Black people could never be citizens because they had not been citizens of the states at the time of the Constitution’s adoption but rather had been branded with “such deep and enduring marks of inferiority and degradation.”<sup>123</sup> The Court further declared that Congress could not confer citizenship on former slaves or their descendants because its naturalization power did not extend to “rais[ing] to the rank of a citizen any one born in the United States, who . . . belongs to an inferior and subordinate class.”<sup>124</sup>

The Fourteenth Amendment repudiated *Dred Scott*’s holding and linked national citizenship to equal citizenship. Following its ratification, the guarantee of birthright citizenship is a guarantee of American citizenship that does not depend on race or state citizenship status. As one of the provision’s drafters explained, the Citizenship Clause reaffirmed “the first clause in the Civil Rights Bill, declaring the citizenship of all men born in the United States, without regard to race or color.”<sup>125</sup> American citizenship so reaffirmed is a citizenship without caste. It is also a citizenship that is not established—and cannot be withdrawn or interfered with—by the states.<sup>126</sup>

120. *Id.* at 94; see Barnett, *supra* note 103, at 224 (noting that Joel Tiffany’s Treatise marked “the reception of Spooner’s position into the mainstream of abolitionist constitutionalism”). Spooner and other abolitionists recognized Article IV’s Privileges and Immunities Clause as an existing protection of such equal American citizenship. See Barnett, *supra* note 103, at 208; CONG. GLOBE, 35th Cong., 2d Sess. 984 (1859) (statement of Rep. John Bingham) (“[I]ts meaning is self-evident that it is ‘the privileges and immunities of citizens of the United States in the several States’ that it guaranties.”).

121. 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

122. *Id.* at 403.

123. *Id.* at 416 (stating that it was “hardly consistent with the respect due to these States, to suppose that they regarded at that time, as fellow-citizens and members of the sovereignty, a class of beings whom they had thus stigmatized . . . and upon whom they had impressed such deep and enduring marks of inferiority and degradation”).

124. *Id.* at 417.

125. W. W. Wines, Speech at the Union Party in Indiana, Great Republican Gathering (Aug. 18, 1866), in SPEECHES OF THE CAMPAIGN OF 1866 IN THE STATES OF OHIO, INDIANA AND KENTUCKY 13, 14 (Cincinnati Commercial 1866).

126. See, e.g., Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at Dred Scott*, 82 CHI.-KENT L. REV. 49, 55–56 (2007) (noting that “*Dred Scott* used citizenship as the central dividing line

In fewer than thirty words, the Citizenship Clause thus marked a fundamental change in constitutional citizenship with three interrelated features. First, it established “the primacy of national citizenship,”<sup>127</sup> specifying that all Americans are “citizens of the nation first and foremost, with a status and set of birthrights explicitly affirmed in a national Constitution.”<sup>128</sup> Second, the Clause provided for an equal American citizenship, decoupled from race, color, or caste. Prohibiting the denial of “the legal status of citizenship based on prejudice, or [a person’s] socially constructed capacity for citizenship,”<sup>129</sup> the Clause made “[a]ll citizens . . . equal before the law.”<sup>130</sup> Third, the Clause made clear that state citizenship is derivative of national citizenship, not the other way around. While prominent theories of American citizenship leading to the Civil War insisted that state citizenship was primary, the Fourteenth Amendment established that an American citizen would be entitled to state citizenship in any state in which she resided.<sup>131</sup> These three features—birthright national citizenship, equal citizenship, and derivative state citizenship—are inseparable.

## 2. Protections of State Citizenship

Even as the Fourteenth Amendment made national citizenship paramount, however, it reaffirmed the importance of state citizenship. The Citizenship Clause diminished the centrality of state citizenship both by introducing the guarantee of equal national citizenship and by making state citizenship follow simply from the conjunction of American citizenship with state residence. But the Clause did not eliminate state citizenship as a federal constitutional matter. To the contrary, it expressed the guarantee of U.S. citizenship as a guarantee of both federal and state citizenship: “All persons born or naturalized in the United

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between those who possess basic rights and those who did not,” while the Fourteenth Amendment “firmly overruled” *Dred Scott* and recognized Black Americans as “citizens of the United States”); Williams, *supra* note 103, at 546 (arguing that the original public meaning of the Citizenship Clause was legally equal citizenship and noting that in congressional debates about the Amendment participants “uniformly endorsed a conception of ‘citizenship’ that would encompass, at least, the equal enjoyment of basic civil rights to the same extent enjoyed by other citizens”); see also CONG. GLOBE, 39th Cong., 1st Sess. 1836 (1866) (statement of Rep. William Lawrence) (“[E]quality of civil rights is the fundamental rule that pervades the Constitution and controls all State authority.”).

127. ACKERMAN, *supra* note 101.

128. AMAR, *supra* note 101.

129. Cristina M. Rodríguez, *The Citizenship Clause, Original Meaning, and the Egalitarian Unity of the Fourteenth Amendment*, 11 U. PA. J. CONST. L. 1363, 1366 (2009).

130. *Gibson v. Mississippi*, 162 U.S. 565, 591 (1896); see also CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Jacob Howard) (noting that the effect of the Fourteenth Amendment is to “abolish[] all class legislation” and eliminate “the injustice of subjecting one caste of persons to a code not applicable to another”).

131. See, e.g., *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 112–13 (1873) (Bradley, J., dissenting) (“A citizen of the United States has a perfect constitutional right to go to and reside in any State he chooses, and to claim citizenship therein, and an equality of rights with every other citizen; and the whole power of the nation is pledged to sustain him in that right.”); see also *Saenz v. Roe*, 526 U.S. 489, 502 (1999) (explaining that the right to travel is protected “not only by the new arrival’s status as a state citizen, but also by her status as a citizen of the United States”). On theories of citizenship before the Civil War, see, for example, KETTNER, *supra* note 73.



States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”<sup>132</sup>

According to the Citizenship Clause, state citizenship is derivative of national citizenship: a U.S. citizen automatically becomes a state citizen by virtue of taking up residence in the state, and she is free to take up residence in any state. But state citizenship is also partially constitutive of national citizenship: state citizenship confers constitutional rights and privileges under the Constitution. As Professor Ryan Williams has explained, “the right to enjoy the privileges or immunities of *state* citizenship” is “one of the ‘privileges or immunities’ of United States citizenship protected by the [Fourteenth] Amendment.”<sup>133</sup>

The recognition of state citizenship as an aspect of U.S. citizenship was not incidental. It marks a revision to the text of the Civil Rights Act of 1866, which declared that “all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States.”<sup>134</sup> Although the Act went on to guarantee these citizens’ rights against state infringement, it did not invoke their state citizenship as such or cast state membership as a source of rights or protection. The Fourteenth Amendment declared these same persons to be “citizens of the United States and of the State wherein they reside.”<sup>135</sup>

This reference to state citizenship—in an Amendment broadly designed to superintend state power and guarantee national rights—not only reassured those concerned about the federal government’s power but also reflected the inescapably federal structure of the Union. Representative John Bingham, for example, stressed that state governments remain

essential to the local administration of the law, which makes it omnipresent, visible to every man within the vast extent of the Republic, in every place, whether by the wayside or by the fireside, restraining him by its terrors from the wrong, and protecting him by its power, in the right.<sup>136</sup>

In addition, the recognition of state citizenship within the constitutional provision defining egalitarian national citizenship was consistent with conceptions of state protection that some nineteenth-century abolitionists had urged. As Professor Maeve Glass has argued, antebellum abolitionists relied not only on national citizenship but also on state citizenship to inform anti-slavery arguments.<sup>137</sup> For example, Massachusetts lawyers challenged southern laws that subjected Black men on arriving

132. U.S. CONST. amend. XIV, § 1, cl. 1.

133. Williams, *supra* note 103, at 562; *see also, e.g.*, John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1415 (1992) (noting that although the Citizenship Clause “recognizes that there are separate citizenships of the states and the United States, the [Fourteenth] Amendment does not divide those citizenships, but staples them together”).

134. Pub. L. No. 39-31, 14 Stat. 27, 27 (current version 42 U.S.C. §§ 1981–82).

135. U.S. CONST. amend. XIV, § 1.

136. CONG. GLOBE, 42d Cong., 1st Sess. app. at 84 (1871) (statement of Rep. John Bingham).

137. *See* Maeve Glass, *Citizens of the State*, 85 U. CHI. L. REV. 865, 893–96 (2018).

vessels to imprisonment as an infringement of the “state’s duty to protect its citizens.”<sup>138</sup> As these arguments suggested, recognition of state citizenship as an entailment of national citizenship could be rights-protecting. Even as it strengthened national citizenship, the Fourteenth Amendment did not establish a federal “monopoly over the arena of rights protection in the new America” but preserved state citizenship as well.<sup>139</sup>

The Fourteenth Amendment’s rewriting of the Civil Rights Act of 1866 was notable in another pertinent respect. The Act referred to rights guaranteed in “every State and Territory,” while the Fourteenth Amendment referred exclusively to states.<sup>140</sup> This was consistent with a unanimous portion of the *Dred Scott* opinion, not repudiated by the Reconstruction Amendments, that insisted the Constitution permitted territories to be organized only as future states, not perpetual colonies.<sup>141</sup> In the late nineteenth century, many believed that the Fourteenth Amendment “required statehood for all annexed lands.”<sup>142</sup> Indeed, there was an unprecedented break in imperial expansion based on concerns that inevitable statehood for territories would mean American citizenship for their non-white inhabitants—concerns that were addressed following the Spanish-American War

138. *See id.* at 874, 896–97.

139. *Id.* at 924; *see also* Frederick Douglass, *Reconstruction*, ATLANTIC (Dec. 1866), <https://www.theatlantic.com/magazine/archive/1866/12/reconstruction/304561/> (“[T]he Constitution of the United States knows no distinction between citizens on account of color. Neither does it know any difference between a citizen of a State and a citizen of the United States. Citizenship evidently includes all the rights of citizens, whether State or national.”); Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 554 (1991) (arguing that the Fourteenth Amendment incorporated “a fundamental right to protection by the government, with a corresponding obligation on the states to afford such protection”).

140. *Compare* Civil Rights Act of 1866, Pub. L. No. 39-31, 14 Stat. 27 (current version 42 U.S.C. §§ 1981–82), *with* U.S. CONST. amend. XIV, § 1.

141. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 446 (1857) (enslaved party) (“There is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure; nor to enlarge its territorial limits in any way, except by the admission of new States. . . . [N]o power is given to acquire a Territory to be held and governed permanently in that character.”), *superseded by constitutional amendment*, U.S. CONST. amend. XIV; *see* ERMAN, *supra* note 9, at 11 (noting that the Thirteenth and Fourteenth Amendments together “obliterated *Dred Scott*’s notorious deprivation of African American citizenship – but they did not obliterate *Dred Scott*’s bar on perpetual colonies and could be reconciled with it easily enough”).

142. ERMAN, *supra* note 9, at 11; *see, e.g.*, CONG. GLOBE, 42d Cong., 1st Sess. 533 (1871) (statement of Sen. Justin Morrill) (“An empire may be able, through its more despotic rule, for a time to hold discordant peoples in subjection . . . [but we must] make such materials sovereign and equal . . . for we accept for ourselves nothing less, crowning all with our fourteenth and fifteenth amendments. . . .”); Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393, 405–09 (1899); Sam Erman, “*The Constitutional Lion in the Path*”: *The Reconstruction Constitution as a Restraint on Empire*, 91 S. CAL. L. REV. 1197, 1206–07 (2018) (describing the eighteenth and nineteenth centuries’ “unbroken, and still influential tradition that all inhabited U.S. lands would eventually become states”).

by the *Insular Cases*' explicitly racist justification for perpetual territorial status.<sup>143</sup>

Although Washington, D.C. was not itself an acquired territory,<sup>144</sup> the constitutional commitment to statehood rather than perpetual colonization was nonetheless relevant. Broadly speaking, the problem of disenfranchised people governed “under the despotism of Congress” was as much a problem of D.C. residents as residents of territories.<sup>145</sup> More narrowly, shortly after the ratification of the Fourteenth Amendment, from 1871 to 1874, Congress imposed a territorial government on D.C.<sup>146</sup> An intermediate step between a brief flowering of multiracial democracy and complete disenfranchisement of D.C. residents, this use of the territorial form marked an inversion of the usual approach. In the American West, organization through the territorial form had always preceded statehood.<sup>147</sup> In D.C., for the first time, the territorial form did not facilitate more autonomous self-government but instead impeded it—a development that anticipated the resumption of imperial annexation later in the century, and one that was equally inconsistent with the Fourteenth Amendment's commitment to equal citizenship.

#### B. FEDERATED CITIZENSHIP AND POLITICAL RIGHTS

By declaring that all U.S. citizens are also citizens of “the State wherein they reside,”<sup>148</sup> the Fourteenth Amendment not only rendered state citizenship derivative—the simple product of American citizenship plus residence—but also guaranteed a right of Americans to be recognized as state citizens in any state. The federated nature of the guarantee is widely accepted when it comes to movement among the states.<sup>149</sup> But there is a further corollary: all Americans living in the United States must be able to claim state citizenship where they reside. Equal citizenship is federated citizenship; it necessarily entails both national and state citizenship.

143. *Downes v. Bidwell*, 182 U.S. 244, 306, 315 (1901) (White, J., concurring) (noting that American citizenship could not be extended to “an uncivilized race . . . absolutely unfit to receive it”); see ERMAN, *supra* note 9, at 12–13; Ponsa-Kraus, *supra* note 9, at 7.

144. See *supra* note 9 (discussing D.C. and the ostensibly “unincorporated” territories).

145. See 32 CONG. REC. 433–36 (1899) (statement of Sen. Donelson Caffery) (“Congress can only govern [a territory], under the limitations of the Constitution, with a view to its becoming a State as early as possible. . . . People inhabiting a territory ceded to us become ipso facto citizens of the United States, and I defy any man to show that under the principles of our Constitution they can be governed for an indefinite period of time, for eternity, under the despotism of Congress. . . . [T]he Constitution contemplates no other than a federated government of States . . . consequently new Territories must as soon as practicable be admitted as States.”).

146. See *supra* note 63 and accompanying text.

147. See *supra* notes 53–56 and accompanying text.

148. U.S. CONST. amend. XIV, § 1.

149. As a matter of doctrine, this is understood as a right to travel, one of the few privileges or immunities of national citizenship that survived the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). See *Saenz v. Roe*, 526 U.S. 489, 505 (1999) (recognizing the right to travel, including a “citizen's right to be treated equally in her new State of residence”). Although the Supreme Court's effective evisceration of the Privileges or Immunities Clause in the *Slaughter-House Cases* has not been revisited by the Court despite near-unanimous criticism of the opinion, the meaning of the Citizenship Clause is not constrained by the Court's reading of the Privileges or Immunities Clause. Our argument, in any event, is directed to Congress rather than to the courts. See *supra* note 18 and accompanying text.

The requirement of federated, equal citizenship is not a requirement of the Citizenship Clause standing alone, but one that depends on looking from Reconstruction backward to the Founding and forward to the Second Reconstruction. The Fourteenth Amendment's first sentence is the critical connection between the federalism of 1789 and the citizenship of the Civil Rights Movement, and its guarantee is informed by both the constitutional structure that preceded it and the more robust recognition of individual political rights that followed.

In particular, because the Fourteenth Amendment did not alter the Founding architecture of federalism as the basis for both local self-government and national representation, a guarantee of citizenship as full membership requires state as well as national citizenship.<sup>150</sup> The recognition of citizenship as full membership, especially through the franchise, has in turn been effectuated by constitutional developments that followed the Fourteenth Amendment, especially the voting rights amendments and constitutional interpretations of the twentieth century.<sup>151</sup> The constitutional recognition of political rights began with the Reconstruction Amendments—indeed, began well before them, through abolitionist constitutionalist arguments<sup>152</sup>—but it took subsequent legal developments, as well as underlying social changes, for equal citizenship to be knitted to political rights. Although political rights may extend beyond citizens, and citizenship entails more than such political rights, it is clear today that equal citizenship requires, at a minimum, full political membership. The principle of equal, federated citizenship thus emerged through constitutional amendment, interpretation, and political contestation that were inaugurated but not completed by the Citizenship Clause.

### 1. Suffrage During Reconstruction

When the Fourteenth Amendment was drafted and ratified, the connection between citizenship and political rights was deeply contested. While some argued that Section One of the Amendment conferred the franchise, many supporters insisted it was limited to civil, rather than political, rights and defined these as non-overlapping categories.<sup>153</sup> Language

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150. See, e.g., FUENTES-ROHWER & CHARLES, *supra* note 6, at 1 (“U.S. citizenship is not enough to vote for national office; one must also be a citizen of a state.”).

151. See U.S. CONST. amends. XV, XIX, XXIV, XXVI.

152. See *supra* notes 116–20 and accompanying text.

153. For example, Senator Jacob Howard argued:

The right of suffrage is not, in law, one of the privileges or immunities thus secured by the Constitution. It is merely the creature of law. It has always been regarded in this country as the result of positive local law, not regarded as one of those fundamental rights lying at the basis of all society. . . .

CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Jacob Howard). Traditional conceptions of citizenship separated political rights from civil rights; while civil rights, such as the right to own property and contract, followed from citizenship, political rights such as voting and running for office were rights earned or the result of status. See, e.g., KATE MASUR, AN EXAMPLE FOR ALL THE LAND: EMANCIPATION AND THE STRUGGLE OVER EQUALITY IN WASHINGTON, D.C. 129 (2010) (describing conceptions of voting as a “privilege that acknowledged a person’s high standing in a community, whether that standing derived from his status as a taxpayer, as a property holder, or as a white man”). But see Mark Tushnet, *Civil Rights and Social Rights: The Future of the Reconstruction Amendments*, 25 LOY. L.A. L. REV. 1207, 1209–10 (1992) (arguing that even during Reconstruction there was an overlap between political and civil rights). See generally HORACE EDGAR FLACK, THE

in early drafts empowering Congress to ensure “equal political rights”<sup>154</sup> was deleted. Given opposition to Black suffrage in the North, there were strategic as well as substantive reasons for Reconstruction Republicans to deny that the Fourteenth Amendment conferred political rights, or at least to keep the issue unsettled.

Even so, the Fourteenth Amendment did begin to connect citizenship to political rights as a matter of constitutional text and principle. After Section One names as a body the “citizens of the United States,” Section Two specifies that a state’s denial of the franchise to any adult male “citizens of the United States” shall reduce the state’s share of congressional representatives.<sup>155</sup> As a matter of congressional rather than judicial enforcement, the Amendment thus connected citizenship (at least of adult men) to the franchise, and it recognized that this political right extended to both federal and state elections.<sup>156</sup>

Outside of Congress and state legislatures, moreover, reformers and activists insisted that reconstructed citizenship entailed political rights. Some of the most powerful arguments came from Black residents of Washington, D.C.<sup>157</sup> In December of 1865, for example, a suffrage petition reminded Congress that “Governments derive their just powers from the consent of the governed” and that “[t]he Colored American citizens of the District of Columbia are denied the benefits of this conceded principle.”<sup>158</sup> Much of the petition’s argument followed convention by treating voting as a privilege to be earned, noting that Washington’s Black citizens paid “no inconsiderable amount of taxes,” owned property, built schools, contributed disproportionately through their military service to the effort to preserve the Union, and were “virtuous” and “intelligent.”<sup>159</sup> But the petition

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ADOPTION OF THE FOURTEENTH AMENDMENT 20–35 (1908) (discussing the congressional debate over whether suffrage was a political or civil right).

154. BENJ. B. KENDRICK, *THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION: 39TH CONGRESS, 1865-1867*, at 56 (1914) (“Congress shall have power to make all laws which shall be necessary and proper to secure all persons in every state full protection in the enjoyment of life, liberty and property; and to all citizens of the United States in any State the same immunities and also equal political rights and privileges.”) (quoting Rep. John Bingham).

155. U.S. CONST. amend. XIV, §§ 1–2.

156. See Mark A. Graber, *Constructing Constitutional Politics: The Reconstruction Strategy for Protecting Rights 6* (unpublished manuscript), [https://law.yale.edu/sites/default/files/documents/pdf/Intellectual\\_Life/LTW-Graber.pdf](https://law.yale.edu/sites/default/files/documents/pdf/Intellectual_Life/LTW-Graber.pdf) [<https://perma.cc/R4PH-KRN6>] (“Members of the Thirty-Ninth Congress thought [Sections Two and Three] would most likely compel the South to enfranchise persons of color and, if not, sharply reduce the influence of former slave states and slaveowners on national policy and constitutional decision making.”); see also Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 WASH. L. REV. 379, 384–85 (2014) (arguing that Section Two critically informs Congress’s Fourteenth Amendment enforcement authority).

157. During and immediately after the Civil War, D.C.’s population changed significantly. At the onset of the War, District residents were overwhelmingly white and Southern, but substantial migration, particularly by newly freed slaves, made D.C.’s population approximately one-third Black by 1870. See CONSTANCE McLAUGHLIN GREEN, *THE SECRET CITY: A HISTORY OF RACE RELATIONS IN THE NATION’S CAPITAL* 63 tbl.II (1967) (showing that between 1860 and 1870, the Black population grew from less than 11,000 to more than 35,000).

158. Petition of the Colored Citizens of the District of Columbia to the U.S. Congress (Dec. 1865), <http://www.freedmen.umd.edu/Cook%20et%20al.html>. [<https://perma.cc/CQN8-WVCR>].

159. *Id.*

also made a “claim for suffrage” that connected voting to abolition and full citizenship: “[W]ithout the political rights enjoyed by every other man, the colored men of the District of Columbia are but nominally free. . . . Without the right of suffrage, we are without protection. . . .”<sup>160</sup> Days after passage of the Civil Rights Act of 1866, Black leaders marched in front of President Andrew Johnson’s Executive Mansion with banners calling for “[e]qual political rights” and “[u]niversal suffrage.”<sup>161</sup>

In Congress, Republican Representatives took up the cause of “Emancipation by Enfranchisement” in the District.<sup>162</sup> For example, Senator Charles Sumner, who had helped draft the Civil Rights Act of 1866, argued that the Act ensured only “semi-equality” without the right to vote.<sup>163</sup> Other members of Congress likewise described how enfranchising Black men in D.C. could be “an example to the whole country”<sup>164</sup> and “a pillar of fire to illumine the footsteps of millions.”<sup>165</sup> The D.C. suffrage bill they advanced was remarkable for its time in establishing universal manhood suffrage for local elections. Republicans defeated proposals to impose “literacy, military service, or taxpayer status” requirements<sup>166</sup> and forged a critical link between U.S. citizenship and political equality. As Senator Justin Morrill stated: “Congress at its last session enacted that every person born in the United States is a citizen thereof, and entitled to protection in his civil rights. It remains now to recognize that political equality which is the common right of the American citizen.”<sup>167</sup>

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160. *Id.* See generally Roberts, *supra* note 115, at 71 (“[A]bolishing slavery required granting to formerly enslaved people the full ability to participate as citizens in the nation’s reconstructed democracy.”).

161. See MASUR, *supra* note 153, at 121 (internal citations omitted).

162. CONG. GLOBE, 39th Cong., 2d Sess. 107 (1866) (statement of Sen. Charles Sumner).

163. 14 CHARLES SUMNER, HIS COMPLETE WORKS 41–42 (1900) (emphasis omitted).

164. CONG. GLOBE, 39th Cong., 2d Sess. 107 (1866) (statement of Sen. Charles Sumner); see also *id.* at 38 (statement of Sen. Justin Morrill) (noting, in reintroducing the suffrage bill in December 1866, that it “may be said to be inaugurating a policy not only strictly for the District of Columbia, but in some sense for the country at large”).

165. *Id.* at 107 (statement of Sen. Charles Sumner) (“If [the bill] were regarded simply in its bearings on the District it would be difficult to exaggerate its value; but when it is regarded as an example to the whole country under the sanction of Congress, its value is infinite. It is in the latter character that it becomes a pillar of fire to illumine the footsteps of millions.”). Opponents also recognized D.C. suffrage as national precedent. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 246 (1866) (statement of Sen. Garrett Davis) (“[T]he question whether a few thousand negroes of this District shall vote in its elections is of very trivial importance to the people of the United States. . . . [but] [t]his contest is but an experiment, a skirmish, an entering wedge to prepare the way for a similar movement in Congress to confer the right of suffrage on all the negroes of the United States, liberated by the recent amendment of the Constitution, the power to be claimed under its second clause. It is following up the tactics of the party four years ago, when the assault upon slavery in this District heralded the general movement that was to be made against it.”).

166. See MASUR, *supra* note 153, at 139. They did explicitly limit the franchise to men, despite debating women’s suffrage. See, e.g., CONG. GLOBE, 39th Cong., 2d Sess. 107 (1866) (statement of Sen. Charles Sumner) (noting women’s suffrage was “obviously the great question of the future”).

167. CONG. GLOBE, 39th Cong., 2d Sess. 40 (1866) (statement of Sen. Justin Morrill); see also *id.* at 107 (statement of Sen. Charles Sumner) (arguing that an educational test would not be a problem for



In December 1866, Congress passed the D.C. suffrage bill. Although President Johnson vetoed it, arguing that Black voters would have “the supreme control of the white race,”<sup>168</sup> Congress overrode his veto. In January 1867, before the ratification of the Fourteenth Amendment in 1868 and the Fifteenth Amendment in 1870, universal suffrage for men in local D.C. elections became law. As the *National Republican* declared, “the experiment of enlarging the elective franchise” was first made in D.C., where “the Republican party entered upon the policy of equal rights for all men, and avowed it to the world.”<sup>169</sup>

Although the connection between equal citizenship and political rights was forged in part in Washington, D.C., developments in the District anticipated not only the initial promise but also the dismantling of Reconstruction.<sup>170</sup> Congress had advanced equal citizenship, including universal manhood suffrage, in D.C. as an example for the nation, but “Redemption” also came early to the capital. In one decade, D.C.’s universal male suffrage became universal disenfranchisement, as all D.C. residents were stripped of their political rights.<sup>171</sup>

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suffrage in the District but would be in the South because all Black men needed the franchise to protect themselves and the Union).

168. Andrew Johnson, *Veto Message*, AM. PRESIDENCY PROJECT (Jan. 5, 1867), <https://www.presidency.ucsb.edu/documents/veto-message-422> [<https://perma.cc/PNW2-JYHD>] (“[H]ere the black race constitutes nearly one-third of the entire population, whilst the same class surrounds the District on all sides, ready to change their residence at a moment’s notice, and with all the facility of a nomadic people, in order to enjoy here, after a short residence, a privilege they find nowhere else. It is within their power in one year to come into the District in such numbers as to have the supreme control of the white race, and to govern them by their own officers and by the exercise of all the municipal authority. . . .”). Suffrage opponents in Congress, as well as among D.C.’s white citizens, made similar arguments. See, e.g., CONG. GLOBE, 39th Cong., 2d. Sess. 46 (statement of Sen. Willard Saulsbury) (“Is there a Senator on this floor who, if in his own State there was such a proportion of negroes to the white population, would vote for giving the right of suffrage in his State to the negro race? . . . [W]here the races are so nearly equal, and where it is reasonable to suppose that the ‘paradise’ opened up for negroes will be filled with more negroes than whites, I hold that I should be derelict in duty to my own race, which I believe to be superior in all respects to the negro race, if I were to vote to give them the right of suffrage under any circumstances whatever.”).

169. MASUR, *supra* note 153, at 1–2.

170. During the short period from 1867 to 1871, for example, citizens of D.C. desegregated the municipal bureaucracy, founded Howard University, expanded the nation’s best Black public school system, adopted antidiscrimination ordinances, and removed racial restrictions on office holding and jury service. See ASCH & MUSGROVE, *supra* note 107, at 138–39; MASUR, *supra* note 153, at 148–50, 159; Thomas R. Johnson, *Reconstruction Politics in Washington: “An Experimental Garden for Radical Plants,”* 50 RECS. COLUM. HIST. SOC’Y 180, 180 (1980).

171. On the “journey from biracial democracy to universal disenfranchisement,” see ASCH & MUSGROVE, *supra* note 107, at 156–66. Among other developments, after imposing a temporary territorial government, Congress voted in 1874 to adopt a presidentially-appointed board of three commissioners to run the city. Although proposed as an emergency measure of sorts, Congress made the governance structure permanent four years later, and D.C. residents lost the right to vote for any part of municipal self-government for a century. See, e.g., *The Crime Against the Suffrage in Washington*, NATION, June 27, 1878, at 415 (“Under this bill not a vestige is left of popular municipal government: aldermen, common councilmen, mayors, boards of works, school boards, police boards, primaries, conventions, all are swept away, and the entire government is handed over to three men, appointed by a foreign authority, responsible not to their fellow-citizens, but to the President and Senate.”).

## 2. The Political Rights of “Citizens of the United States”

Although the District quickly ceased to be an “example for all the land,”<sup>172</sup> the equal citizenship that proponents of D.C. suffrage advocated was ultimately guaranteed as a constitutional matter to all Americans—except for D.C. residents themselves.<sup>173</sup> In the decades following Reconstruction, both constitutional amendments and interpretive developments established that “[t]he right to vote is partly constitutive of what it means to be a full citizen” and, conversely, “to be denied the right to vote is to be something less than a full citizen.”<sup>174</sup> While most accounts of citizenship require more than the franchise, the right to vote is widely understood as a “minimal condition of political equality.”<sup>175</sup>

As a constitutional rather than purely democratic-theoretic matter, this connection is most clearly advanced by the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments, which recognize voting as a right of the “citizens of the United States” named as such by the Citizenship Clause.<sup>176</sup> The Fifteenth Amendment severed the link between voting and racial caste, providing that the “right of citizens of the United States to vote” could not be denied on account of “race, color, or previous condition of servitude.”<sup>177</sup> The Nineteenth Amendment later provided that the “right of citizens of the United States to vote” could not be denied “on account of sex.”<sup>178</sup> The Twenty-Fourth Amendment (which was proposed together with partial enfranchisement for D.C. residents<sup>179</sup>) protected the “right of citizens of the United States to vote” in federal elections without a poll tax.<sup>180</sup> And the Twenty-Sixth Amendment protected the “right of citizens of the United States” over age eighteen to vote.<sup>181</sup>

These amendments are best understood not as wholly distinct constitutional guarantees, but as glosses on the “citizens of the United States” recognized by the

172. 13 CHARLES SUMNER, *THE WORKS OF CHARLES SUMNER* 351 (1880).

173. Equal citizenship also continues to be denied to residents of U.S. territories who, under existing case law, do not possess constitutional but only statutory U.S. citizenship, in the case of most territories—or no citizenship at all, in the case of American Samoa. *See, e.g., Tuaua v. United States*, 788 F.3d 300, 311–12 (D.C. Cir. 2015). D.C. residents are the only Americans who are understood to possess constitutionally guaranteed U.S. citizenship without corresponding state citizenship. *See generally* Cassandra Burke Robertson & Irina D. Manta, *Integral Citizenship*, 100 TEX. L. REV. (forthcoming) (arguing that the Constitution’s promise of birthright citizenship to all born “in the United States” applies to U.S. territories).

174. Fishkin, *supra* note 105, at 1333–34; *see* Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 FLA. L. REV. 443, 451–52 (1989).

175. IRIS MARION YOUNG, *INCLUSION AND DEMOCRACY* 6 (2000); *see also* SHKLAR, *supra* note 105, at 25–62 (exploring the centrality of voting to citizenship); RONALD DWORIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* 187 (2000) (“The community confirms an individual person’s membership, as a free and equal citizen, by according him or her a role in collective decision. In contrast, it identifies an individual who is excluded from the political process as someone not fully respected or not fully a member.”).

176. U.S. CONST. amend. XIV, § 1; *see id.* amends. XV, XIX, XXIV, XXVI.

177. *Id.* amend. XV.

178. *Id.* amend. XIX.

179. *See infra* Section III.A.

180. U.S. CONST. amend. XXIV, § 1.

181. *Id.* amend. XXVI, § 1.

Fourteenth Amendment. Beyond the precise repetition of the phrase “citizens of the United States,”<sup>182</sup> social movements—from the women’s suffrage movement to the Civil Rights Movement—organized around this very connection.<sup>183</sup> Advocates for women’s suffrage, for example, maintained that political equality and suffrage were integral to full citizenship. Upon ratification of the Fourteenth Amendment (including the introduction of “male” citizenship into the document in Section Two<sup>184</sup>), suffragists invoked the Citizenship and Privileges or Immunities Clauses, claiming that because women were “citizens,” they were entitled to vote.<sup>185</sup> Although the Supreme Court rejected their claims in *Minor v. Happersett*,<sup>186</sup> offering a “hollowed-out conception of ‘citizen[ship],’”<sup>187</sup> the Nineteenth Amendment not only recognized women’s right to vote but also more closely tied suffrage to equal citizenship as a constitutional matter.<sup>188</sup> As a Congressman advocating for suffrage could plausibly argue in 1915: “There can be no logical objection to universal suffrage in a democracy. Indeed, a democracy is inconceivable without universal suffrage.”<sup>189</sup>

If the Nineteenth Amendment launched a new “politics of universalism and equal citizenship with regard to the right to vote,”<sup>190</sup> the Civil Rights Movement critically furthered that work. During the Second Reconstruction, the promise of the First finally began to be realized. Most notably, Jim Crow restrictions that had undermined the Fifteenth Amendment’s guarantee were dismantled.<sup>191</sup> Although Black enfranchisement was the most important substantive outcome of the 1960s and 1970s voting rights revolution, constitutional and statutory law alike went further. As Professor Joseph Fishkin explains: “Rather than simply dismantling

182. Amar, *Intratextualism*, *supra* note 103, at 789 (“On no less than four occasions—the Fifteenth, Nineteenth, Twenty-Fourth and Twenty-Sixth Amendments—the Constitution uses the same highly elaborate set of words, ‘the right of citizens of the United States . . . to vote,’ and an intratextualist would be inclined to read these provisions *in pari materia*.”).

183. *See, e.g.*, Siegel, *supra* note 103, at 968 (“Disputes about the terms of women’s citizenship in our constitutional order that began at the time of the Fourteenth Amendment’s drafting continued for decades and across generations until women finally secured an amendment to the Constitution guaranteeing their right to vote. These debates, I argue, are plainly relevant to understanding how the Fourteenth Amendment’s guarantee of equal citizenship applies to women.”).

184. U.S. CONST. amend. XIV, § 2.

185. *See* Siegel, *supra* note 103, at 971–72 (noting that suffragists also rested their claims on “other federal constitutional provisions, many of which abolitionists had invoked in challenging the institution of slavery”).

186. 88 U.S. (21 Wall.) 162, 171 (1875).

187. Fishkin, *supra* note 105, at 1341. The year before *Minor*, Sara Spencer’s argument that the extension of suffrage only to male U.S. citizens in D.C. violated the Fourteenth Amendment was rejected by the D.C. Supreme Court. *See* *Spencer v. Bd. of Registration*, 8 D.C. (1 MacArth.) 169, 176–77 (1873) (opining that “the legal vindication of the natural right of all citizens to vote would, at this stage of popular intelligence, involve the destruction of civil government” and that “[t]he fact that the practical working of the assumed right would be destructive of civilization is decisive that the right does not exist”).

188. *See* U.S. CONST. amend. XIX.

189. Siegel, *supra* note 103, at 1007 (quoting 52 CONG. REC. 1437 (1915) (statement of Rep. William Bryan)).

190. Fishkin, *supra* note 105, at 1343.

191. *Id.* at 1345.

race discrimination in voting, American law took a dramatic universalist turn, sweeping away almost all the bases of suffrage restriction that remained in 1960 and establishing a nationwide norm of universal adult suffrage tied closely to individual citizenship.<sup>192</sup> Judicial decisions of this period tied universal suffrage to citizenship and the Fourteenth Amendment, as well as to more specific protections of subsequent amendments.<sup>193</sup>

Today, although attacks on the franchise and political equality remain pervasive,<sup>194</sup> any tenable understanding of citizenship includes political rights. Even if the argument that equal citizenship did not necessitate suffrage was plausible when the Fourteenth Amendment was ratified in 1868, it has not withstood subsequent constitutional developments. The conception of citizenship that emerges from more than a century of contestation includes the ability to vote, to participate in choosing the government that in turn binds the polity.

As has been true since the Founding, moreover, this government is in fact two governments: state government and federal government. The Reconstruction Amendments and their citizenship-perfecting progeny did not displace the federal structure. States remain republican units of local self-government and the only constitutional architecture for representation in the federal government. Because of federalism's place in the constitutional structure, equal citizenship necessarily entails both national and state membership. Integrating the commitment to equal citizenship into the Founding federalism framework requires that an American citizen be a state citizen anywhere in the United States.

The guarantee of the Citizenship Clause—as informed by the Founding's federalism and the Second Reconstruction's citizenship—is inconsistent with having a geographical entity within the United States in which residents do not have state citizenship.<sup>195</sup> Read in its broader context, the Clause requires not only that all

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192. *Id.*; see also *id.* at 1349 (“[T]he basic conceptual link between citizenship and voting is now firmly established in our law. The only area in which the right to vote has become substantially *more* restricted over the course of this transition to universalism is, instructively, citizenship status: it is now a federal crime for noncitizens to vote in federal elections.”); KEYSSAR, *supra* note 74, at 228–29 (“What occurred in the course of a decade was not only the reenfranchisement of African Americans but the abolition of nearly all remaining limits on the right to vote. . . . The political leaders of the 1960s . . . journey[ed] from a focus on black enfranchisement to an embrace of universal suffrage.”).

193. See, e.g., *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (“No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.”); *Reynolds v. Sims*, 377 U.S. 533, 554–55 (1964) (footnote omitted) (“Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. . . . And history has seen a continuing expansion of the scope of the right of suffrage in this country. The right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.”).

194. See generally CAROL ANDERSON, *ONE PERSON, NO VOTE: HOW VOTER SUPPRESSION IS DESTROYING OUR DEMOCRACY* (2018) (chronicling the rise of voter ID requirements, gerrymandering, and poll closures after the Supreme Court’s decision in *Shelby County v. Holder*, 570 U.S. 529 (2013)).

195. Cf. *O’Donoghue v. United States*, 289 U.S. 516, 540 (1933) (“It is important to bear constantly in mind that the District was made up of portions of two of the original states of the Union, and was not taken out of the Union by the cession. Prior thereto its inhabitants were entitled to all the rights, guaranties, and immunities of the Constitution. . . . We think it is not reasonable to assume that the

American citizens residing in a state be considered members of that state but also that all Americans be state citizens.

Although Washington, D.C.'s status has been justified by the District Clause, which allows Congress to "exercise exclusive Legislation" over the District,<sup>196</sup> this justification fails to contend with the Constitution as transformed by the Civil War and the equal citizenship protections of the Fourteenth Amendment and its successors. Whatever logic D.C.'s status had at the Founding did not survive the remaking of American citizenship—as the evisceration of the Reconstruction project in the District underscores. Rather, recognizing D.C. residents' equal citizenship is a constitutional imperative, and Congress has a remedy readily at hand: exercising its power under the Admissions Clause to admit D.C. as a state through simple legislation.<sup>197</sup> Conferring state citizenship on D.C. residents is the only way to recognize their equal national citizenship.

### III. THE TWENTY-THIRD AMENDMENT AND THE SECOND RECONSTRUCTION

Although Congress has not yet admitted D.C. into the Union, in the mid-twentieth century it began to take up anew the work of Reconstruction. In addition to passing civil rights legislation, Congress also unbundled statehood and conferred discrete aspects on D.C.: representation in presidential elections,<sup>198</sup> a delegate (without a vote) in the House of Representatives,<sup>199</sup> and a degree of home rule.<sup>200</sup> The Twenty-Third Amendment, which granted D.C. presidential electors, brought the capital's residents a step closer to the constitutional paradigm.<sup>201</sup> Like the anti-poll-tax bill that was introduced together with it, the Twenty-Third Amendment was a citizenship-perfecting resolution. In the words of the House

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cession stripped them of these rights. . . ."); *Callan v. Wilson*, 127 U.S. 540, 550 (1888) ("There 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 guarantees of life, liberty, and property. . . .").

196. U.S. CONST. art. I, § 8, cl. 17; see *supra* notes 38–41 and accompanying text.

197. See U.S. CONST. art. IV, § 3, cl. 1.

198. *Id.* amend. XXIII.

199. 2 U.S.C. § 25a. A House delegate for D.C. was proposed as part of the resolution that became the Twenty-Third Amendment, but it was stripped before the resolution passed and subsequently adopted in 1970. District of Columbia Delegate Act, Pub. L. No. 91-405, 84 Stat. 845, 848–55 (1970). Congress also proposed a constitutional amendment that would have conferred on D.C. residents full representation in the House and Senate, but only sixteen states ratified the proposed amendment before the deadline. See H.R.J. Res. 554, 95th Cong. (1978); Sandra Evans, *Voting Rights Amendment Runs Out of Time*, WASH. POST, Aug. 22, 1985, at C3.

200. See District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973). In the decades after Reconstruction, Black disenfranchisement came to be described as an express objective of federal control over the District. In an 1890 debate about restoring suffrage, for example, Senator John Morgan of Alabama, a former Confederate general, argued that the 1874 Congress had "found it necessary to disfranchise every man in the District of Columbia, no matter what his reputation or character might have been or his holdings in property, in order thereby to get rid of this load of negro suffrage that was flooded in upon them." EDWARD INGLE, *THE NEGRO IN THE DISTRICT OF COLUMBIA* 85–86 (1893). Congress decided "[t]o burn down the barn to get rid of the rats, . . . the rats being the negro population and the barn being the government of the District of Columbia . . ." *Id.*

201. See U.S. CONST. amend. XXIII.

Report, its purpose was to remove the “constitutional anomaly of imposing all the obligations of citizenship without the most fundamental of its privileges.”<sup>202</sup> The Twenty-Third Amendment thus pursued the work of the Fourteenth Amendment, much as the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments recognized suffrage rights guaranteed to the “citizens of the United States” who had been named as such in the Fourteenth Amendment.<sup>203</sup>

This Part examines the struggle for citizenship and political rights for District residents that led to the Twenty-Third Amendment. As the congressional debates underscore, the Twenty-Third Amendment was understood as a step, but only a step, toward recognizing D.C. residents as full American citizens. It did not confer political representation or self-government beyond participation in the Electoral College—steps that Southern Democrats’ strangleholds on key committees put out of reach—but it also did not foreclose the possibility of statehood or extinguish Congress’s broader constitutional obligation to recognize D.C. residents’ dual political identity as state and national citizens.

This Part then offers a proposal that reconciles the Twenty-Third Amendment with D.C. statehood. Although the Amendment does not pose a constitutional obstacle to statehood, it does pose a practical complication that opponents of statehood have been quick to point out: What would happen to the three Electoral College votes conferred on the “District constituting the seat of Government of the United States”<sup>204</sup> if D.C. became a state entitled to its own Electoral College votes and separate from the barely populated District? The statehood legislation pending in Congress proposes expedited repeal of the Twenty-Third Amendment and, in the meantime, strikes the provision of federal law establishing D.C.’s participation in the Electoral College.<sup>205</sup> A better approach would be to confer the District’s votes on the winner of the national popular vote. Such a decision would not only conform to the text of the Amendment but would also appropriately recognize the “District constituting the seat of Government of the United States” as belonging to “all the people of America.”<sup>206</sup>

#### A. TOWARD “FIRST-CLASS CITIZENS”<sup>207</sup>

In the years after World War II, Washington D.C.’s status became a prominent civil rights concern. As the Second Reconstruction commenced, racial segregation

202. H.R. REP. NO. 86-1698, at 2 (1960).

203. See U.S. CONST. amend. XV (“The right of citizens of the United States to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude.”); *id.* amend. XIX (“The right of citizens of the United States to vote shall not be denied or abridged . . . on account of sex.”); *id.* amend. XXIV (“The right of citizens of the United States to vote . . . shall not be denied or abridged . . . by reason of failure to pay any poll tax or other tax.”); *id.* amend. XXVI (“The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged . . . on account of age.”).

204. *Id.* amend. XXIII.

205. Washington, D.C. Admission Act, H.R. 51, 117th Cong. (as passed by House of Representatives, Apr. 22, 2021).

206. 106 CONG. REC. 12569 (1960) (statement of Rep. Donald Ray Matthews).

207. *Id.* at 1762 (statement of Sen. J. Glenn Beall).



and discrimination in the nation's capital garnered widespread attention and opprobrium. The National Committee on Segregation in the Nation's Capital emphasized the discordance of racial discrimination in the District and the abysmal failure of democracy this represented; D.C. symbolized the nation, yet segregation was more rigid than in the Jim Crow South.<sup>208</sup> Indeed, Southern congressional leaders used their hold on the House District of Columbia Committee to promote D.C. as the "capital of white supremacy."<sup>209</sup> According to the *Washington Evening Star*, "[i]t must be viewed as one of the ironies of history that the Confederacy, which was never able to capture Washington during the course of [the Civil War], now holds it as a helpless pawn."<sup>210</sup>

As the federal government increasingly sought to position itself as a guarantor of equality against resistant states, the capital belied this narrative. From segregated schools to the denial of access to public accommodations, the federal government was responsible.<sup>211</sup> Moreover, segregation and discrimination went hand-in-hand with disenfranchisement. The federal government that constituted the entirety of government for Washington residents was a government in which these Americans had no voice: citizens in the majority Black capital were denied the vote absolutely. They could not elect local, state, or federal officials. "Without any kind of vote, the people of the District of Columbia are mere wards of Congress," Representative Emanuel Celler declared. "They are declassed."<sup>212</sup>

As all three branches of the federal government began to address racial segregation, they struggled with D.C.'s status as a non-state, a jurisdiction outside the federalism framework the Reconstruction Amendments relied upon to guarantee equal citizenship. In *Bolling v. Sharpe*, the Supreme Court departed from *Brown v. Board of Education*'s reliance on the Equal Protection Clause's regulation of states and simply declared: "In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."<sup>213</sup> Although the Court correctly bound the federal government to the guarantee of equal citizenship, the school desegregation litigation

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208. See KENESAW M. LANDIS, NAT'L COMM. ON SEGREGATION IN THE NATION'S CAPITAL, SEGREGATION IN WASHINGTON 17 (1948); see also *id.* at 4–10 (excerpting a story from the *Associated Press* about a Russian newspaper's treatment of segregation in D.C., recounting discriminatory treatment and humiliation of "visiting dignitaries from certain African and Caribbean countries" and quoting a "horrified" letter from a Danish visitor noting that "Washington . . . is not a good 'salesman' for your kind of democracy").

209. *Id.* at 88.

210. *Id.*

211. *Id.* ("[The federal government], and it alone, has the power to break the chains that bar a quarter of a million Negroes in Washington from their equal rights as Americans. Worse, the government has helped to make the chains.").

212. 106 CONG. REC. 12557 (1960) (statement of Rep. Emanuel Celler).

213. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954); see *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). The year before, in *District of Columbia v. John R. Thompson Co.*, the Court responded to a campaign of restaurant sit-ins in D.C., holding that civil rights acts passed by D.C.'s territorial legislative assembly in 1872 and 1873 remained good law despite the intervening changes in D.C.'s government structure and the general repeal of that legislative assembly's work. See 346 U.S. 100, 101 (1953).

underscored the structural problems of Congress acting as a state legislature and of American citizens lacking state citizenship.<sup>214</sup>

For its part, Congress not only began to adopt civil rights legislation but also turned its attention to voting rights for D.C. residents. Statehood was not politically feasible, or even the subject of much agitation at mid-century, but members of Congress began to pursue core features of statehood more discretely. In particular, Congress repeatedly considered—and ultimately adopted in limited form—proposals to give D.C. residents a measure of self-government in the form of home rule and proposals to give D.C. residents a voice in the federal government through participation in electing the President and some form of representation in Congress.<sup>215</sup> As they debated these three measures (home rule, presidential electors, and congressional representation), members of Congress not only noted the moral stakes but also advanced distinctly constitutional arguments about the meaning of American citizenship and its realization in the nation's capital.

The Twenty-Third Amendment, in particular, was understood as a citizenship-perfecting measure, following in the tradition of other vote-guaranteeing amendments such as the Fifteenth and Nineteenth. When introduced in the 86th Congress, the proposal that would become the Twenty-Third Amendment was taken up together with the proposal that would become the Twenty-Fourth (prohibiting poll taxes in federal elections).<sup>216</sup> Introducing the D.C. suffrage provision, which initially provided for congressional representation as well as presidential electors, Senator Kenneth Keating declared: “I believe that consideration of this matter . . . in connection with the anti-poll-tax amendment is particularly appropriate. Both are of the same nature in that they are attempts to remove unreasonable impediments to voting rights. They are both comparable in their impact and their justification.”<sup>217</sup> Keating suggested that, in fact, enfranchisement for D.C. residents might be the greater democratic imperative:

I do not know how many people in Alabama, Arkansas, Mississippi, Texas, and Virginia [the five states that still had a poll tax] will be benefited by the removal of the poll tax. But I am certain that the number is no more than the number of citizens in the District of Columbia who would benefit from removal of the absolute bar against their right to vote. This is not a mere matter of numbers, however, but basically a matter of principle. We cannot justify the denial of the right of a citizen to vote because of his residence in the District of

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214. See generally Williams, *supra* note 103 (arguing that *Bolling* should have been decided under the Citizenship Clause).

215. See *supra* notes 198–200 and accompanying text.

216. U.S. CONST. amend. XXIV. Both proposals were added to a bill that would have permitted state governors to make temporary appointments to the House. See S.J. Res. 39, 86th Cong. (1960). For a comprehensive legislative history of the poll tax and its eventual repeal through the Twenty-Fourth Amendment, see *Poll Tax and Enfranchisement of District of Columbia: Hearings on S.J. Res. 126, S.J. Res. 60, S.J. Res. 70, and S.J. Res. 134 Before the Subcomm. on Const. Amends. of the S. Comm. on the Judiciary*, 86th Cong. (1959).

217. 106 CONG. REC. 1759 (1960) (statement of Sen. Kenneth Keating).

Columbia any more than we can justify the denial of the right to vote because a citizen has failed to pay a fee.<sup>218</sup>

Although the poll-tax provision was ultimately held for the next session, Senators and Representatives discussed the meaning and import of the two suffrage measures together.<sup>219</sup> Arguments linking the franchise to equality and membership in the political community—and connecting the disenfranchised citizens of the South to the disenfranchised citizens of the capital—resonated throughout the floor debates.<sup>220</sup> With respect to D.C. suffrage, in particular, Senators and Representatives described the amendment as a step toward achieving full citizenship for the residents of the capital.<sup>221</sup> A frequent refrain—appearing in constitutional argot, as well as Revolutionary-era slogans<sup>222</sup>—was that Washingtonians bore all of the obligations of citizenship but were denied the fundamental right (or privilege, as some still understood it) of voting. Members of Congress emphasized that residents of the nation’s capital paid federal taxes and served and died in the armed forces and yet could not vote.<sup>223</sup> Only enfranchisement would make D.C. residents “full-fledged American citizens.”<sup>224</sup>

If members of Congress recognized that the obligations and privileges of citizenship should be reciprocal, the obvious problem was the Constitution’s machinery for granting the franchise: through the states. As the House Report noted: “[D.C. residents] cannot now vote in national elections because the Constitution has restricted that privilege to citizens who reside in States.”<sup>225</sup> Because statehood

218. *Id.*

219. See, e.g., *id.* at 1758, 12556–57.

220. See, e.g., *id.* at 12556–57, 12852–54. See generally *Amend the Amendment!*, EVENING STAR, Aug. 14, 1959, at A12 (“An otherwise qualified resident of this city, the Capital of the United States, is in precisely the same category as a citizen of Alabama, Arkansas, Mississippi, Texas and Virginia who has failed to pay his poll tax. . . . The great difference between the District citizen and the citizen of one of these States, however, is that the latter can remove his disenfranchisement by paying the tax.”).

221. See, e.g., 106 CONG. REC. 12557 (1960) (statement of Rep. Emanuel Celler).

222. See, e.g., *id.* at 1759 (1960) (statement of Sen. Kenneth Keating) (“Taxation without representation is still the lot of our local citizens.”).

223. See, e.g., *id.* at 12563 (statement of Rep. John Lindsay) (“[I]t is difficult to realize that the citizens of this great city are unable to express their preference at the ballot box for the office of President or Vice President. The people of the District are no different than those in the cities you and I represent. The Treasury consumes their tax dollar in the same fashion as they do any other revenue. No boy was disqualified from serving in the Armed Forces because he was a resident of the District of Columbia. The District has a population equal to or larger than several States and the tax revenues from it exceed that of 25 States.”); see also, e.g., *District of Columbia Representation and Vote: Hearings on H.J. Res. 529 Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 86th Cong., 2nd Sess. 5 (1960) [hereinafter *D.C. Vote Hearing*] (statement of Sen. Kenneth Keating) (“This is America. We do not believe in second-class citizenship.”).

224. 106 CONG. REC. 12564 (1960) (statement of Rep. John Foley).

225. H.R. REP. NO. 86-1698, at 2 (1960); see also, e.g., 106 CONG. REC. 12556 (1960) (statement of Rep. Emanuel Celler) (“Technically, voting rights are denied [to] District residents because the Constitution is said to provide the machinery only through the States. . . . Since the District is not a State or part of a State, there is no machinery through which its citizens may participate in such matters.”). The connection between statehood and voting did not seem much of a concern to those who understood D.C. residents to be transients, citizens of other states who maintained privileges, including the

and even home rule were politically out of reach,<sup>226</sup> proponents of full citizenship concluded that “half a loaf is better than no loaf at all”<sup>227</sup> and began with voting rights for presidential elections. Importantly, members of Congress did not understand the Twenty-Third Amendment to impose an obstacle to future democracy-enhancing measures, such as home rule, congressional representation, or statehood itself.<sup>228</sup> They saw their work as furthering District residents’ equal citizenship, not creating a barrier to its complete realization.<sup>229</sup>

Their decision to proceed piecemeal rather than through statehood, however, has had a paradoxical effect. Commentators who oppose statehood trade on an intuitive logic: If a constitutional amendment was required to grant D.C. residents the right to participate in the Electoral College, how could a much greater recognition—statehood, with attendant participation in the Electoral College, representation in Congress, and self-government—be achieved by simple legislation?

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franchise, in those states. But congressional hearings on the resolution highlighted the large number of native-born Washingtonians who had no other state affiliation. *See, e.g., Enfranchisement of District of Columbia: Hearing on S.J. Res 138 Before the Subcomm. on Const. Amends. of the S. Comm. on the Judiciary*, 86th Cong., 1st Sess. 14 (1959) [hereinafter *Enfranchisement Hearing*] (statement of Sen. Jennings Randolph) (“Mr. Chairman, 50 years ago, even 25 years ago, the presence of a large segment of population within the District of Columbia, who had been born here, was not a truism. But today it [is]. . . . They possess no validity to claim citizenship within any State. . . .”). Not explicit, but also understood, was that D.C.’s Black residents were more likely to have been born in D.C. than its white residents, who were accordingly more likely to be eligible absentee voters in other states. *See, e.g., Carliner v. Bd. of Comm’rs*, 265 F. Supp. 736, 738 (D.D.C. 1967) (noting that 27.7% of white residents and 44.4% of Black residents were born in D.C.).

226. Southern Democrats, who controlled the House District of Columbia Committee, opposed home rule because it could mean that Washington would be “controlled by the city’s large Negro population.” *Constitutional Amendment on D.C. Suffrage*, CQ ALMANAC (1960); *see also The Twenty-Third Amendment*, N.Y. TIMES, Mar. 24, 1961, at 30 (“One impediment to full-scale citizenship in the District is that it has a majority of Negro citizens. Some Southern legislators who have their own peculiar views about human rights would rather not see the District of Columbia governed by a majority.”).

227. 106 CONG. REC. 12556 (1960) (statement of Rep. Emanuel Celler); *see id.* at 12558 (statement of Rep. Abraham Multer) (“There is no doubt that this resolution is a step in the right direction, but I must emphasize that it is only one step. . . . [N]one who support this bill should assume that they have done their full duty by the citizens of the District of Columbia.”); *id.* at 12559 (statement of Rep. George Meader) (“[T]his is only a partial franchise. . . .”).

228. Although the House Report noted that making D.C. a state would present a “serious constitutional question,” the only recorded concerns were political. H.R. REP. NO. 86-1698, at 2 (1960). Insisting on keeping statehood separate from federal representation for the resolution’s chances, Senator Kenneth Keating concluded: “It is conceivable that at some time the District of Columbia might be a State but there is certainly no movement now to do that.” *D.C. Vote Hearing*, *supra* note 223, at 11. In 1978, Congress did send to the states a proposed constitutional amendment that would have conferred on D.C. full representation in the House and Senate. *See supra* note 199.

229. Upon ratification of the Twenty-Third Amendment on March 29, 1961, President John F. Kennedy declared it “a major step in the right direction.” *District of Columbia Wins Right to Vote for First Time*, N.Y. HERALD TRIB., Mar. 30, 1961, at 6. Opponents likewise recognized the Twenty-Third Amendment as a partial step toward fuller representation. Segregationist groups actively fought ratification. And when Arkansas became the first state to reject the Amendment, Arkansas State Representative Marion Crank argued: “They propose to create another state. Giving them electors is the first step.” Morton Mintz, *Arkansas Is First to Reject District Voting Amendment*, WASH. POST, Jan. 25, 1961, at B1.

Although paradoxical, the distinction follows from the critical place of federalism in the American constitutional order. States provide the only constitutional channels for representative government, and constitutional law accordingly yokes political rights to state status. Upon admission to the Union, residents of a new state receive an established bundle of rights—particularly the franchise—and their state enters on equal footing with extant states.<sup>230</sup> Outside of statehood, however, there is no established constitutional “machinery . . . for the selection of the President and Vice President.”<sup>231</sup> Approached piecemeal, rather than in the composite form the Constitution contemplates, amendment was required.

#### B. THE ELECTORAL COLLEGE AFTER STATEHOOD

What does Congress’s choice to confer a partial franchise via constitutional amendment mean for statehood today? Opponents argue that D.C. statehood is inconsistent with the Twenty-Third Amendment’s provision of electors to the District.<sup>232</sup> Their argument is not a textual one. Current proposals for D.C. statehood would preserve a separate “District constituting the seat of Government of the United States,” as the Twenty-Third Amendment specifies,<sup>233</sup> so the Amendment could continue to operate according to its express terms even if Douglass Commonwealth were admitted as a state with its own electoral votes. But, some opponents contend, statehood conflicts with the intent of the Amendment’s drafters and ratifiers: “Plainly, those who

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230. The Committee Report on the Twenty-Third Amendment appreciated just this. *See* H.R. REP. NO. 86-1698, at 2 (1960) (“It should be noted that, apart from the Thirteen Original States, the only areas which have achieved national voting rights have done so by becoming States. . . .”). Congress had recently admitted Alaska and Hawaii as states through ordinary legislation. *See* Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958); Hawaii Statehood Act, Pub. L. No. 86-3, 73 Stat. 4 (1959). Some testimony linked these Union-expanding decisions to D.C.’s cause. *See, e.g., Enfranchisement Hearing, supra* note 225, at 1 (statement of Sen. Estes Kefauver) (“The enfranchisement of the U.S. citizens in Alaska and Hawaii (by the granting of statehood to those territories) has left the residents of the District the only voteless American citizens. Granting of statehood to Alaska and Hawaii has dramatized the existence of this last large void in our democratic form of government.”).

231. H.R. REP. NO. 86-1698, at 2 (1960). Although Congress could arguably rely on its Article I authority to grant certain voting rights apart from statehood, this authority does not extend to Electoral College participation. *See* Memorandum from Viet D. Dinh & Adam H. Charnes to H. Comm. on Gov’t Reform, The Authority of Congress to Enact Legislation to Provide the District of Columbia with Voting Representation in the House of Representatives, *in* H.R. REP. NO. 109-593, pt. 1, at 41, 62–63 (2006) (“Because legislating with respect to the Electoral College is outside Congress’ Article I authority, Congress could not by statute grant District residents a vote for President . . . . By contrast, providing the District with representation in Congress implicates Article I concerns and Congress is authorized to enact such legislation by the District Clause.”). *But see* OLC D.C. Representation Opinion, *supra* note 6 (“Congress may not by statute give the District of Columbia voting representation in the House. . . . [because] the District is not a ‘State’ within the meaning of the Composition Clause.”).

232. *See, e.g.,* Matthew J. Franck, *The Real Constitutional Difficulty with D.C. Statehood*, NAT’L REV. (June 10, 2020, 2:40 PM), <https://www.nationalreview.com/bench-memos/the-real-constitutional-difficulty-with-d-c-statehood/> [<https://perma.cc/YJ6Y-VHET>] (“Ironically, the adoption almost 60 years ago of the Twenty-third Amendment, which gave D.C. residents some say in presidential elections, practically foreclosed almost any chance of the District’s becoming a state. . . .”); Roger Pilon, *DC Statehood Is a Fool’s Errand*, NAT’L INT. (ONLINE) (June 5, 2016), <https://www.cato.org/commentary/dc-statehood-fools-errand> [<https://perma.cc/U2AN-FRPG>] (arguing that statehood would require the repeal of the Twenty-Third Amendment).

233. U.S. CONST. amend. XXIII, § 1.



wrote and ratified the Twenty-Third Amendment envisioned a district of a certain size,” writes Roger Pilon of the Cato Institute.<sup>234</sup>

The drafting and ratification record of the Twenty-Third Amendment tells a different story than this argument suggests—a story focused on achieving partial enfranchisement rather than impeding full enfranchisement. In any event, as others have explained, “the Constitution is not violated anytime the factual assumptions underlying a provision change.”<sup>235</sup> Most constitutional provisions operate against backdrops their framers could not have anticipated. Even if those who wrote and ratified the Twenty-Third Amendment expected D.C. to have certain boundaries, those assumptions are not constitutional barriers to statehood in the form H.R. 51 proposes.

These opponents are correct, however, that the Twenty-Third Amendment raises serious policy concerns. Left in place after D.C. becomes a state, the Amendment might confer the District’s three electoral votes on a tiny group of people residing in the federal enclave, perhaps only the President’s family. The current draft of H.R. 51 recognizes the problem by providing for expedited consideration of the repeal of the Twenty-Third Amendment.<sup>236</sup> In the meantime, it would rescind the federal statutory provision implementing the Amendment,<sup>237</sup> denying any residents of the federal enclave the right to participate in the Electoral College as such and instead granting them the right to vote in their previous states of residence.<sup>238</sup>

A better approach would be to legislate that the electoral votes of the “District constituting the seat of Government of the United States”<sup>239</sup> shall be awarded to the winner of the national popular vote for President, at least pending the repeal of the Twenty-Third Amendment.<sup>240</sup> This tweak to the legislation better comports with both the text and purposes of the Amendment. First, although some insist that the Twenty-Third Amendment is not self-executing, so Congress may simply decline to provide electors for the District,<sup>241</sup> the mandatory language of the Amendment (“The District . . . shall appoint in such manner as the Congress may

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234. Pilon, *supra* note 232.

235. Dinh Testimony, *supra* note 10, at 84.

236. Washington, D.C. Admission Act, H.R. 51, 117th Cong. § 224 (as passed by House of Representatives, Apr. 22, 2021) (proposing “Expedited Procedures for Consideration of Constitutional Amendment Repealing 23rd Amendment”).

237. *See id.* § 223 (repealing 3 U.S.C. § 21).

238. *See id.* § 221.

239. U.S. CONST. amend. XXIII, § 1.

240. We suggested this after the Supreme Court’s decision in *Chiafalo v. Washington*. *See* Jessica Bulman-Pozen & Olatunde Johnson, Commentary, *The Electoral College Shouldn’t Get in the Way of D.C. Statehood*, TAKE CARE (July 7, 2020), <https://takecareblog.com/blog/the-electoral-college-shouldn-t-get-in-the-way-of-d-c-statehood> [<https://perma.cc/J9NY-TQYU>]. *See generally* Chiafalo v. Washington, 140 S. Ct. 2316, 2328 (2020) (considering state “faithless elector” laws and holding that a state may “instruct[] its electors that they have no ground for reversing the vote of millions of its citizens”). As an alternative, Congress could award the votes to the winner of the Electoral College before the District’s three votes were included. Because we do not believe the Electoral College well represents the nation’s people, we favor reliance on the national popular vote. But either would be superior to H.R. 51’s current approach.

241. *See, e.g.*, Schrag, *supra* note 4, at 348–49; *see also* Raven-Hansen, *supra* note 16, at 188–89 (arguing that no one would have standing to challenge a lack of suffrage for the seat of government upon D.C. statehood).



direct”<sup>242</sup>) makes problematic the appointment of no electors. Congress’s discretion is better understood to be limited to the mechanics and form of the appointment rather than the fact of appointment.<sup>243</sup>

Second, assigning the District’s electoral votes to the winner of the national popular vote would recognize the special place of the nation’s capital as belonging to all Americans. Although the Twenty-Third Amendment was designed to partially enfranchise District residents, comments throughout the drafting and ratification process emphasized D.C.’s national role and status. For instance, Representative Joel Broyhill argued that “Washington is thought of as belonging to every citizen in the entire Nation.”<sup>244</sup> Allocating the District’s Electoral College votes to the winner of the national popular vote would provide legal recognition of the nation’s capital as belonging to all Americans, while also—through statehood for Douglass Commonwealth—continuing to recognize the more specific Electoral College participation of D.C. residents.

#### IV. TWENTY-FIRST CENTURY FEDERALISM

A conscientious member of Congress should recognize D.C. statehood as a constitutional imperative and vote to admit Douglass Commonwealth to the Union. The constitutional arguments to the contrary are feeble—but they are also not what stands between the people of Washington, D.C. and statehood. Instead, the decision to withhold self-governance and federal representation is a political one. Describing opposition to congressional representation for the District half a century ago, Senator Ted Kennedy noted his colleagues’ perception of D.C. as “too liberal, too urban, too black or too Democratic.”<sup>245</sup> Today’s statehood opponents sound variations on these themes.<sup>246</sup>

242. U.S. CONST. amend. XXIII, § 1.

243. See, e.g., Neuman, *supra* note 21, at 1224 (“The . . . argument that Congress could ignore the Amendment because it is not self-executing is . . . troubling.”).

244. *D.C. Vote Hearing*, *supra* note 223, at 24 (statement of Rep. Joel T. Broyhill). The sentiment was echoed by both proponents and opponents of measures such as home rule. Compare, e.g., 106 CONG. REC. 12568–69 (1960) (statement of Rep. Donald Matthews) (“[A] Federal city, reserved especially for the Capitol of the United States, is a responsibility of all the representatives of the United States and we cannot abrogate that responsibility. . . . [T]he District of Columbia, a great city, belongs to all the people of America.”), with *id.* at 12570 (statement of Rep. Seymour Halpern) (“The fact that the District is a ‘Federal city’ in which all the citizens of the country have an interest is not, in my opinion, a sufficient reason for denying to its inhabitants control over their local problems. . . .”).

245. 124 CONG. REC. 26345 (1978) (statement of Sen. Edward Kennedy).

246. See, e.g., Press Release, Sen. Lindsey Graham, Graham Strongly Opposes DC Statehood (June 29, 2020), <https://www.lgraham.senate.gov/public/index.cfm/2020/6/graham-strongly-opposes-dc-statehood> [<https://perma.cc/4RMW-A6ZU>] (“At its core this is about trying to add two more Democratic votes in the U.S. Senate, effectively cancelling out the votes of a state like South Carolina with two Republican Senators.”); Veronica Stracqualursi & Nicky Robertson, *Cotton Says Wyoming’s “Well-Rounded Working-Class” Population More Worthy of Statehood than DC*, CNN (June 27, 2020, 7:14 AM), <https://www.cnn.com/2020/06/26/politics/tom-cotton-wyoming-dc-statehood/index.html> [<https://perma.cc/RQ7D-DS8N>] (quoting Sen. Tom Cotton as saying: “Wyoming is smaller than Washington by population, but it has three times as many workers in mining, logging and construction, and 10 times as many workers in manufacturing. In other words, Wyoming is a well-rounded working-class state. A new state of Washington would not be.”).

A natural response of statehood proponents is to insist that this is a matter of principle, not politics. It is, as we have emphasized, certainly a matter of constitutional and democratic principle to recognize the full and equal citizenship of D.C.'s residents. But it is also a matter of politics, as the admission of new states always has been. A Democratic Congress that admitted "liberal," "Democratic" D.C. as a state to bolster its partisan ranks would be hewing closely to the American tradition. Given the current bias of federal representative institutions toward Republicans, such a decision would also be on strong democratic ground.<sup>247</sup> Although partisanship is a legitimate congressional consideration, it is in the partisan-linked but distinct understanding of D.C. as "too black" and "too urban" where the most compelling political reasons for statehood are found.<sup>248</sup> D.C.'s unique population and geography hold promise not only for the District itself but also for twenty-first-century American government.

Many of the normative values that courts, politicians, and scholars associate with federalism—from creating spheres of minority rule, to satisfying local preferences, to providing laboratories for democratic experimentation—are not well-realized in practice. But the very features of D.C. that have long impeded its recognition as a self-governing political community introduce new possibilities for achieving these values. As a plurality Black state, D.C. would provide a novel forum for federalism to empower people of color. And as the nation's first city-state, D.C. would merge federalism with localism and facilitate subsidiarity.

#### A. PARTISANSHIP AND DEMOCRACY

Discussions of statehood often contrast principle and politics, but statehood has always been a political question—not only in the jurisdictional sense that the matter is left to congressional discretion but also in the sense that partisan considerations have always pervaded congressional debates and decisions. Senators and Representatives have weighed how new states would affect partisan or sectional power within the federal government and have advocated or opposed statehood accordingly.

Sometimes, such considerations led Congress to admit states in pairs. In the half-century before the Civil War, Congress frequently admitted a free state and a slave state in close temporal proximity. Indiana joined the Union with Mississippi, Illinois with Alabama, Maine with Missouri, Michigan with Arkansas, and Iowa with Florida.<sup>249</sup> As a normative matter, any suggestion that partisan balance is inherently desirable with respect to statehood admission does not find support in this practice: it was above all Southern states' representatives who insisted on balance as a slavery-protecting measure.

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247. See generally Jonathan S. Gould & David E. Pozen, *Structural Biases in Structural Constitutional Law*, 97 N.Y.U. L. REV. 59 (2022) (describing various "structural biases" in favor of the Republican party).

248. 124 CONG. REC. 26345 (1978) (statement of Sen. Edward Kennedy). On the close relationship between partisanship, race, and geography, see, for example, LILLIANA MASON, *UNCIVIL AGREEMENT: HOW POLITICS BECAME OUR IDENTITY* (2018).

249. See generally *THE UNITING STATES*, *supra* note 64 (discussing the path to statehood for each of the fifty states).

But the claim also falls short descriptively. Although partisan considerations have always informed statehood decisions, twofer admission has not been the norm outside of the slave state/free state practice. In the years immediately before and after the Civil War, for instance, partisan “power grabs”<sup>250</sup> were instead the prevailing practice. Statehood for Nevada, Nebraska, and Colorado was engineered (although delayed for Colorado) by a Republican party desperate to hold onto the presidency.<sup>251</sup> In 1889, Congress similarly admitted North Dakota, South Dakota, Montana, and Washington to retain Republican control over the federal government,<sup>252</sup> and it admitted Idaho and Wyoming as Republican-supporting states the next year.<sup>253</sup>

The return to pairing in the most recent grants of statehood to Alaska and Hawaii in 1959 has made bipartisan admission more salient, but perhaps more than anything those statehood decisions illuminate the anomalous character of mid-twentieth-century partisanship. Although Democratic and Republican labels are coherent across the country today, this was not true at mid-century when the parties were regionally fractured; this was the era of Southern Democrats and Rockefeller Republicans. Alaska was expected to be Democratic and Hawaii was expected to be Republican, but the main objection to statehood in Congress for both concerned the effects on civil rights legislation. Southern representatives feared that these racially diverse states would “help to loosen their stranglehold on civil rights legislation,”<sup>254</sup> opposition that was overcome only after Congress

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250. Cf. Devan Cole, *GOP Senator Blasts DC Statehood as ‘Power Grab’ in Clash with Democratic Mayor During Hearing*, CNN (June 22, 2021, 8:07 PM), <https://www.cnn.com/2021/06/22/politics/dc-statehood-bill-senate-committee-hearing/index.html> [<https://perma.cc/AY8B-CC42>] (quoting Sen. Ron Johnson stating that D.C. statehood “seems just like a naked power grab”).

251. See Mark R. Ellis, *The State of Nebraska*, in *THE UNITING STATES*, *supra* note 64, at 725, 725 (“Nebraska, along with Nevada and Colorado territories, was targeted for statehood by Republican lawmakers during the Civil War. Republicans at the federal and territorial levels hoped that the addition of three strong, loyal Republican states would help re-elect President Lincoln in 1864 and make post-war Reconstruction congressional legislation easier to attain.”); Jeffrey M. Kintop, *The State of Nevada*, in *THE UNITING STATES*, *supra* note 64, at 753, 778 (describing the admission of Nevada as a means of “bolster[ing] Lincoln’s] chances of election” and facilitating Radical Reconstruction legislation); William Virden, *The State of Colorado*, in *THE UNITING STATES*, *supra* note 64, at 161, 173 (“Not until 1876, when the Republican Party became desperate to retain its hold on the presidency, did Colorado emerge as a full-fledged member of the Union.”).

252. See, e.g., David B. Danbom, *The State of North Dakota*, in *THE UNITING STATES*, *supra* note 64, at 921, 931 (noting that, with unified Republican government, “there was a political incentive to admit as many potentially Republican states into the Union as possible and to do so quickly, before another election threatened to divide the government again,” so North Dakota, South Dakota, Montana and Washington were admitted in 1889).

253. See, e.g., Phil Roberts, *The State of Wyoming*, in *THE UNITING STATES*, *supra* note 64, at 1351, 1351 (“Like the earlier western states of Idaho, North Dakota, South Dakota, Montana, and Washington, Wyoming’s admission came as a result of the territory’s record of support for Republicans. When the presidency and both houses of Congress returned to Republican hands as a result of the 1888 election, Wyoming was well positioned for admission. . .”).

254. William S. Hanable, *The State of Alaska*, in *THE UNITING STATES*, *supra* note 64, at 55, 72–73 (“Congress’s conservative Southerners had been chronic opponents of Alaska statehood bills, for they feared that representatives of a new, Democratically inclined state with a large nonwhite population

managed to pass the Civil Rights Act of 1957.<sup>255</sup> The confident contemporaneous predictions that Alaska would be a blue state and Hawaii a red state also underscore the limits of partisan prognostication; the regional realignment of the parties in the ensuing decades has made Hawaii one of the bluest states and Alaska solidly red in the early twenty-first century.

Changes in the parties, as well as state populations, over time have limited the staying power of other statehood decisions based on partisanship as well, but that has not made initial partisan assessments any less central to such determinations. The expected partisan composition of prospective states has hastened or delayed statehood, generated congressional support or opposition, and always been a driving consideration.

The lesson from such precedent is a modest one: not that Congress should or must consider partisanship in statehood determinations but simply that it has traditionally done so. Arguments that Congress would be engaging in a novel or illegitimate partisan power grab in admitting D.C. as a state conjure as precedent an apolitical past that does not exist. Wholly independent of partisan considerations, Congress has a constitutional obligation to effectuate the guarantee of federated equal citizenship by admitting D.C. as a state, but partisan motivations to carry out this obligation do not render suspect the resulting action.

The partisan case to admit D.C. is stronger than the precedent itself indicates, moreover. Insofar as states are both self-governing communities and the constitutive units of federal representation, a Democratic decision to admit D.C. would be on strong democratic ground. Today, the United States' "political geography . . . tilts a host of longstanding structural arrangements in Republicans' favor," including the composition of the Senate and House.<sup>256</sup> Because partisanship is the dominant logic of American government,<sup>257</sup> Democrats compete with Republicans on an uneven playing field. The state of Douglass Commonwealth could provide a partial corrective to such partisan imbalance

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might help to loosen their stranglehold on civil rights legislation. . . . An unusually frank Dixiecrat spoke the unpleasant truth when he said: 'I'm sorry, but a group of us are committed to oppose the admission of any states whose senators are not likely to support our stand on cloture. The merits of the statehood won't play any part in our decision.'"); J. D. Bowers, *The State of Hawaii*, in *THE UNITING STATES*, *supra* note 64, at 295, 305 ("Hawaii's prospects for statehood were mired in a political contest between the Republicans and Democrats . . . [and] in the opposition of southern politicians who were leery of the civil rights implications should a racially diverse and tolerant Hawaii join their states on an equal footing.").

255. Pub. L. 83-315, 71 Stat. 634 (1957).

256. Gould & Pozen, *supra* note 247, at 114–15. See generally ADAM JENTLESON, *KILL SWITCH: THE RISE OF THE MODERN SENATE AND THE CRIPPLING OF AMERICAN DEMOCRACY* 10–11 (2021) (arguing that the structural imbalance of the Senate and the filibuster give disproportionate power to a minority of predominantly white conservative Senators); JONATHAN RODDEN, *WHY CITIES LOSE: THE DEEP ROOTS OF THE URBAN-RURAL POLITICAL DIVIDE* 133 (2019) (showing how the clustering of center-left voters in cities gives Democrats a structural disadvantage in the House of Representatives).

257. See generally Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077 (2014) (arguing that relationships among the states and the federal government are critically shaped by partisan politics); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006) (arguing that the relationships among the branches of the federal government are critically shaped by partisan politics).

insofar as it would add two Senators and one Representative who could be expected—at least for the immediate future—to be Democrats.<sup>258</sup> To the extent the celebration of joint state admission speaks to preserving balance in the federal government, the admission of D.C. alone would more closely track these objectives than would admitting an anticipated blue state and red state together.

#### B. MINORITY RULE

At the heart of many theories of federalism is the idea of minority rule—a population in the minority at the national level may govern as a local majority. As Dean Heather Gerken argues:

Federalism is an idea that depends on, even glories in, the notion of minority rule. It involves decentralized governance and a population that is unevenly distributed across two levels of government, something that allows national minorities to constitute local majorities. Minority rule, in turn, is thought to promote choice, competition, experimentation, and the diffusion of power.<sup>259</sup>

Around the world, federalism has emerged alongside other consociational structures as an approach to ethnic and religious divisions: minorities can seek refuge from national majorities and govern themselves in separate states while retaining membership in the broader nation.<sup>260</sup>

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258. This corrective would be quite limited; no one should look to D.C. statehood as a solution to the democratic woes of the United States. *But cf.* Note, *Pack the Union: A Proposal to Admit New States for the Purpose of Amending the Constitution to Ensure Equal Representation*, 133 HARV. L. REV. 1049, 1050, 1060 (2020) (proposing admitting D.C.'s 127 neighborhoods as separate states). In at least one respect, D.C. statehood would exacerbate an anti-democratic bias of the Senate: the equal representation accorded low-population and high-population states. D.C.'s approximately 700,000 residents would have the same voting power in the Senate as California's 40 million residents, a skew that has been widely criticized when it comes to Wyoming's almost 600,000 residents. D.C. statehood would somewhat ameliorate the partisan consequences of this skew—the lowest-population states are currently heavily Republican—which might bolster the prospects of deeper reform. *See, e.g., Annual Estimates of the Resident Population for the United States, Regions, States, District of Columbia, and Puerto Rico: April 1, 2020 to July 1, 2021*, U.S. CENSUS BUREAU, [https://data.census.gov/cedsci/table?tid=PEPPPOP2021.NST\\_EST2021\\_POP&hidePreview=false](https://data.census.gov/cedsci/table?tid=PEPPPOP2021.NST_EST2021_POP&hidePreview=false) [<https://perma.cc/PZ97-RP3A>] (last visited Apr. 22, 2022) (showing the five lowest-population states to be Wyoming, Vermont, Alaska, North Dakota, and South Dakota); *2020 Electoral College Results*, NAT'L ARCHIVES, <https://www.archives.gov/electoral-college/2020> [<https://perma.cc/2ECT-YPLF>] (last visited Apr. 22, 2022) (showing that Wyoming, Alaska, North Dakota, and South Dakota voted for the Republican presidential candidate); *Senators*, U.S. SENATE, <https://www.senate.gov/senators/> [<https://perma.cc/JHE7-YPQ2>] (last visited Apr. 22, 2022) (showing that Wyoming, Alaska, North Dakota, and South Dakota each have two Republican senators); *Directory of Representatives*, U.S. HOUSE OF REPRESENTATIVES, <https://www.house.gov/representatives> [<https://perma.cc/RS72-57D3>] (last visited Apr. 22, 2022) (showing that Wyoming, Alaska, North Dakota, and South Dakota each have one Republican representative). But statehood for D.C. is far from an answer to broader structural problems.

259. Heather K. Gerken, *The Supreme Court 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 11–12 (2010) (footnote omitted); *see also* Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1864 (2019) (“Empowering minorities to rule is part and parcel of American democracy.”).

Although many accounts of American federalism likewise champion the idea of minority rule,<sup>261</sup> the state system does not empower racial, ethnic, or religious minorities. To the contrary, for these minorities, federalism has more frequently been a source of oppression—hence William Riker’s aphorism that if “one disapproves of racism, one should disapprove of federalism.”<sup>262</sup> In addition to the federalism conjured by “states’ rights,” the history of new-state admission has been closely bound up in white supremacy, with members of Congress seeking to limit the power of people of color in particular states and in the federal government.<sup>263</sup>

Even if we could consign white supremacist federalism to history, the fifty states would remain a poor vehicle for empowering people of color in the United States. Racial and ethnic groups that constitute minorities of the national population also constitute minorities of the states in which they reside. No state, for instance, has a majority Black population.<sup>264</sup> And the political power of Black voters to achieve desired policy outcomes appears to be still less than their numbers in any given jurisdiction would suggest.<sup>265</sup> State-level governance thus “relentlessly reproduces the same inequalities in governance that racial minorities experience elsewhere.”<sup>266</sup>

Scholars who promote government structure as a means of racial empowerment—a guarantee of decisionmaking power rather than mere voice—have accordingly looked beyond the states to focus on sub-state institutions. In Gerken’s terminology, racial minorities depend on “federalism-all-the-way-down”: local institutions can foster minority rule where states cannot.<sup>267</sup> Thus, cities may allow groups that function as racial minorities at the state or national level to govern locally.<sup>268</sup> Electoral districts may empower racial

260. See AREND LIJPHART, *DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION* 42–44 (1977) (exploring federalism as a consociational method); Daryl J. Levinson, *The Supreme Court 2015 Term—Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 102 (2016) (footnote omitted) (“[F]ederalism allows groups to *exit* the policymaking domain of the national state and govern themselves independently. Groups that are minorities at the national level and that are vulnerable to oppression by majorities can escape to their own jurisdiction, taking control over the policies that will prevail.”).

261. See Gerken, *supra* note 259, at 12 n.10 (“Most theories of federalism explicitly or implicitly depend on minority rule. For instance, states are unlikely to constitute laboratories of democracy or facilitate Tieboutian sorting if the same types of people are making decisions at the state and national levels. Similarly, ambition is unlikely to counter ambition if state and national actors are united in their ambitions.”).

262. WILLIAM H. RIKER, *FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE* 155 (Sheldon S. Wolin ed., 1964).

263. This was true from eighteenth- and nineteenth-century debates about statehood to the most recent admissions of Alaska and Hawaii. See FRYMER, *supra* note 54; see also *supra* note 254 and accompanying text.

264. The Black population ranges from less than 1% in Idaho and Montana to more than 30% in Mississippi, Louisiana, and Georgia. See *Population Distribution by Race/Ethnicity*, KAISER FAM. FOUND., <https://www.kff.org/other/state-indicator/distribution-by-raceethnicity/> [<https://perma.cc/HD5Y-FESS>] (last visited Apr. 22, 2022). There is also no state with a majority-Hispanic/Latino population (though New Mexico is quite close at 49.5%) or with a majority-Asian population (though Hawaii is the closest at almost 40%). *Id.* See generally Gerken, *supra* note 259, at 51–52 (“[R]acial minorities are not the sort of minorities that typically rule at the state level.”).

265. See, e.g., Nicholas O. Stephanopoulos, *Political Powerlessness*, 90 N.Y.U. L. REV. 1527, 1527, 1542, 1545 (2015).

266. Gerken, *supra* note 259, at 51.



minorities to elect their candidates of choice.<sup>269</sup> School boards and juries may enable racial minorities to make decisions that bind the broader community.<sup>270</sup>

The limits of federalism all the way down as a strategy for minority rule, however, inhere in sub-state institutions' lack of constitutional powers and protections guaranteed to the states.<sup>271</sup> It is true that invocations of state sovereignty may overstate the degree to which states are independent governments, and non-sovereign entities can at least sometimes get their way without legal insulation.<sup>272</sup> But as the exhortation to extend "federalism" all the way down itself underscores, statehood furnishes unique legal and political authority.

Statehood for D.C. offers an opportunity to realize minority rule as an aspect of American federalism. Douglass Commonwealth would have the largest percentage of Black Americans of any U.S. state.<sup>273</sup> Although the Black population has dipped below an outright majority in recent years, Black D.C. residents make up a substantial plurality at 46%, and the District is majority-minority.<sup>274</sup> D.C. would be a state in which Black Americans could govern and set policy, one in which they were empowered "not just to participate, but to rule."<sup>275</sup> Indeed, D.C. would be among the most racially diverse states in the country, with substantial Black, white, and Latino populations, as well as a small, but significant, Asian population.<sup>276</sup> The multiracial composition of D.C. would allow for the emergence of state-level legislative and policy innovations responsive to the needs of a racially diverse, urban constituency. It would also provide opportunities for intra-racial diversity to emerge insofar as there would be no felt need to unite against racially polarized opposition.<sup>277</sup>

267. *Id.* at 47 (noting that "[local] institutions are small enough to benefit two groups that are generally too small to control at the state level: racial minorities and dissenters" and that "[f]ederalism reimagined thus reveals that the benefits of minority control can extend not just to Southern racists, but to blacks and Latinos").

268. *Cf.* *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 528 (1989) (Marshall, J., dissenting) ("It is a welcome symbol of racial progress when the former capital of the Confederacy acts forthrightly to confront the effects of racial discrimination in its midst.").

269. *See, e.g.*, 42 U.S.C. §§ 1973, 1973c; *Thornburg v. Gingles*, 478 U.S. 30, 74–77 (1986); Pamela S. Karlan, *Our Separatism? Voting Rights as an American Nationalities Policy*, 1995 U. CHI. LEGAL F. 83, 88. *See generally* LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* (1994) (providing alternatives to winner-take-all districting to empower racial and political minorities).

270. Gerken, *supra* note 259, at 23–26.

271. *See infra* Section IV.C.

272. *See* Gerken, *supra* note 259, at 12–13.

273. *Population Distribution by Race/Ethnicity*, *supra* note 264.

274. *QuickFacts: District of Columbia*, U.S. CENSUS BUREAU (July 1, 2021), <https://www.census.gov/quickfacts/DC> [<https://perma.cc/2HSS-MMQE>]. The white non-Hispanic population is 37.5%; the Hispanic/Latino population is 11.3%; and the Asian population is 4.5%. *Id.*

275. Gerken, *supra* note 259, at 56; *cf.* Blackhawk, *supra* note 259 (arguing for the importance of structure over rights as an empowerment strategy for Native Nations).

276. *See generally* Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099 (2005) (describing democratic benefits of majority- but not exclusively-minority institutions).

277. *Cf.* Michael S. Kang, *Race and Democratic Contestation*, 117 YALE L.J. 734, 781 (2008) ("Within a majority-minority district, minority members who once banded together defensively against the white majority are liberated to explore intragroup differences and disagreements. . . . Once a majority-minority district obviates the

D.C. statehood thus presents the possibility of realizing the aspirations of Black Washingtonians who endeavored in the face of nineteenth-century racism to construct a democratic space through educational, faith, and civic associations; newspapers; and cultural institutions.<sup>278</sup> More than a century after Reconstruction held out the fleeting promise of majority Black state governments, D.C. statehood could resurrect multiracial federalism for the twenty-first century.

### C. LOCALISM AND THE CITY-STATE

If the argument that D.C. is “too black” for statehood is today only uttered through dog whistles, the argument that it is “too urban”—a point bound up in its racial composition and partisan identity—is recited aloud.<sup>279</sup> D.C. would be the only American state that is also a city. Although opponents sometimes suggest a city cannot be a state, there is no such legal or structural prohibition, and federalism’s most celebrated values might be best realized through a city-state.

The normative values associated with federalism are often values of subsidiarity, promoted better by local governments. From participation, to experimentation, to diversity, to competition for a mobile citizenry, these ends may be better realized by cities and towns than by states.<sup>280</sup> Cities, in particular, may also be sites of “public freedom” and civic solidarity.<sup>281</sup>

Federalism doctrine does not furnish protection for cities, however. To the contrary, it treats local governments as creatures of their states. “[T]he American legal system has chosen to create cities that are powerless to act on their own

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need to cohere against racially polarized opposition, minority citizens can consider more nuanced differences among them than would have otherwise been advisable.”).

278. See Rona M. Frederick & Jenice L. View, *Facing the Rising Sun: A History of Black Educators in Washington, DC, 1800-2008*, 44 URB. EDUC. 571, 575–76 (2009) (describing Black educational and cultural institutions in the antebellum and Reconstruction period in D.C.); *supra* note 170 (noting varied civic and educational institutions developed by Black Washingtonians in the Reconstruction era).

279. 124 CONG. REC. 26345 (1978) (statement of Sen. Edward Kennedy); see, e.g., Stracqualursi & Robertson, *supra* note 246 (quoting Sen. Tom Cotton).

280. Richard Briffault, “What About the ‘Ism’?” *Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1312–16 (1994) (“[I]t would seem that the characteristics of the states and of federalism that promote these values are even more pronounced at the local level.”); Richard Briffault, Essay, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 2018–19 (2018) [hereinafter Briffault, *New Preemption*] (“The Court’s normative concerns with responsiveness to diverse needs in a heterogeneous society, innovation and experimentation, and citizen involvement in democratic processes apply even more to local governments than to states.”); see also, e.g., Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1233 (2018) (“City power is necessary to vindicate the values of diversity, majority rule, and local self-government.”); David J. Barron, *The Promise of Cooley’s City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 489–90 (1999) (building a theory of “local constitutionalism”).

281. See GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 60 (1999) (noting that cities “offer the possibility of dealing with the problematic nature of group power by reinvigorating the idea of ‘the public’”); IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 237 (1990) (“By ‘city life’ I mean a form of social relations which I define as the being together of strangers. In the city persons and groups interact within spaces and institutions they all experience themselves as belonging to, but without those interactions dissolving into unity or commonness.”).

initiative,” writes Professor Jerry Frug.<sup>282</sup> “A city is the only collective body in America that cannot do something simply because it decides to do it.”<sup>283</sup>

Beyond such legally constructed city powerlessness, states have not hesitated to more actively override and incapacitate their urban centers.<sup>284</sup> State officials have frequently hindered local self-government precisely because of the “responsiveness of local governments to citizen engagement, their attentiveness to distinctly local preferences and concerns, and their policy innovations intended to address local problems.”<sup>285</sup> Although the United States is an urban nation—all but a handful of states have a majority urban population, and most have a supermajority urban population<sup>286</sup>—electoral districting (both as it reflects the residential patterns of metropolitan and rural areas themselves<sup>287</sup> and as it is exacerbated by gerrymandering<sup>288</sup>) gives outsized influence to rural areas in state legislatures.<sup>289</sup>

The resulting state legislative “attack” on cities<sup>290</sup> has been most visible with respect to preemption. On specific policy issues ranging from environmental protection,<sup>291</sup> to workplace regulation,<sup>292</sup> to transgender rights,<sup>293</sup> to immigration,<sup>294</sup>

282. FRUG, *supra* note 281, at 5.

283. *Id.*

284. See Schragger, *supra* note 280, at 1164–65 (describing state preemption of local health, labor, and civil rights laws); Paul A. Diller, *Reorienting Home Rule: Part 1—The Urban Disadvantage in National and State Lawmaking*, 77 LA. L. REV. 287, 291 (2016) (showing how partisan gerrymandering, redistricting, and other factors systemically operate to disadvantage urban areas in federal and state lawmaking).

285. Briffault, *New Preemption*, *supra* note 280, at 2019.

286. Adriana Lopez, *The Most Urbanized States*, PORCH (Mar. 30, 2021), <https://porch.com/advice/most-urbanized-states> [<https://perma.cc/MWZ9-QE6B>]; *Urban Percentage of the Population for States, Historical*, IOWA ST. UNIV.: IOWA CMTY. INDICATORS PROGRAM, <https://www.icip.iastate.edu/tables/population/urban-pct-states> [<https://perma.cc/9TF5-J96G>] (last visited Apr. 25, 2022).

287. See, e.g., Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 Q.J. POL. SCI. 239, 239 (2013).

288. See Diller, *supra* note 284 (showing that since 2000 “Republican state legislatures have exacerbated the urban disadvantage by intentionally gerrymandering U.S. House and state legislative districts to favor the political preferences of exurban and rural areas.”).

289. See Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1761 (2021).

290. Schragger, *supra* note 280, at 1232.

291. See, e.g., OKLA. STAT. tit. 52, § 137.1 (2021) (prohibiting local governments from enacting fracking bans); Hannah J. Wiseman, *Disaggregating Preemption in Energy Law*, 40 HARV. ENV’T L. REV. 293, 295–96 (2016).

292. See, e.g., MICH. COMP. LAWS §§ 123.1381–.1396 (2021) (prohibiting local governments from regulating paid sick days, wages, scheduling, and hours or benefits disputes); FLA. STAT. § 218.077(2) (2021) (prohibiting local governments from establishing a minimum wage different than the state or federal minimum wage); MISS. CODE ANN. § 17-1-51(1) (2021) (prohibiting local governments from requiring mandatory minimum sick days for employees); Olatunde C. A. Johnson, *The Future of Labor Localism in an Age of Preemption*, 74 INDUS. & LAB. RELS. REV. 1179, 1179 (2021) (explaining the rise of state preemption of local minimum wage, sick leave, and employment discrimination innovations).

293. See, e.g., H.B. 2, 2016 Gen. Assemb., 2d Extra Sess. (N.C. 2016) (preempting Charlotte, N.C., Ordinance 7056-X (Feb. 22, 2016), which allows individuals to use the bathroom that corresponds to their gender identity), *repealed in part and amended in part* by H.B. 142, 2017 Gen. Assemb., Reg. Sess. (N.C. 2017)).

294. See, e.g., S.B. 4, 85th Leg., Reg. Sess. (Tex. 2017) (barring local officials from adopting any ordinance, rule, or practice that limits the enforcement of federal immigration law); Pratheepan

and more,<sup>295</sup> state governments have overridden cities' attempts to set locally responsive policy.<sup>296</sup> This preemption has grown more sweeping and vitriolic in recent years. In contrast to traditional analysis focused on conflicts between state and local law, "the new" or "hyper" preemption "clearly, intentionally, extensively, and at times punitively bar[s] local efforts to address a host of local problems."<sup>297</sup> It is aimed less at avoiding or mitigating conflict than at preventing local regulation outright. Some preemptive laws not only invalidate local rules but also impose penalties on local officials for adopting such rules.<sup>298</sup> Others seek to foreclose altogether the mere prospect of local regulation.<sup>299</sup> And time and again, these preemptive measures target cities specifically.<sup>300</sup>

Beyond preemption, state legislatures also hinder city attempts at self-government in other ways, both deliberate and incidental. For example, states have restricted local governments' revenue-raising capacities while also shifting fiscal responsibilities onto them.<sup>301</sup>

Although many commentators seek to harness federalism to respond to intra-state preemption and anti-urban regulation, federalism doctrine as such furnishes no protection to sub-state entities. Other challenges to anti-local regulation may yet prove successful,<sup>302</sup> but federalism's empowerment of states remains far more

Gulasekaram, Rick Su & Rose Cuisson Villazor, Essay, *Anti-Sanctuary and Immigration Localism*, 119 COLUM. L. REV. 837, 848 (2019).

295. See, e.g., Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L. J. 954, 964–68 (2019) (collecting state preemption measures across a "range of policy areas").

296. See, e.g., Lori Riverstone-Newell, *The Rise of State Preemption Laws in Response to Local Policy Innovation*, 47 PUBLIUS 403, 403 (2017); Richard C. Schragger, *Federalism, Metropolitanism, and the Problem of States*, 105 VA. L. REV. 1537, 1571 (2019) ("The new state law preemption is not indifferent to the site of local regulation; it is aggressively anti-city.").

297. Briffault, *New Preemption*, *supra* note 280, at 1997; see Erin Adele Scharff, *Hyper Preemption: A Reordering of the State-Local Relationship?*, 106 GEO. L.J. 1469, 1473 (2018) ("'[H]yper preemption,' seeks not just to curtail local government policy authority over a specific subject, but to broadly discourage local governments from exercising policy authority in the first place.").

298. See Briffault, *New Preemption*, *supra* note 280, at 2002–07; Schragger, *supra* note 280, at 1181–83.

299. See Briffault, *New Preemption*, *supra* note 280, at 2007–08; cf. Joshua S. Sellers & Erin A. Scharff, *Preempting Politics: State Power and Local Democracy*, 72 STAN. L. REV. 1361, 1361 (2020) (analyzing state displacement of local "structural authority" to design institutions).

300. Indeed, while the partisan account of red states preempting blue cities has much explanatory force, blue states also preempt their urban centers, albeit to a lesser degree. See, e.g., Jesse McKinley, *Cuomo Blocks New York City Plastic Bag Law*, N.Y. TIMES (Feb. 14, 2017), <https://www.nytimes.com/2017/02/14/nyregion/cuomo-blocks-new-york-city-plastic-bag-law.html>.

301. See Schragger, *supra* note 296, at 1572 ("[R]evenue restrictions are part of a nationwide anti-regulatory agenda that seems to target cities, even as those cities seek to raise and spend locally sourced tax dollars."); *id.* at 1577 (describing "unfunded mandates coupled with reduced state aid"); see also GERALD E. FRUG & DAVID J. BARRON, *CITY BOUND: HOW STATES STIFLE URBAN INNOVATION* 80–82 (2008) (discussing cities with restricted capacity to raise revenue); Yunji Kim & Mildred E. Warner, *Shrinking Local Autonomy: Corporate Coalitions and the Subnational State*, 11 CAMBRIDGE J. REGIONS, ECON. & SOC'Y 427, 427–28 (2018) (analyzing "state rescaling," in which the "subnational state uses the federalist structure to dump fiscal responsibilities to lower levels").

302. See, e.g., Johnson, *supra* note 292, at 1193–96 (analyzing equal protection constraints); see also Briffault, *New Preemption*, *supra* note 280, at 2022 (proposing an approach to preemption focused on "whether a state law unduly impinges on the local capacity for self-governance"); cf. Rick Su, *Intrastate Federalism*, 19 U. PA. J. CONST. L. 191, 244–46 (2016) (discussing federal preemption of state preemption of local regulation).

likely to limit city power.<sup>303</sup> In the extant fifty states, federalism and localism are set up to clash, and the state is set up to win.<sup>304</sup>

As with minority rule, Douglass Commonwealth could offer a necessarily discrete but powerful corrective and counterexample. An entirely urban jurisdiction, D.C. would be the United States' first city-state.<sup>305</sup> Privileging urban over rural, D.C. would thus uniquely yoke federalism to localism, state power to city power.

As a practical matter, this would mean that state-local preemption and anti-urban regulation had no purchase in D.C. There would be no rural or suburban interests to override city governance. The precise correspondence of city and state would immediately dissolve pervasive problems of malapportionment and thorny questions of home rule. Risks of local decisionmaking that have been cited in the preemption context—in particular, parochialism, exclusion, and spillover effects—would not be obviated by a city-state amalgam.<sup>306</sup> D.C. would continue to be embedded in a broader metropolitan region, and line-drawing questions about where authority should reside and how competing interests should be accommodated would continue to arise. But these jurisdictional conflicts are inescapable in a federal system, and a D.C. city-state could enrich existing experiments in the mid-Atlantic area with regional cooperation.<sup>307</sup> As a practical matter, merging city with state would reduce jurisdictional conflict while eliminating forms of state-city domination.

As a more theoretical matter, D.C. statehood could also reduce the distance between American federalism and subsidiarity, and better instantiate federalism's values. Insofar as local governments may already be better than states at fostering participation, experimentation, and responsiveness to diverse needs but lack legal power to further these ends in the face of state resistance, D.C. would be uniquely

303. See Briffault, *New Preemption*, *supra* note 280, at 2008 (“Existing legal doctrines provide local governments with few protections against state preemption. Federal constitutional law treats state-local relations as almost entirely a matter for the states.”).

304. See Schragger, *supra* note 280, at 1232 (“Anti-urbanism is . . . deeply embedded in the structure of American federalism. . .”).

305. Cf. Chrystie Floumoy Swiney & Sheila Foster, *Cities Are Rising in Influence and Power on the Global Stage*, BLOOMBERG CITYLAB (Apr. 15, 2019, 10:34 AM), <https://www.bloomberg.com/news/articles/2019-04-15/denied-by-united-nations-cities-make-global-pacts> [<https://perma.cc/8PHZ-E2EK>] (“Cities are more involved in international policy-making, more savvy at navigating the international halls of power, more ambitious about voicing their opinions at the global level, and more influential in shaping global initiatives than perhaps at any time since Italy’s city-states dominated during the Renaissance.”).

306. See, e.g., Davidson, *supra* note 295, at 976–77 (citing as the flip side of localism’s positive values the risks of “lack of democratic engagement at the local level,” “exclusion,” “externalities and spillover effects,” and “a particularly toxic vein of local parochialism that hardens a range of socioeconomic and racial inequalities”).

307. See WILLOW LUNG-AMAM, AN EQUITABLE FUTURE FOR THE WASHINGTON, DC REGION?: A “REGIONALISM LIGHT” APPROACH TO BUILDING INCLUSIVE NEIGHBORHOODS 5–6 (2017), [www.jchs.harvard.edu/sites/default/files/a\\_shared\\_future\\_equitable\\_future\\_washington\\_dc.pdf](http://www.jchs.harvard.edu/sites/default/files/a_shared_future_equitable_future_washington_dc.pdf) [<https://perma.cc/D3KA-UEFP>] (describing efforts of regional cooperation in the Washington metropolitan area to produce more affordable housing). Stronger regional planning might help diminish inequality, and advance inclusive economic growth and the delivery of government services. Cf. Yonah Freemark, Justin Steil & Kathleen Thelen, *Varieties of Urbanism: A Comparative View of Inequality and the Dual Dimensions of Metropolitan Fragmentation*, 48 J. POL. & SOC’Y 235, 240, 255 (2020) (detailing how metropolitan fragmentation contributes to inequality and describing features of strong regional planning and governance approaches).



positioned to do so. As a city-state, it could be the sort of laboratory of democracy American federalism discourse celebrates but rarely realizes.<sup>308</sup>

#### CONCLUSION

“Statehood for the District of Columbia is not a racial issue. It is not a civil rights issue. It is a constitutional issue that goes to the very foundation of our federal union,”<sup>309</sup> declares the 1987 Office of Legal Policy (OLP) report that remains a touchstone for statehood opponents. To the contrary, as we have argued, D.C. statehood can only be understood as a racial issue, a civil rights issue, and a constitutional issue—one because it is another. The Constitution makes state citizenship a constitutive component of national citizenship and requires that all American citizens living in the United States also be able to claim state citizenship where they reside. Equal citizenship is federated citizenship.

“A change in the status of the District of Columbia,” the OLP report continues, “would signal a substantial change in our form of federalism.”<sup>310</sup> In certain respects, this is true. As a plurality Black city-state, D.C. would be different from the existing fifty states in ways that could uniquely further federalism’s values of minority rule, subsidiarity, and democratic experimentation. But insofar as the OLP report implies that the admission of D.C. as a state would be an act discontinuous with the development of American federalism, the argument has it backwards. The report is symptomatic of a broader constitutional sclerosis. For most of American history, states were admitted with regularity.<sup>311</sup> The expansion and renewal of the Union within an established federalism framework was part of the constitutional design: the document specified powers and responsibilities of states and the federal government as a matter of fundamental law but left it to Congress, through ordinary politics, to shape the contours of the nation.<sup>312</sup> As a result, the history of the United States can largely be told through the history of state admission. From the status of Black Americans, Asian-Americans, and Native Nations; to sectional divisions; to religious freedom; to women’s suffrage; and more, debates about national character and American democracy have also been debates about admitting new states.

Today, there is a chance to write a new chapter. Admitting D.C. as a state would, most importantly, fulfill Congress’s as yet unrealized constitutional obligation to effectuate the equal citizenship guarantee of the Fourteenth Amendment within the framework of American federalism. More than two hundred years after the Founding, it would also confirm that the United States remains a work in progress, a nation still capable of renewing its commitment to becoming a “more perfect Union.”<sup>313</sup>

308. *See, e.g.*, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

309. OFF. OF LEGAL POL’Y, DOJ, *supra* note 92, at 50.

310. *Id.* (“The issue should be dealt with on that level, and not on the level of racial politics.”).

311. Until the period between Arizona’s admission in 1912 and Hawaii’s admission in 1959, the longest the nation had gone between admitting states was fifteen years (Missouri in 1821 to Arkansas in 1836). We are currently inhabiting the longest period with no new state. *See generally* THE UNITING STATES, *supra* note 64 (describing each state’s journey to statehood).

312. *See supra* notes 47–48 and accompanying text.

313. U.S. CONST. pmb1.