

Constitutionally Compromised Democracy: The United States District Clause, Its Historical Significance, and Modern Repercussions

by BRADLEY RABOIN*

Introduction

On September 17, 1787, the United States Constitution was submitted for approval to the Congress of the Confederation and, subsequently, for ratification by the American States.¹ This constitution was a political phenomenon: For the first time in history, an entire nation would be given the power—through popular ratification—to decide what form of government would rule over them.² At its core, the constitution was a hybrid instrument, both affirming fundamental positivist laws and serving as a practical framework—an instruction manual framing government branches, establishing checks and balances, and listing the specific enumerated powers of a new federal government that would unite the American States into a single, cohesive nation.³

Yet, the Constitution remained uncharacteristically ambiguous regarding where this new federal government would reside.⁴ The uncertainty arose from Article I, section 8, clause 17, referring to powers reserved to the federal government's legislative branch:

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1. See AKHIL REED AMAR, *AMERICA'S CONSTITUTION* 3 (2005).

2. *Id.* at 7–8.

3. Suzanna Sherry, *The Founder's Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1147, 1154 (1987).

4. See generally Allan Erbsen, *Constitutional Spaces*, 95 MINN. L. REV. 1168, 1208–10 (2011); Frank Sprigg Perry, *The State of Columbia*, 9 GEO. L.J. 13, 13 (1921).

[The Congress shall have the power] [t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings . . .⁵

Commonly referred to as the District Clause, it clearly authorized the creation of a limited territory as the physical residence of the federal government.⁶ However, the clause also explicitly restricted the federal territory in size, very specifically decreeing the area be “not exceeding ten Miles square.”⁷ This innocuous limitation remains a mysterious and wholly underappreciated aspect of the U.S. Constitution.

Indeed, Part I of this Article contends that the District Clause’s ten miles square limit was neither absurd nor arbitrary, instead representing one of the most important compromises in American constitutional history. The District Clause was the consequence of a gamble between the two predominate political ideologies of the time—Federalists and Anti-Federalists.⁸ While Federalists supported a Constitution creating a strong and centralized national government, their Anti-Federalist counterparts advocated state sovereignty and accordingly wanted the Constitution to limit the emerging federal bureaucracy.⁹ The result of these conflicting visions for postrevolution America poignantly manifested within the District Clause; ultimately, Federalists and Anti-Federalists alike believed the clause would serve their ultimate constitutional goals.¹⁰

Federalists, hoping the district would be the backbone of a large and powerful national government, approved the clause because of its potentially massive size allowance and the express grant of exclusive federal

5. U.S. CONST. art. I, § 8, cl. 17.

6. U.S. CONST. art. I, § 8, cl. 17.

7. U.S. CONST. art. I, § 8, cl. 17.

8. “Federalist” and “Anti-Federalist,” despite their somewhat ambiguous historical meaning, refer here to the two clearly divergent lines of thought—those supporting an expansive federal government and those supporting state sovereignty—during the constitutional convention and ratification debates. See, e.g., DAVID WOOTTON, *THE ESSENTIAL FEDERALIST AND ANTI-FEDERALIST PAPERS* 43 (2003).

9. Akhil Reed Amar, *Anti-Federalists, the Federalist Papers, and the Big Argument for Union*, 16 HARV. J.L. & PUB. POL’Y 111, 111 (1993); SAUL CORNELL, *THE OTHER FOUNDERS* 11 (1999).

10. See *infra* Part I(B).

jurisdiction within the seat of government.¹¹ Anti-Federalists, intending to use the district as a constitutional barrier against unfettered federal expansion, also approved the clause because they felt it was inherently subject to a series of safeguards serving to check the powers of that national government.¹²

Ultimately, however, it quickly became clear that Anti-Federalists were on the losing end of this constitutional gamble. Part II discusses this failure by reviewing the historical creation of the federal district as a pillar on which a massive federal territory—and with it an increasingly powerful federal government—firmly rested.¹³

Yet, the most dramatic consequence of the District Clause compromise is also one of the great constitutional contradictions in modern democratic history and evidences a failure of both Federalist and Anti-Federalist ideology. Part III investigates this persisting problem—namely, that due to the language of the clause and subsequent judicial interpretation, residents living in the American capital have no representation in the federal government that shares their physical home.¹⁴ Incredibly, the very district created to house a government “for the people, of the people, and by the people,” does not even allow the people residing therein to partake in that government.¹⁵ As calls for statehood in the district persist, the time has come for a reevaluation of how this disenfranchisement occurred, and how it can be addressed.¹⁶

I. Constitutional Compromises: The District Clause

A. The Constitutional Seat of Government

Under the Articles of Confederation—the first attempt to unite the independent and sovereign American States under a national government—

11. See *infra* notes 26–47 and accompanying text.

12. See *infra* notes 48–61 and accompanying text.

13. See *infra* Part II.

14. Peter Raven-Hansen, *Congressional Representation for the District of Columbia: A Constitutional Analysis*, 12 HARV. J. ON LEGIS. 167, 167 (1974-75); Perry, *supra* note 4, at 13; EUGENE BOYD, CONG. RESEARCH SERV., RL33830 DISTRICT OF COLUMBIA VOTING REPRESENTATION IN CONGRESS: AN ANALYSIS OF LEGISLATIVE PROPOSALS; James Raskin, *Democratic Capital: A Voting Rights Surge in Washington Could Strengthen the Constitution for Everyone*, 23 WM. & MARY BILL RTS. J. 47, 47–48 (2014).

15. President Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863). Though not a founding father, President Lincoln’s famous understanding of American democracy would certainly have resonated with those Founders.

16. See *infra* Part III (discussing the ongoing arguments for district statehood and how representation in the Federal capital may be best addressed).

the Congress of the Confederation was constantly on the move.¹⁷ In the eight years of its existence, this national legislative body convened in Philadelphia, Princeton, Annapolis, Trenton, and New York City.¹⁸ Although discussions regarding a permanent location were raised in 1783—and Congress actually approved of a plan for two capitals, one located on the Potomac and another on the Delaware River—the states refused this arrangement.¹⁹

When representatives were invited to Philadelphia in 1787 to rework the Articles of Confederation, it was hardly surprising that the convention included consideration of a seat of government—an issue at the center of political consideration since the Revolutionary War.²⁰ Following victory over Great Britain, it was generally agreed that if a unified American nation was to emerge, a new national government—complete with a permanent residence—was needed.²¹

Yet, while the constitutional convention—at which the actual document was debated and authored—was ripe with intense bickering, there is little evidence of prolonged debate over the seat of government.²² In fact, James Madison would later recall that the convention agreed to the District Clause “nem: con: [or, of one mind, and without dissent].”²³ Seemingly counterintuitive that such an important, divisive aspect of the Constitution would garner so little discussion, this fact only further evidences the bipartisan confidence of Federalists and Anti-Federalists alike that the clause would serve their ultimate vision of the future federal government. At the core of each party’s confidence in the District Clause was the ten miles square limitation.²⁴

17. Mark S. Scarberry, *Historical Considerations and Congressional Representation for the District of Columbia: Constitutionality of the D.C. House Voting Rights Bill in Light of Section Two of the Fourteenth Amendment and the History of the Creation of the District*, 60 AL. L. REV., 783, 866–70 (2009).

18. *Id.*

19. *Id.* at 873.

20. *Id.* at 869.

21. AMAR, *supra* note 1, at 111–12 (The District Clause determined the permanent seat of government, unlike in Britain, where the King could require the national legislature to convene when and where he wished.).

22. JOSEPH B. VARNUM, JR., *THE SEAT OF GOVERNMENT OF THE UNITED STATES* 4 (2 ed. 1854); MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 170 (1913); KENNETH R. BOWLING, *THE CREATION OF WASHINGTON, D.C.: THE IDEA AND LOCATION OF THE AMERICAN CAPITAL* 76 (1991).

23. JAMES MADISON, *DEBATES IN THE FEDERAL CONVENTION OF 1787* 512–13 (2007) [hereinafter *DEBATES*].

24. *See infra* Part I(C).

B. Ideologies Underlying the Compromise: Federalists and Anti-Federalists

The task of creating this new government—and the Constitution that would embody the nascent nation—fell to the leaders of America’s revolutionary resistance. Now standing at the forefront as representatives of their respective states, these “founding fathers” fell into two political factions defined by their divergent approach to both the role of the federal government and the purpose of the emerging Constitution—the Federalists and the Anti-Federalists.²⁵

Federalists supported a strong, centralized U.S. government with a permanent seat to consolidate and preserve its stability and power, expressly provided for in the Constitution.²⁶ History, Federalists argued, clearly evidenced the need for a constitutional guarantee of a permanent federal district.²⁷ Under the Articles of Confederation, Congress typically met in Philadelphia.²⁸ However, Philadelphia was not the official seat of government and Congress had no actual jurisdiction or military presence within the city.²⁹ As a result, Pennsylvania was expected to provide protection to this national government body.³⁰ A sensible arrangement in theory, it would prove an utter failure in reality.

In July 1783, several hundred Continental Army soldiers stationed around Philadelphia sent a message to Congress demanding payment for their service during the Revolutionary War.³¹ Although the disgruntled soldiers had threatened action should their demands be ignored, Congress was in no financial position to accede to the requests for immediate recompense.³² The next day, another group of Continental soldiers vacated their posts in Lancaster and joined with the mob already forming at the Philadelphia city barracks.³³ Together, this group seized effective control over the city weapons and munitions depots.³⁴ When the band marched on Independence Hall, Congress called on the State governor to provide protection and repel the uprising.³⁵

25. CORNELL, *supra* note 9, at 1; BOWLING, *supra* note 22, at ix.

26. CORNELL, *supra* note 9, at 1; BOWLING, *supra* note 22, at ix.

27. See THE FEDERALIST NO. 43 at 288–290 (James Madison) (Philip B. Kurland & Ralph Learner eds., 1987).

28. Scarberry, *supra* note 17, at 870–71.

29. *Id.*

30. *Id.* at 871–72.

31. Jonathan Turley, *Too Clever by Half: The Unconstitutionality of Partial Representation of the District of Columbia in Congress*, 76 GEO. WASH. L. REV. 305, 310–12 (2008).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

However, the Pennsylvania Executive Council refused to provide any aid.³⁶ Consequently, Congress was forced to secretly evacuate Philadelphia, fleeing to Princeton in nearby New Jersey.³⁷

Memory of this incident—deemed the “Philadelphia Mutiny”—was invoked repeatedly by Federalists during the constitutional convention as justification for the District Clause.³⁸ They continued making this argument during subsequent ratification debates across the nation.³⁹ In Virginia, Federalists implored their fellow delegates not to forget that “disgraceful insult which Congress received some years ago,”⁴⁰ while in Massachusetts Federalists similarly reminded the assembly that the failure to provide a permanent seat of government had previously forced Congress to flee “because they were not protected by the authority of the state in which they were then sitting.”⁴¹ Ultimately, Federalists believed the events in Philadelphia provided sufficient impetus for their argument that the Constitution needed to expressly provide for a permanent seat of government where federal authorities would have complete jurisdiction to maintain and protect themselves.⁴²

Federalists also argued that the district needed to be large enough that it could function independent of any individual State.⁴³ Staunch Federalists like Madison were adamant that the district was to be a distinct territory, not subject to the laws and jurisdictional influences of the State from which it

36. Turley, *supra* note 31.

37. Turley, *supra* note 31.

38. Turley, *supra* note 31, at 311 (“[w]hen the framers gathered in Philadelphia in the summer of 1787 to draft a new constitution, the flight from that city five years before was still prominent in their minds”); Joseph Story, *Commentaries on the Constitution* 3 §§ 1212-22 (1873), in 3 THE FOUNDERS’ CONSTITUTION 236 (Doc. 22) (Philip B. Kurland & Ralph Lerner eds., 1987).

39. *Debate in North Carolina Ratifying Convention*, 30 July 1788, in 3 THE FOUNDERS’ CONSTITUTION 225 (Doc. 8) [hereinafter *NC Convention*] (“[d]o 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.”).

40. *Debate in Virginia Ratifying Convention*, 16 June 1788, in 3 THE FOUNDERS’ CONSTITUTION 222 (Doc. 6) [hereinafter *Virginia Convention*].

41. *Debate in Massachusetts Ratifying Convention*, 24 January 1788, in 3 THE FOUNDERS’ CONSTITUTION 219 (Doc. 4) [hereinafter *Massachusetts Convention*].

42. VARNUM, JR., *supra* note 22, at 7 (“it was probably owing to the recent disturbance [referring to Philadelphia], that the subject of a permanent Seat of Government was now taken up, and continued to be, at intervals, the subject of discussion up to the formation of the Constitution”); *Federal Farmer No. 18*, 25 January 1788, in 3 THE FOUNDERS’ CONSTITUTION 220 (Doc. 5) [hereinafter *Federal Farmer No. 18*] (“... and it is not improbable, that the sudden retreat of congress from Philadelphia, first gave rise to [the calls for an exclusive seat of federal government]”).

43. Perry, *supra* note 4, at 14; Scarberry, *supra* note 17, at 870–71.

would be geographically formed.⁴⁴ During the ratifying debates, he memorably opined:

The indispensable necessity of compleat authority at the seat of Government carries its own evidence with it . . . [w]ithout it, not only the public authority might be insulted and its proceedings be interrupted, with impunity; but a dependence of the members of the general Government, on the State comprehending the seat of 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.⁴⁵

By allowing for a large, independent district, Federalists hoped that the national government would remain insulated from such state interference and the district would become a haven where the federal bureaucracy could exercise its powers, confer amongst its branches, and address the international relations of the United States.⁴⁶ It was yet another lesson Federalists had taken to heart following the Continental Congress' temporary residence in Philadelphia, where the federal assembly was subject to the unending interference of local politicians seeking to influence and curry favor with federal authorities.⁴⁷

Anti-Federalists, meanwhile, were wary of a strong federal government that could threaten the sovereignty of the individual states and wanted the Constitution to effectively check the expansion of this new national entity.⁴⁸ They feared, above all else, the “centralization of power in the national

44. THE FEDERALIST NO. 43 at 219 (James Madison) (Philip B. Kurland & Ralph Lerner eds., 1987).

45. *Id.*

46. *Virginia Convention*, *supra* note 40, at 224 (“Congress shall exclusively legislate [in the seat of government], in order to preserve the police of the place and their own personal independence, that they may not be overawed or insulted, and of course to preserve them in opposition to any attempt by the state where it shall be.”). St. George Tucker, *Blackstone's Commentaries 276–78 (1803)*, in 3 THE FOUNDERS' CONSTITUTION 229 (Doc. 11) (“I agree with the author of the Federalist, that a complete authority at the seat of government was necessary to secure the public authority from insult, and it's proceedings from interruption.”).

47. Scarberry, *supra* note 17, at 870–71. In 1775 there were complaints of interference by Philadelphians and considerations of relocating. *Id.* Then, by 1777 “the Continental Congress and the Pennsylvania Assembly were at odds, with members of Congress continuing to resent attempts by Philadelphians to influence Congress [and] in 1778 and 1779, there were continuing jurisdictional disputes, and Philadelphia became ‘[t]he nearest equivalent in the United States to revolutionary Paris of the 1790’s.’” *Id.*

48. Cecelia M. Kenyon, *Men of Little Faith: The Anti-Federalists on the Nature of Representative Government*, 12 WM. & MARY Q. 3, 6 (1955).

government,”⁴⁹ and continued to advocate a revision of the Articles of Confederation.⁵⁰ Others conceded that while a new Constitution was needed, the spirit of State sovereignty should remain the cornerstone of the new political regime.⁵¹ Anti-Federalists fought vigorously—both in the constitutional convention and subsequent ratification—to promote a limited federal government whose powers remained constrained by strong, autonomous, and independent State governments.⁵²

Consequently, Anti-Federalists considered the seat of government wrought with danger—such an exclusive territory serving as the foundation from which the new federal government could build its power and influence, ultimately subsuming the individual states, and destroying their sovereignty.⁵³ They feared an excessively large federal government would inevitably degrade into a “consolidated republic that would deteriorate into monarchy or despotism.”⁵⁴ Ultimately, Anti-Federalists “did not want to exchange the government at London for the government at Philadelphia.”⁵⁵

Another Anti-Federalist concern was that the federal district would inevitably grow and, before long, consume a vast part of the nation.⁵⁶ This worry stemmed from the expectation that Congress would invariably grant special privileges and commercial advantages to district inhabitants.⁵⁷ These individuals would apparently be exempt from state laws, having all judicial matters heard by federal courts alone.⁵⁸ The potential insulation of the district population and its affairs from all State jurisdiction would, Anti-Federalists feared, result in the almost complete authority of the federal judiciary in many critical commercial areas.⁵⁹ Anti-Federalist “suspicion of centralized authority” and what they viewed as its inevitably antirepublican

49. Kenyon, *supra* note 48, at 6; Amar, *supra* note 9, at 111–12.

50. See RICHARD BEEMAN, *PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION* 402 (2009).

51. *Id.* at 402.

52. Kenyon, *supra* note 48, at 25–26.

53. *FEDERALISTS AND ANTIFEDERALISTS: THE DEBATE OVER THE RATIFICATION OF THE CONSTITUTION* 3–4 (John Kaminski & Richard Leffler eds., 1998) [hereinafter *THE DEBATE OVER THE RATIFICATION OF THE CONSTITUTION*]. Some Anti-Federalists even denied “a single America people existed.” CORNELL, *supra* note 9, at 63.

54. Scarberry, *supra* note 17, at 870–71.

55. Scarberry, *supra* note 17, at 870.

56. Scarberry, *supra* note 17, at 883.

57. See *Virginia Convention*, *supra* note 40, at 222 (“this district would be the favorite of the generality, and that it would be possible for them to give exclusive privileges of commerce to those residing within it . . .”).

58. *Federal Farmer No. 18*, *supra* note 42, at 220 (“[t]he inhabitants of the federal city and places, will be as much exempt from the laws and controul of the state governments, as the people of Canada or Nova Scotia . . .”).

59. *Federal Farmer No. 18*, *supra* note 42, at 220.

consequences, defined their approach to the District Clause and the Constitution generally.⁶⁰

C. Terms of the Compromise: “not exceeding ten Miles square”

Federalist and Anti-Federalist ideologies “defined the terms of the [constitutional] debate” and “became the sources that later generations would turn to when seeking to understand the meaning of the Constitution.”⁶¹ Yet, despite their diametrically opposed expectations for the new constitution, both approved of the District Clause with little debate.⁶² While Federalists were satisfied the clause would ensure a strong and powerful federal government, Anti-Federalists equally believed it would effectively limit that new, unified American regime.⁶³ The reason for their mutual confidence was the five-word limitation at the beginning of the clause: “not exceeding ten Miles square.”⁶⁴

While Anti-Federalists were wary of any centralized power, they were also politically realistic, recognizing that a postrevolution federal government, and seat to house it, was inevitable.⁶⁵ Nonetheless, they remained “united in their desire to put more checks on the new government” and viewed the District Clause as a perfect constitutional mechanism through which to accomplish this.⁶⁶ It was in this inhibitory spirit that Anti-Federalists viewed the District Clause, which they believed contained a series of powerful limitations inherently restricting the growth of the new federal government.⁶⁷

The first of these Anti-Federalist checks lay in the discretionary nature of the clause. Clearly, it authorized the establishment of an actual place where the federal government could operate.⁶⁸ However, the clause is

60. CORNELL, *supra* note 9, at 1; BOWLING, *supra* note 22, at 23.

61. CORNELL, *supra* note 9, at 19.

62. ESTABLISHING CONGRESS: THE REMOVAL TO WASHINGTON D.C., AND THE ELECTION OF 1800 40 (Kenneth R. Bowling & Donald R. Kennon eds., 2005) [hereinafter ESTABLISHING CONGRESS]; BOWLING, *supra* note 22, at 76.

63. CORNELL, *supra* note 9, at 1; BOWLING, *supra* note 22, at ix; Kenyon, *supra* note 48, at 6.

64. U.S. Const. art. I, § 8, cl. 17.

65. BEEMAN, *supra* note 50, at 402 (“[w]ith few exceptions, most of them [Anti-Federalists] had given up on an outright rejection of the Constitution”).

66. See Kenyon, *supra* note 48, at 25–26.

67. See generally CORNELL, *supra* note 9, at 1–2; BOWLING, *supra* note 22, at 23–24.

68. U.S. CONST. art. I, § 8, cl. 17; William Tindall, *Naming the Seat of Government of the United States: A Legislative Paradox*, 23 RECORDS OF THE COLUM. HIST. SOC’Y 10 (1920).

entirely elective—arguably, it doesn't even require the creation of a federal district at all.⁶⁹

Secondly, the clause was widely understood as creating only a maximum area, not a required size, for the new federal government seat.⁷⁰ Although the one hundred square mile allowance was massive by eighteenth century standards, it was a constitutional limit all the same, guaranteeing the district would remain limited to a fraction of the then-existing U.S. landmass.⁷¹ Further, Anti-Federalists believed that the potential size allowed under the clause was unthinkable; such a large area was totally unnecessary for the new, relatively small federal government and they probably never imagined the district would require this maximum allowance.⁷² Finally, the fact that the District Clause authorized, but did not require, this excessive size, allowed Anti-Federalists to argue against the clause on the basis that all one-hundred square miles would be realized, even if they didn't actually believe that was a likely reality.⁷³ Ultimately, this tactic was used by Anti-Federalists to argue against the District Clause generally; by presenting the dangers of an overbearing and oppressive federal government not as hypothetical, but rather “as sober predictions,” Anti-Federalists sought to capitalize on American's fresh, painful memories of British rule.⁷⁴

The third internal District Clause check was the requirement of State cessation of any territory constituting this seat of government.⁷⁵ Consequently, the district's size depended completely on the states.⁷⁶ This requirement was absolute; as Joseph Story observed, the federal government could acquire jurisdiction over State land only through affirmative, willful

69. U.S. CONST. art. I, § 8, cl. 17 (“such a district . . . as may, by cessation of particular States, and the acceptance of Congress, become the seat of the Government of the United States”); Erbsen, *supra* note 4, at 1209.

70. See, e.g., *Massachusetts Convention*, *supra* note 41, at 219 ([w]hen one member inquired “why [the seat of government] need be *ten miles square*, and whether one mile square would not be sufficient,” another replied “Congress was not to exercise jurisdiction over a district of ten miles, but one not *exceeding* ten miles square”).

71. The Congress of the Confederation, in 1787, had vastly increased the overall size of the United States via the Northwest Ordinance. See *Northwest Territory*, OHIO HISTORY CENTRAL (July 1, 2005), <http://www.ohiohistorycentral.org/entry.php?rec=772>.

72. BOWLING, *supra* note 22, at 81 (“[o]ne hundred square miles was an enormous area to an agrarian people who largest city, thirty-six mile Philadelphia, had a settled area of less than two square miles”).

73. *Id.*

74. CORNELL, *supra* note 9, at 121.

75. U.S. CONST. art. I, § 8, cl. 17 (“such District . . . as may, by *Cession of particular States*, and Acceptance of Congress, become the Seat of Government of the United States”).

76. See Evan Zoldan, *The Permanent Seat of Government: An Unintended Consequence of Heightened Scrutiny Under the Contract Clause*, 14 J. LEGIS. & PUB. POL'Y 163, 171 (2011) (“the United States had no right to take land that it wanted for its seat of government; rather, it was obligated to convince the states, through bargain or otherwise, to voluntarily cede this land”).

grant.⁷⁷ U.S. courts would confirm this understanding, establishing clear precedent that federal jurisdiction arises only when a State formally elects to voluntarily give land to the national government.⁷⁸ As the power and influence of individual states would be most affected by an increasingly powerful federal government, the Anti-Federalists felt reassured that the size of the district would remain regulated.⁷⁹

Fourthly, the Clause did not specify what kind of city would emerge in the district—leaving open the possibility that leading politicians would push for a small and agrarian capital.⁸⁰ Many of America’s most notorious “founding fathers” hailed from traditionally rural southern states and Anti-Federalists believed that these individuals—most prominently Virginians George Washington, James Madison, and Thomas Jefferson—would fight to ensure the creation of a similarly rural federal district.⁸¹

History supported this Anti-Federalist expectation. When the Continental Congress was located in Philadelphia, there was a strong sentiment that Congress needed to reside in a smaller, less commercial city.⁸² Connecticut’s Oliver Ellsworth “reported that it was generally agreed that Congress should remove to a place of less expense, less avocation, and less influence than are to be expected in a commercial and opulent city.”⁸³ Later, George Washington “implied, and may actually have expressed, a fear that Congress could not maintain secrecy and autonomy in a wealthy and socially active commercial colonial capital.”⁸⁴

When the Confederation Congress was replaced with the new, constitutionally mandated federal one, Anti-Federalists likely assumed such provincially biased sentiments would endure.

The final Anti-Federalist means of limiting federal power via the District Clause arose from concerns that the seat of government would be

77. Story, *supra* note 38, at § 1222 (“[b]ut if there has been no cession by the state of the place, although it has been constantly occupied and used, under purchase or otherwise, by the United States for a fort, arsenal, or other constitutional purpose, the state jurisdiction still remains complete and perfect”).

78. *People v. Godfrey*, 17 Johns. R. 225 (1819), in 3 THE FOUNDERS’ CONSTITUTION 235 (Doc. 17) (“the power of exclusive legislation under the 8th section of the first article of the constitution, which is jurisdiction, is united with cession of territory, which is to be the free act of the states”).

79. BOWLING, *supra* note 22, at ix, 23; CORNELL, *supra* note 9, at 63.

80. See *Federal Farmer No. 18*, *supra* note 42, at 220 (“[i]f a federal town be necessary for the residence of congress and the public officers, it ought to be a small one, and the government of it fixed on republican and common law principles, carefully enumerated and established by the constitution”).

81. Scarberry, *supra* note 17, at 866–70.

82. Scarberry, *supra* note 17, at 866–70.

83. Scarberry, *supra* note 17, at 870–71.

84. Scarberry, *supra* note 17, at 869.

uncontrollable if Congress was granted exclusive jurisdiction within that district.⁸⁵ Anti-Federalists feared the district, free from all state taxes, jurisdictions, and laws, would become a safe harbor for fugitives, debtors, and other malcontents seeking to escape the reach of the states.⁸⁶ Further, exclusive congressional jurisdiction could lead to the establishment of a large standing federal army within the district.⁸⁷ If allowed, the federal government would be free to use its exclusive power of lawmaking in the district to enact undemocratic and despotic laws,⁸⁸ potentially reestablishing a ruling federal aristocracy beyond state supervision.⁸⁹

Yet, the extent and legal impact of the District Clause grant of exclusive jurisdiction remained undefined and Anti-Federalists again placed their faith in the individual states.⁹⁰ Just as with the cessation requirement, Anti-Federalists believed state judiciaries, out of pure self-preservation, would undoubtedly limit the Constitution's exclusive grant of federal jurisdiction within the district.⁹¹ Massachusetts' delegate, Rufus King, exemplified this Anti-Federalist hope when he argued that constitutional ratification could not be done through state legislatures: "[States cannot be] expected to approve of a document which divested them of a considerable part of their power . . . the [State] Legislatures also being to lose the most power, will also certainly be most likely to raise objections."⁹²

Meanwhile, on the other side of "one of the greatest political struggles in American history,"⁹³ Federalists approved the District Clause because the

85. Some claimed that exclusive federal power "[departed] from every principle of freedom, as far as the distance of the two polar stars from each other." Thomas Tredwell, *New York Ratifying Convention*, 2 July 1788, in 3 THE FOUNDERS' CONSTITUTION 225 (Doc. 7); 4 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 493, 497 (John P. Kaminski et al. eds., 1997).

86. See William Wirt, *Right to Tax Government Property*, in 3 THE FOUNDERS' CONSTITUTION 236 (Doc 20); *Virginia Convention*, *supra* note 40, at 222–23.

87. See Brutus, *9th and 19th Letters, Objections to a Standing Army (parts 1 & 2)*, N.Y. J., Jan. 17 & 24, 1788.

88. See *NC Convention*, *supra* note 39, at 225; THE DEBATE OVER THE RATIFICATION OF THE CONSTITUTION, *supra* note 53, at 782 (delegates feared that district inhabitants would become "numerous and wealthy slaves . . . infallibly devoted to the views of their [congressional] masters").

89. New York, Virginia, and North Carolina introduced amendments limiting exclusive jurisdiction to internal police power and good government, but these proposals "shared the fate of many others, whose object was to limit the exercise of power in the federal government" and were rejected. See St. George Tucker, *supra* note 46.

90. Sherry, *supra* note 3, at 1151–52.

91. During ratification debates, Virginian Anti-Federalist John Nicholas provided such a limiting interpretation, arguing exclusive jurisdiction was akin to "a coat of armor intended to protect the government in periods of danger, and not to be worn at all times for parade and show." ESTABLISHING CONGRESS, *supra* note 62, at 40–41.

92. *Records of the Federal Convention*, in 4 THE FOUNDERS' CONSTITUTION 648 (Doc. 2).

93. CORNELL, *supra* note 9, at 1.

federal government could potentially acquire exclusive control over an immense territory.⁹⁴ The one hundred square mile allowance was absolutely massive by eighteenth century standards⁹⁵ as it could make the district amongst the largest cities in the world—over four times the size of the British capital at London.⁹⁶

This potential area was also far larger than had previously been considered necessary for the federal district.⁹⁷ In 1784, the Confederation Congress passed an ordinance permitting a permanent federal seat of government not exceeding three square miles.⁹⁸ Then, in another 1784 proposal, Congress considered a federal city along the Delaware River, allowing between four and nine square miles.⁹⁹ Ultimately, in exchange for the potential of a constitutionally authorized one hundred-square mile district, Federalists gladly risked that the Federal capitol would be far smaller, if it were established at all.¹⁰⁰

The District Clause also mandated exclusive federal jurisdiction over the area comprising the seat of government.¹⁰¹ Again, while Federalists had no guarantee that the federal seat would be as large as the Constitution permitted, they were assured that, however large, the federal government would retain exclusive power there.¹⁰²

Additionally, Federalists felt secure in their belief that although the district remained contingent on the generosity of the states,¹⁰³ their dream would nonetheless be realized. In fact, many Federalists believed that there would be competition amongst the states to establish the federal district within their borders.¹⁰⁴ While Federalists feared undue influence on the

94. See U.S. Const. art. I, § 8, cl. 17.

95. It remains large even by modern standards—bigger than present-day American cities like Boston, Cincinnati, and St. Louis. See *Land Area for U.S. Cities*, GOVERNING, <http://www.governing.com/gov-data/census/Land-Area-for-US-Cities.html>.

96. *Federal Farmer No. 18*, *supra* note 42, at 220.

97. VARNUM, JR., *supra* note 22, at 7; BOWLING, *supra* note 22, at 64–65.

98. VARNUM, JR., *supra* note 22, at 7.

99. BOWLING, *supra* note 22, at 65.

100. Federalists believed expansion—of the nation and federal government—was inevitable. See James Madison, *Location of Capital, House of Representatives*, in 3 THE FOUNDERS' CONSTITUTION 228 (Doc. 10).

101. The Federalists considered exclusive jurisdiction over the seat to be absolutely essential in transcending State influence and oppression. See *Virginia Convention*, *supra* note 40, at 223 (“[h]ow could the general government be guarded from the undue influence of particular states, or from insults, without such exclusive power?”).

102. U.S. CONST. art. I, § 8, cl. 17.

103. See *supra* note 76 and accompanying text.

104. See Zoldan, *supra* note 76, at 171; *Virginia Convention*, *supra* note 40, at 222 (“I believe that, whatever state may become the seat of the general government, it will become the object of the jealousy and envy of the other states”).

federal government, they also knew that states would expect to have more influence the closer they were to the district and thus finding states willing to cede portions of their land could prove fairly easy.¹⁰⁵

Lastly, the District Clause was wholly passive in that it did not affirmatively indicate where this “Seat of the Government of the United States” should be located—a fact Federalists also took advantage of during ratification debates.¹⁰⁶ In not naming a seat, the clause prevented alienating states whose support might have been jeopardized if they knew the federal government would be housed in a distant location.¹⁰⁷ When proposals were made to include a location in the District Clause, Pennsylvania’s Governor Morris was “apprehensive that such a clause might make enemies of Phila. & N. York which had expectations of becoming the Seat of the Genl. Govt.”¹⁰⁸ In securing ratification in New York, Federalists went even further, actually using the postponement of naming the federal seat—and thereby keeping open the implication that New York would be selected—to effectively bribe the state convention.¹⁰⁹

Ultimately, while Anti-Federalists may have had grave reservations about some aspects of the District Clause—particularly its potential massive size and grant of exclusive federal jurisdiction—these fears were outweighed by confidence in the clause’s internal security checks against federal expansion.¹¹⁰ Federalists, meanwhile, understood the need to quickly agree to the basic tenants of a new constitution and remained willing to risk that those checks would effectively limit the federal district.¹¹¹ In September 1787, the Constitution was sent to the states for ratification. Federalists and Anti-Federalists with their District Clause bets confidently placed, eagerly awaited the outcome of their great political gamble.¹¹²

II. Compromised Reality: Creating a Seat and The Anti-Federalist Failure

On July 9, 1790, the U.S. House of Representatives passed *An Act for Establishing the Temporary and Permanent Seat of the Government of the*

105. See, e.g., Madison, *supra* note 100, at 226 (“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.”).

106. See Scarberry, *supra* note 17, at 874–75.

107. *Id.*; BOWLING, *supra* note 22, at 75.

108. *Records of the Federal Convention*, in 3 THE FOUNDERS’ CONSTITUTION 218 (Doc. 2).

109. BOWLING, *supra* note 22, at 87–88.

110. See *supra* Part I(C).

111. See *supra* Part I(C).

112. AMAR, *supra* note 1, at 5–6.

United States.¹¹³ The *Residence Act* realized the Constitution's discretionary authorization to create a federal seat.¹¹⁴ The Act mandated that there would be a federal district, and thus the Anti-Federalists' first District Clause obstacle was overcome.¹¹⁵

Shortly after the *Residence Act* was enacted, it became evident that the Anti-Federalists' other District Clause checks against federal power would prove equally inadequate. Since the Constitution established only that a federal district *could* be created—and not where it was to be located—there was fierce competition as each State vied for proximity to the new federal government.¹¹⁶ Ultimately, the states, like the Federalists, expected that “Congress would ‘everyday increase in consequence,’ bringing wealth and influence to the inhabitants of the city and state that hosted the government.”¹¹⁷ Thereafter, offers were accepted from Maryland and Virginia selling portions of their territory along the Potomac to create the federal district.¹¹⁸ Moreover, to the alarm of Anti-Federalists, the states donated the full one-hundred square miles.¹¹⁹ In fact, not only did the State legislatures pass resolutions ceding this territory, they even advanced funding to assist in building district infrastructure.¹²⁰ In one fell swoop, the second and third Anti-Federalist District Clause checks against federal expansion were nullified.¹²¹

After the state lands from Maryland and Virginia were formally transferred, George Washington was given the power to decide where exactly the new federal city would be built.¹²² Anti-Federalist excitement that this development would result in a small and modest city—Washington was, after all, born and raised in Virginia, and thus the product of a decidedly rural southern culture—was quickly extinguished.¹²³ Washington chose Major Pierre L’Enfant—a French engineer and architect who had fought in

113. VARNUM, JR., *supra* note 22, at 15–16.

114. *See supra* notes 69–70 and accompanying text.

115. *See supra* notes 69–70 and accompanying text.

116. Scarberry, *supra* note 17, at 882; Zoldan, *supra* note 76, at 171 (“all parts of the Union were anxious to have the seat of government”).

117. Zoldan, *supra* note 76, at 171.

118. *Id.* Like every other state, Maryland and Virginia “both succumbed to capital fever and expressed willingness ‘to make any sacrifice to obtain the capital.’”

119. *Id.* at 173–74.

120. *See* THOMAS HART BENTON, ABRIDGMENT OF THE DEBATES OF CONGRESS, FROM 1789 TO 1856(1857). It is estimated that the states’ donations—taking into account both the land and the monetary contributions—amounted to over a million dollars. *Id.* at 332–33.

121. *See supra* notes 71–80 and accompanying text.

122. *See* Tindall, *supra* note 68, at 12.

123. BOWLING, *supra* note 22, at 106–13.

the Revolutionary War—to design the city.¹²⁴ L’Enfant’s designs indicated a grand and expansive vision; his plans called for the construction of the largest city in North America—over 6,000 acres capable of accommodating nearly 800,000 residents.¹²⁵

Washington’s ambitions for a large and commercial district were supported by two of the most influential politicians of the time, James Madison and Thomas Jefferson, both hailing from the agrarian traditions of Virginia.¹²⁶ Initially, Washington, Madison, and Jefferson worked together in securing the federal district on the Potomac River—infamously known as the Compromise of 1790. Northern states accepted a southern capital in exchange for assumption of all Revolutionary War debt by the federal government, to be borne equally by the newly united states.¹²⁷

Anti-Federalists believed these preeminent southern leaders had obtained a Potomac district in order to protect the agrarian traditions of their native Virginia.¹²⁸ After the southern location was announced, Pennsylvania Senator William Maclay, a staunch agrarian supporter, “‘hope[d] that the decision to go to the Potomac might give a preponderance to agriculture in the dire contest he foresaw between the two economic philosophies,’ [agrarianism and commercial capitalism].”¹²⁹ Maclay, and the Anti-Federalists, were in a way right—state interests did motivate Washington, Madison, and Jefferson; unfortunately, it was not the Anti-Federalist interest of State over federal sovereignty:

Although Virginians, particularly those associated with the economic promotion of the Potomac River, often spoke for the South in Congress, they were not typically southern. Strongly influenced by the commercial ethos of the Middle States, particularly the Chesapeake world, they did not oppose commercial capitalism. They just opposed its profits going north. Consequently, they dreamed of a Potomac capital which would not only strengthen southern political power, but also establish Virginia as a commercial state perhaps without rival in the Union. The capital they envisioned would serve the American Empire as both its preeminent political and commercial center as it spread westward to the Pacific. For this dream of uniting

124. *Creating the United States: New Federal Capital City in the District of Columbia*, LIBR. OF CONGRESS, <https://www.loc.gov/exhibits/creating-the-united-states/forging-a-federal-government.html>.

125. See Scarberry, *supra* note 17, at 884.

126. See Scarberry, *supra* note 17, at 866–70.

127. Zoldan, *supra* note 76, at 170–71.

128. Scarberry, *supra* note 17, at 867–68.

129. BOWLING, *supra* note 22, at x.

The Hague and Amsterdam into one city, promoters of a Potomac capital abandoned agrarianism¹³⁰

Washington, Madison, and Jefferson were ultimately concerned with *their* state's interests. They felt that the proximity of a powerful, influential federal district along the Potomac to Virginia would best secure their provincial interests while concurrently allowing the new federal government to maximize its significance in the emerging American nation.

Anti-Federalist conflation of individual State interests with the desire to limit federal power had similarly hampered their cause during the ratification debates. In those debates, it was widely argued that “it to be the general sense of America, that neither the Seat of a State Government, nor any large commercial City should be the seat of the General Government.”¹³¹ The fatal Anti-Federalist mistake was in assuming these delegates were arguing against the seat being in a large and commercial city; In reality, however, they meant only that the federal district shouldn't be located in a preexisting, state-controlled, commercial city.¹³² In the end, these developments further undercut Anti-Federalist hopes for a small, limited, and substantially agrarian federal district, thus negating their fourth District Clause security measure.¹³³

As the district grew rapidly and swelled in population and commercial activity,¹³⁴ Anti-Federalists had only one last way the District Clause might slow this expanding federal juggernaut—the hope that state and federal courts would limit Congress' grant of exclusive jurisdiction.¹³⁵ In the years shortly following the creation of the district, there were several opportunities for courts to limit the clause's grant of exclusive congressional jurisdiction within the federal seat. However, State courts remained hesitant to question this grant of exclusive jurisdiction and instead affirmed the existence of extensive federal powers.¹³⁶ First, in 1811, a Massachusetts court determined that it lacked any jurisdiction over an offense perpetrated on land ceded to the United

130. BOWLING, *supra* note 22, at x-xi.

131. DEBATES, *supra* note 23, at 332.

132. *Records of the Federal Convention*, *supra* note 108, at 218 (many delegates argued “neither the Seat of a State Govt. nor any large commercial City should be the seat of the Genl. Govt.”).

133. *See supra* notes 81–82 and accompanying text.

134. Though the district did not become a hub of commercial enterprise overnight, it was evident from the outset that this was the intent. BEEMAN, *supra* note 50, at 418–19.

135. *See supra* notes 86–93 and accompanying text.

136. *See, e.g.*, *Commonwealth v. Clary*, 8 Mass. 72 (1811), in 3 THE FOUNDERS' CONSTITUTION 231 (Doc. 14); *Custis v. Lane*, 3 Munf. 579 (Va. 1813), in 3 THE FOUNDERS' CONSTITUTION 232 (Doc. 15).

States government as a military arsenal.¹³⁷ The court specifically held that states, in the absence of express congressional decree, have no jurisdictional power on federal soil.¹³⁸ Then, in 1813, a Virginia court was even more definitive, declaring a federal district resident “expatriated thereby from the government of Virginia.”¹³⁹

Accordingly, the court continued:

That he is no longer within the jurisdiction of the commonwealth of Virginia, is manifest from this consideration, that congress are vested, by the constitution, with exclusive power of legislation over the territory in question; and it is only by the consent and courtesy of congress that any of the laws of Virginia have been permitted to operate therein.¹⁴⁰

Likewise, federal courts, instead of considering exclusive congressional jurisdiction a threat to their own judicial prerogative, refused to narrow the scope of federal power within this new seat of government.¹⁴¹ In an 1805 case, the Supreme Court did not dispute an appellant’s argument that Congress retains absolute jurisdiction when legislating within the federal district.¹⁴² Then, in 1819, Justice Story affirmed that only Congress had jurisdiction over activities on federal territory and “by the very terms of the constitution . . . state jurisdiction is completely ousted.”¹⁴³ Further, Story continued, the District Clause grant of exclusive federal authority in the seat “was manifestly the avowed intention of those wise and great men who framed the constitution.”¹⁴⁴ The following year, the Court continued their liberal interpretation of exclusive federal jurisdiction, ruling that Congress had undeniable power to tax district residents for any purpose whatsoever.¹⁴⁵

Yet, the most devastating blow to the Anti-Federalists’ final District Clause check against federal power came in an 1821 opinion by Supreme

137. *Clary*, 8 Mass. at 76–77.

138. *Clary*, 8 Mass. at 76 (in “the territory of the *United States* . . . congress have the exclusive power of legislation”).

139. *Custis*, 3 Munf. at 591.

140. *Custis*, 3 Munf. at 591.

141. *See, e.g.*, *United States v. More*, 3 CRANCH 159 (1805), in 3 THE FOUNDERS’ CONSTITUTION 382 (Doc. 8) (“When legislating over the District of Columbia, congress are bound by no constitution”); *United States v. Cornell*, 25 Fed. Cas. 646 No. 14,867 (C.C.D.R.I. 1819), in 3 THE FOUNDERS’ CONSTITUTION 233 (Doc. 16).

142. *United States v. More*, 3 CRANCH 159 (1805).

143. *Cornell*, 25 Fed. Cas. 646 No. 14, 867 (C.C.D.R.I. 1819).

144. *Id.*

145. *Loughborough v. Blake*, 5 WHEAT. 317 (1820), in 3 THE FOUNDERS’ CONSTITUTION 363 (Doc. 16).

Court Chief Justice John Marshall.¹⁴⁶ Marshall held that exclusive federal jurisdiction extended beyond the seat of government and the Constitution generally granted the U.S. Supreme Court jurisdictional supremacy over *all* state court decisions implicating or conflicting with the Constitution: “The constitution and laws of a State, so far as they are repugnant to the constitution and laws of the United States, are absolutely void. These states are constituent parts of the United States. They are members of one great empire—for some purposes sovereign, for some purposes subordinate.”¹⁴⁷

Marshall, to Anti-Federalists’ horror, had used the District Clause grant of exclusive jurisdiction to assert the far more sweeping proposition of federal supremacy over individual State sovereignty.

Ultimately, the willingness of both state and federal courts to broadly interpret exclusive federal jurisdiction cemented Anti-Federalist failure to use the District Clause as a means of limiting federal government power. While the District Clause may have represented the final wager of an unsustainable Anti-Federalist ideology,¹⁴⁸ it would also emerge as one of the great ironic failures of democratic principles in America. A bipartisan failing of Anti-Federalists and Federalists alike, the resulting District Clause capital remains “an undemocratic anomaly”—the district does not, to this day, have representation in the very government it houses.¹⁴⁹

III. Consequences of the Compromise: District Disenfranchisement

The U.S. Constitution’s District Clause created a seat of government to serve as the shining epicenter of the new American nation, the beating heart of a bold political experiment resting squarely on principles of democratic representation. Congress’ exclusive jurisdiction inherently prevents local governance and, since the district is not a state, its residents have no representation in either Congress or the Senate.¹⁵⁰ Perhaps most disturbingly,

146. *Cohens v. Virginia*, 19 U.S. 264 (1821), in 4 THE FOUNDERS’ CONSTITUTION 326–39 (Doc. 74).

147. *Cohens*, 19 U.S. 264 (1821).

148. A key political ideology during the constitutional convention and ratification, Anti-Federalism did not emerge as a sustainable political party following adoption of the Constitution. CORNELL, *supra* note 9, at 1.

149. Kate Masur, Opinion, *Capital Injustice*, N.Y. TIMES, Mar. 28, 2011, at A31.

150. District residents do elect a single, but non-voting, congressional delegate. See Raskin, *supra* note 14, at 48. Larry Mirel & Joe Sternlieb, “. . . Chosen by the People of the Several States . . .”: *Statehood for the District of Columbia*, 23 WM. & MARY BILL RTS. J. 1, 1–2 (2014); Perry, *supra* note 4, at 14.

this blatant disenfranchisement of the nation's capital is a problem about which a majority of American citizens remain completely unaware.¹⁵¹

A. The Current State of Affairs: Home Rule and the Statehood Argument

The issue of representation in the federal district did not actually arise until the U.S. government formally began operations in 1800.¹⁵² Until that time, residents remained subject to the laws of, and enjoyed representation in, the states that had ceded the district's lands.¹⁵³ When the federal government took control over the district and dissolved those temporary state allegiances, residents were formally disenfranchised.¹⁵⁴

In place of federal representation, the concept of "home rule" gradually developed as a means of allowing limited local governance—overseen by Congress—to district residents.¹⁵⁵ Initially, this meant that a mayor and elected council served as the local authority, and there was almost no federal involvement in district affairs.¹⁵⁶ However, in 1871 and 1874, Congress passed legislative acts significantly altering the district's governance structure.¹⁵⁷ Together, these acts expressly permitted federal repeal of any local legislation and replaced the elected district council with federally appointed commissioners.¹⁵⁸

A century later, under the 1973 Home Rule Act, residents were again allowed to appoint a local council capable of regional governance and regulatory lawmaking.¹⁵⁹ However, all council decisions remained subject to congressional approval and the Act continued to allow Congress to veto any district legislation.¹⁶⁰ This congressional oversight has not proven a simple formality; rather, Congress has used this power to dictate district policy on several divisive issues, such as conditions of municipal employment, required HIV testing for insurance coverage, public funding

151. According to a research poll published in 2000, 56% of surveyed Americans believe that District residents have the same federal representation rights as other U.S. citizens. See Mark David Richards, *U.S. Public Opinion on Political Equality for Citizens of the District of Columbia*, DC WATCH, Apr. 12, 2000, <http://www.dccwatch.com/richards/000412.htm>. That unawareness appears likely to grow. According to the same poll, a staggering 70% of young American voters (aged 21–34) are not aware that District residents lack federal representation. *Id.*

152. Boyd, *supra* note 14, at 590–91.

153. *Id.*

154. Samuel B. Johnson, *The District of Columbia and the Republican Form of Government Guarantee*, 37 HOWARD L.J. 333, 338 (1993-94); Raven-Hansen, *supra* note 14, at 175.

155. Johnson, *supra* note 154, at 335.

156. *Id.* at 338.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

for abortions, and prohibitions against sexual discrimination.¹⁶¹ Most importantly, all district funding, including its annual budget and tax policies, must be approved by Congress.¹⁶² In the end, home rule allows the appearance of local governance, but is little more than a façade, underscoring the purely federal authority that ultimately dictates district bureaucracy.

Widespread local dissatisfaction with home rule has resulted in near-continual calls for reform.¹⁶³ While a variety of proposals have emerged over the years,¹⁶⁴ the most enduring has been the argument that the federal district should be granted statehood.¹⁶⁵ While this solution has the benefit of immediately resolving the issue of federal representation—as a state, D.C. would immediately become entitled to two senators and congressional representatives in proportion to their population¹⁶⁶—it has also met with severe criticism from both ends of the political spectrum.¹⁶⁷

Advocates of D.C. statehood have long argued that it is the only means of ensuring true, legitimate representation of district residents.¹⁶⁸ The idea that the nation's capital might become a formal state was initially broached by a 1978 proposed constitutional amendment, which, though not granting

161. Johnson, *supra* note 154, at 335, 338–40.

162. *Id.* at 339–40.

163. Since the institution of the current Home Rule system, there have been more than 150 resolutions introduced and over twenty congressional hearings convened to consider representation for the nation's capital. See U.S. Senator Orrin G. Hatch, *Should the Capital Vote in Congress? A Critical Analysis of the Proposed D.C. Representation Amendment*, 7 *FORDHAM URB. L.J.* 470, 495–96 (1979).

164. These include, among others: retrocession of the district to Maryland, quasi-retrocession allowing district residents to vote in Maryland federal elections, constitutional amendment granting federal voting rights, and legislation granting the district federal representation. See Boyd, *supra* note 14; Mirel & Sternlieb, *supra* note 150, at 2–3; Raskin, *supra* note 14.

165. See generally Johnny Barnes, *Towards Equal Footing: Responding to Perceived Constitutional, Legal and Practical Impediments to Statehood for the District of Columbia*, 13 *UDC/DCSL L. REV.* 1 (2010); Mirel & Sternlieb, *supra* note 150; Jamin B. Raskin, *Dominion, Democracy, and the District: The Statehood Position*, 39 *CATH. U. L. REV.* 417 (1990).

166. Under the accepted “Equal Footing Doctrine,” newly admitted states are immediately entitled to “the same power, dignity, and authority of every other state,” including, of course, full representation in the House of Representatives and the Senate. See Mary M. Cheh, *Theories of Representation: For the District of Columbia, Only Statehood Will Do*, 23 *WM. & MARY BILL RTS. J.* 65, 69–70 (2014); see also U.S. CONST. art. I, § 2 (The House of Representatives shall be comprised of members selected “by the People of the several States”); U.S. CONST. amend. XVII (The Senate is formed of two representatives “from each State, elected by the people thereof”); Barnes, *supra* note 165, at 4–5; Coye v. Smith, 221 U.S. 559, 567–69 (1911).

167. Mirel & Sternlieb, *supra* note 150, at 4–5 (noting that both Republicans and Democrats have legitimate concerns over the admission of the district as the fifty-first State).

168. See Raskin, *supra* note 165, at 423 (concluding that in order to secure true political equality with other American citizens, district residents “must escape the geographic and political boundaries of the District of Columbia and form their own State”); Cheh, *supra* note 166, at 66 (“the only complete legal and moral remedy for the District’s political subjugation is statehood”).

full-fledged statehood status, would have granted the district full federal voting rights while maintaining its status as the seat of national government.¹⁶⁹ The amendment was passed by Congress and sent to the individual states for ratification, where it would neglectfully linger and unceremoniously die after garnering only sixteen approvals in seven years.¹⁷⁰ After this abject failure to provide full district representation in the federal government, the push for unreserved statehood was renewed in 1993 when D.C.'s nonvoting congressional delegate, Eleanor Holmes Norton, sponsored legislation seeking to make the district the fifty-first U.S. State.¹⁷¹ Again, the drive for district statehood was soundly rejected; the New Columbia Admission Act failed in Congress by a decisive 153-277 margin.¹⁷² In 2007, some semblance of bipartisan middle ground emerged in the form of the District of Columbia House Voting Rights Act.¹⁷³ The Act, allowing district representation in the House of Representatives, but not the Senate, ultimately failed to garner sufficient support to become law.¹⁷⁴

Despite this legacy of failure, supporters of D.C. statehood remain undeterred. In 2016, amidst reports of all-time high support for statehood within the district,¹⁷⁵ D.C. Mayor Muriel Bowser advocated a district-wide referendum on statehood.¹⁷⁶ Shortly thereafter, the district council released a proposed State constitution to guide New Columbia.¹⁷⁷ Notwithstanding this continued optimism, it remains unlikely that such local movements will acquire the national backing needed to realize statehood for the district.

169. R. Hewitt Pate, *D.C. Statehood: Not Without A Constitutional Amendment*, THE HERITAGE LECTURES, NO. 461, 1993, at 1, 2–3; Turley, *supra* note 31, at 309.

170. Pate, *supra* note 169, at 2.

171. Turley, *supra* note 31, at 309.

172. New Columbia Admission Act, H.R. 51, 103d Cong. (1993).

173. District of Columbia House Voting Rights Act of 2007, H.R. 1433, 110th Cong. (2007).

174. Cheh, *supra* note 166, at 86–87.

175. See Nina Golgowski, *D.C. Votes to Become the 51st State, But It Likely Won't*, HUFFINGTON POST, Nov. 9, 2016, https://www.huffingtonpost.com/entry/dc-votes-to-become-state_us_58235f06e4b0e80b02ce689e (reporting that 79% of D.C. residents voted for statehood in a local referendum); Abigail Hauslohner, *Support for D.C. Statehood at Record High*, WASH. POST (Nov. 23, 2015) https://www.washingtonpost.com/local/dc-politics/support-for-dc-state-hood-at-record-high/2015/11/22/29e80132-8ee5-11e5-ae1f-af46b7df8483_story.html (according to a *Washington Post* poll, 67% of district respondents favored statehood for the district).

176. Martin Austerhuhle, *Mayor Wants Statehood Vote This Year by D.C. Residents*, AMERICAN U. RADIO (Apr. 15, 2016) https://wamu.org/story/16/04/15/mayor_bowser_wants_vote_on_statehood_for_dc/.

177. Aaron C. Davis, *Draft Constitution for 51st American State Would Let Almost Anyone Be Governor of D.C.*, WASH. POST, May 6, 2016, https://www.washingtonpost.com/local/dc-politics/draft-constitution-for-51st-american-state-would-let-almost-anyone-be-governor-of-dc/2016/05/06/97cf0422-1395-11e6-81b4-581a5c4c42df_story.html; Jen Kinney, *Welcome, New Columbia? D.C. Drafts 51st State Constitution*, NEXT CITY, May 9, 2016, <https://nextcity.org/daily/entry/welcome-new-columbia-dc-mayor-releases-draft-constitution-dc-51st-state>.

Ultimately, while Republicans oppose the creation of new, Democrat-favoring congressional seats that would accompany D.C. statehood,¹⁷⁸ Democrats have proven equally disinterested in securing a fifty-first State.¹⁷⁹ Further, legal scholars from both camps continually question whether, and how, D.C. statehood could be constitutionally achieved.¹⁸⁰ Consequently, district statehood has long remained little more than a bargaining chip used by both national political parties to advance their agendas.¹⁸¹

178. See Peter Moore, *Half Oppose Statehood for Washington, D.C.*, YOUGov, Sept. 22, 2014, <https://today.yougov.com/news/2014/09/22/half-oppose-statehood-dc/> (reporting that, in the 2012 presidential election, over 90% of D.C. voters supported the Democrat candidate). The undeniably legitimate influence of this political balance of power shift was evident in the failure of the 2007 D.C. Voting Act. See Cheh, *supra* note 166, at 86. In an attempt to maintain this balance, the Act included a rider that also added a congressional seat to the highly Republican-leaning Utah. *Id.* When it was determined that the addition of congressional representatives to preexisting states was unconstitutional, the bill fell apart in the Senate. *Id.*

179. While the Democratic Party has repeatedly endorsed the idea of district statehood, it has failed to take real action on the issue. See Mark Plotkin, *Democrats Are All Talk When It Comes to DC Statehood*, THE HILL, Nov. 24, 2017, <http://thehill.com/opinion/campaign/361457-democrats-all-are-talk-when-it-comes-to-dc-statehood> (observing that in both 1993 and 2009, Democrats voiced support for district statehood, controlled both houses of Congress and the Presidency, and still failed to take any meaningful steps towards legitimate representation in D.C.). In 2012, Independent Joe Lieberman and a trio of Democrat Senators sponsored a bill seeking D.C. statehood. Arin Greenwood, *D.C. Statehood: Senate Bill by Joe Lieberman Would Make 'New Columbia' 51st State*, HUFF. POST, Dec. 19, 2012, https://www.huffingtonpost.com/2012/12/19/dc-statehood-senate-liberman-new-columbia-n_2334077.html. However, the gesture was widely seen as purely symbolic; the bill was introduced with only two weeks remaining in the Congress and Lieberman set to retire. *Id.*

Similarly, in 2014, Democrats again voiced support for district representation and sponsored another bill granting D.C. statehood. Aaron C. Davis, *Congress Takes up Bill to Make D.C. the 51st State*, WASH. POST (Sept. 15, 2014), https://www.washingtonpost.com/local/dc-politics/congress-takes-up-bill-to-make-dc-the-51st-state/2014/09/15/189a499a-3cd3-11e4-9587-5dafd96295f0_story.html. Again, however, their dedication to the district cause seemed insincere. *Id.* Despite their vocal enthusiasm, only one Democrat actually showed up to the hearing on the bill—Thomas Carper, the one who introduced the bill. *Id.* Meanwhile, many questioned why the president, again a Democrat that had stated his full support for district statehood, failed to send any representatives. *Id.* Further, some Republican attendees questioned whether the timing of the bill, weeks before midterm elections, was just an attempt to sway district voters. *Id.*

180. Numerous scholars, as well as Democrat and Republican-led justice departments alike, have warned that D.C. statehood by mere congressional legislation would be facially unconstitutional. See Pate, *supra* note 169; Turley, *supra* note 31; Lawrence M. Frankel, *National Representation for the District of Columbia: A Legislative Solution*, 139 U. PA. L. REV. 1659, 1673, 1676 (1991).

181. See, e.g., Cheh, *supra* note 166, at 66 (describing “the propensity of members of Congress to use the District as a political plaything”); Paul Kane, Pery Bacon Jr. & David A. Fahrenthold, *Budget Battle Came Down to 3 Men and Their Weaknesses*, WASH. POST, Apr. 9, 2011, https://www.washingtonpost.com/politics/budget-battle-came-down-to-3-men-and-their-weaknesses/2011/04/09/AFLotbAD_story.html (in 2012, President Obama used D.C. abortion funding as a bargaining chip with Republicans in seeking to avoid a government shutdown); see *supra* note 180 and accompanying text (discussing how bills in support of district statehood have often been introduced suspiciously close to election periods); Byron C. Tau, *How the Gun Lobby Shot Down*

Regardless of whether D.C. statehood is a realistic goal—disregarding whether it is advisable¹⁸² or even constitutionally permissible¹⁸³—the fact remains that a large segment of American citizens are federally disenfranchised solely on the basis of geographic misfortune.¹⁸⁴ However, it seems that the question of how to allow for federal government representation in D.C is best resolved by looking directly at the Constitution responsible for its creation in the first place. In considering the initial intentions of the Constitution, and those responsible for drafting it, we may be able to determine the most appropriate means of addressing this decidedly untenable present situation.

B. Original Intent: The Founders and District Representation

Many commentators have argued that the current lack of representation in America's capital is more than ironic,¹⁸⁵ or even unjust;¹⁸⁶ further, they claim, it is contrary to the intention of America's Founders.¹⁸⁷ In concluding the district's lack of representation violates the Constitution's Republican Form of Government Guarantee, Samuel B. Johnson alleges "the majority of the framers . . . expected the implementation of self-government for the District."¹⁸⁸ Indeed, records from the founding support this position: In *Federalist No. 43*, Madison remarked that "a municipal legislature for local purposes, derived from their own suffrages, will of course be allowed" to

D.C.'s Congressional Vote, WASH. CITY PAPER (June 4, 2010), <https://www.washingtoncitypaper.com/news/article/13038940/how-the-gun-lobby-shot-down-dcs-congressional-vote> (2009 district statehood bill was rejected after Republicans added several riders relating to D.C.'s gun laws).

182. Many have argued that D.C. is not economically viable as a state because of its non-existent local economy, completely urban nature, and the large federal stipend granted annually to the district as the national government host. As one commentator succinctly put it, "the District is a company town, and that company is the federal government." See Pate, *supra* note 169, at 8–9. See also Hatch, *supra* note 163, at 519, 525–25, 534; David Schleicher, *Welcome to New Columbia: The Fiscal, Economic and Political Consequences of Statehood for D.C.*, 23 WM. & MARY BILL RTS. J. 89, 91, 97 (2014). *But see* Cheh, *supra* note 166, at 71–72 (arguing that "the District is not too financially dependent on the federal government and would be able to stand on its own as a state").

183. See sources cited *supra* note 181.

184. Some commentators even feel that the district should be considered a "colony" comprised of "second class citizens" in a worse position than those living in American territories, for whom there is at least an established, if onerous, path to statehood and full federal government representation. See Cheh, *supra* note 166, at 71–72; Raskin, *supra* note 165, at 417–18.

185. Raven-Hansen, *supra* note 14, at 167.

186. CHARLES WESLEY HARRIS, CONGRESS AND THE GOVERNANCE OF THE NATION'S CAPITAL (1995) (lack of representation "violates basic democratic principles and the rights of the capital's inhabitants").

187. See, e.g., Johnson, *supra* note 154, at 357–58, 388.

188. Johnson, *supra* note 154, at 358.

district residents.¹⁸⁹ Similarly, Joseph Story stated that the District Clause “without any constitutional scruple, or surmise of doubt” permitted a local government.¹⁹⁰

Meanwhile, others assert with equally persuasive historical evidence that the constitutional failure to provide for district representation is a consequence of mere inadvertence.¹⁹¹ At the founding, they argue, the protection and interests of the new federal government simply overshadowed any consideration of the representative rights of those eventually residing within the district.¹⁹² This interpretation of the Founders’ intent, or lack thereof, was endorsed by Supreme Court Justice Robert Jackson in the 1949 *Tidewater Transfer* case, where he noted “there is no evidence that the Founders, pressed by more general and immediate anxieties, thought of the special problems of the District of Columbia . . . This is not strange, for the District was then only a contemplated entity.”¹⁹³

Finally, some even contend that primary records indicate the district was intentionally excluded from participation in the federal government.¹⁹⁴ In an article arguing that the 1846 retrocession of district land to Virginia¹⁹⁵ violated the Constitution’s Contract Clause, Evan Zoldan alleges, “both Federalists and Anti-Federalists understood that residents of the new district would not be guaranteed the right to representation under the Constitution.”¹⁹⁶ This was considered an acceptable and consensual sacrifice, Zoldan says, because of the expectation that expansion of the federal district would bring “wealth and influence to the inhabitants of the [federal] city and state that hosted the government.”¹⁹⁷

Eugene Boyd likewise argues that there was an immediate awareness of the representation conundrum in the newly formed American capital.¹⁹⁸

189. Madison, *supra* note 27, at 219.

190. Story, *supra* note 38, at §1224.

191. Frankel, *supra* note 180, at 1684–86; Raven-Hansen, *supra* note 14, at 184–91; Tindall, *supra* note 68, at 178, 184 (“disenfranchisement . . . was unintended by both the constitutional framers and the parties to the cessation legislation”).

192. Frankel, *supra* note 180, at 1685–87; Johnson, *supra* note 154, at 357, 387–88; Raven-Hansen, *supra* note 14, at 178, 184, 191.

193. *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 587 (1949).

194. *See generally* Zoldan, *supra* note 76; BOWLING, *supra* note 22, at 85–87.

195. Congress ceded to Virginia the county of Alexandria after its residents requested to return to their native state. Tindall, *supra* note 68, at 19–20. Although disenfranchisement was initially cited as a primary reason for the retrocession, it is now generally agreed that the purely parochial economic interests of Virginia’s most prominent merchant class was at the core of the retrocession movement. *See* Zoldan, *supra* note 76, at 178–79.

196. Zoldan, *supra* note 76, at 172.

197. Zoldan, *supra* note 76, at 171.

198. Boyd, *supra* note 14, at 597–99.

As early as 1804, Boyd notes, disenfranchisement concerns spurred various resolutions that would have returned parts of the district to their original states.¹⁹⁹ However, these proposals were rejected because district disenfranchisement was considered less important than “efforts to create an independent and freestanding federal territory as the seat of the national government.”²⁰⁰ Ultimately, these scholars maintain, the “Framers left no doubt that they were subjecting the people of the federal district to Congress’ legislative power without representation.”²⁰¹

In 1820, the Supreme Court supported the idea that the Constitution intentionally disenfranchised the district.²⁰² In holding that Congress retained absolute constitutional authority to tax district residents, Chief Justice John Marshall stated that in the Constitution “[r]epresentation is not made the foundation of taxation” and although “in theory it might be more congenial to the spirit of our institutions to admit a representative from the district . . . certainly the constitution does not consider their want of a representative in Congress as exempting it from equal taxation.”²⁰³

C. Constitutional Evolution: The Time for Change

Regardless of the Founders’ intentions for the federal district, the time has come to formally recognize and allow representation in the U.S. capital.²⁰⁴ While the District of Columbia “bears the proud title of the Capitol of the greatest Democracy on earth . . . how hollow is the sound of political liberty to the disenfranchised inhabitants living in the very shadow of the dome of the Capitol!”²⁰⁵ Ultimately, America was founded after a revolution sparked by disenfranchisement and U.S. political tradition has since demanded that its Constitution “resolve ambiguities in favor of the ‘fundamental principle of [its] representative democracy.’”²⁰⁶

199. Boyd, *supra* note 14, at 598; *see also* BOWLING, *supra* note 22, at 86.

200. Boyd, *supra* note 14, at 598.

201. Zoldan, *supra* note 76, at 173.

202. *See* Loughborough v. Blake, 18 U.S. 317 (1820).

203. *Blake*, 18 U.S. at 320, 324.

204. Perry, *supra* note 4, at 15 (arguing that regardless of constitutional intent, the justification for exclusive federal jurisdiction in the district—namely, protection and security of the federal government—is not applicable today); *see also* Turley, *supra* note 31, at 314–15 (arguing that the Federal government is now vastly more powerful than at the time of the founding, and, consequently, the “original motivating purposes behind the creation of the federal enclave . . . are no longer compelling.”).

205. Perry, *supra* note 4, at 13.

206. Raven-Hansen, *supra* note 14, at 187.

Although a number of proposals for district representation have emerged,²⁰⁷ the Constitution provides an express mechanism for addressing this issue: the amendment process. The amendment procedure has, in fact, already been used to provide district residents some degree of participation in national government—in 1961, the Twenty-Third Amendment was ratified, allowing the district three Electoral College votes in presidential elections.²⁰⁸

Further, the use of a constitutional amendment to address disenfranchisement in the district was supported at the time of the founding.²⁰⁹ In 1801, the same year that Congress formally assumed district residence, Augustus Woodward, a prominent landowner, member of the original federal city council, and protégé of Thomas Jefferson, released pamphlets espousing exactly such an amendment.²¹⁰ In 1978, a proposed amendment, allowing district representatives in all branches of federal government, passed both Congress and the Senate, but ultimately failed ratification in the states.²¹¹

While a constitutional amendment might not be required to allow district residents federal representation, it remains preferable simply because it is the mechanism specifically envisioned by the Founders to allow America's most important political document to develop over time.²¹² Also, the issue of federal representation for the district is a fundamentally American democratic concern; accordingly, it is a problem shared by all Americans and any solution should similarly be borne by the entire nation. The amendment course accomplishes this admittedly ideological goal by requiring approval of the American people, through ratification in a supermajority of the states.²¹³

Ultimately, the amendment process is the means by which America's Founders allowed the Constitution to evolve and grow. In the years

207. See generally Raskin, *supra* note 14; HARRIS, *supra* note 186; Boyd, *supra* note 14; see also *supra* Part III(A).

208. U.S. CONST. amend. XXIII.

209. Boyd, *supra* note 14, at 593–95.

210. AUGUSTUS BREVOORT WOODWARD, CONSIDERATIONS ON THE GOVERNMENT OF THE TERRITORY OF COLUMBIA: AS THEY RECENTLY APPEARED IN THE NATIONAL INTELLIGENCER, UNDER THE SIGNATURE OF EPAMINONDAS, PAPER NO. 1 OF 1801 (Washington D.C., Samuel Harrison Smith 1801).

211. Boyd, *supra* note 14, at 596.

212. See Tindall, *supra* note 68, at 23–25 (arguing “state” in the Constitution should be understood as including the district for purposes of representation); see also Perry, *supra* note 4, at 26–27 (arguing Congress has independent authority to make the district a state).

213. See U.S. CONST. art. V (amendments must be ratified by three-quarters of the states); see also Pate, *supra* note 169, at 9 (“[t]he people of the fifty states, through their state legislatures, must have their say on this fundamental change to our national capital and the Constitution that created it.”).

immediately following ratification, Justice Marshall discussed the Constitution's need to mature over time:

But a constitution is framed for ages to come . . . [i]ts course cannot always be tranquil. It is exposed to storms and tempests, and its framers must be unwise statesmen indeed if they have not provided it, as far as its nature will permit, with the means of self-preservation from the perils it may be destined to encounter.²¹⁴

The American Founders were wise statesmen indeed; their Constitution, through the amendment process, specifically accounts for Marshall's storms and tempests, permitting for that all-important political self-preservation. Now, the time has come for America to yet again utilize this mechanism of constitutional evolution and provide federal representation to residents of the United States capital.

Conclusion

The U.S. Constitution's District Clause specifically restricts the American seat of government to no more than "ten Miles square."²¹⁵ This wholly overlooked constitutional language was not accidental or random. It was part of a critical compromise between two political factions—Federalists and Anti-Federalists—whose ideologies drove the creation and ratification of that Constitution.²¹⁶

Ultimately, the District Clause was a gamble by both sides of the constitutional debate; Federalists risked the discretionary nature and various internal limitations against the possibility of a large and expansive federal seat.²¹⁷ Meanwhile, Anti-Federalists believed the clause contained sufficient internal checks adequately restraining the potentially limitless powers entrusted to this new national government.²¹⁸ In the end, it was a gamble the Federalists decidedly won.²¹⁹ Before long, the clause led to the creation of a massive federal district donated by willing states, the establishment of a federal city as a commercial epicenter by southern political leaders, and the determination by the nation's courts that the constitutional grant of exclusive federal jurisdiction within the district was essentially unlimited.²²⁰

214. *Cohens v. Virginia*, 19 U.S. 264, 387 (1821).

215. U.S. CONST. art. I, § 8, cl. 17.

216. *See supra* Part I.

217. *See supra* Part I(C).

218. *See supra* Part I(C).

219. *See supra* Part II.

220. *See supra* Part II.

Yet, perhaps the most important consequence of the District Clause is one that continues to perplex modern-day America.²²¹ In creating a federal seat independent of individual states while concurrently granting exclusive congressional jurisdiction within that district, the clause created a “unique and startling” situation wherein district residents lack the democratic representation that very government was intended to symbolize.²²²

Although a number of proposals addressing this disenfranchisement have emerged, including consistent calls for district statehood, the solution most faithful to America’s Founders—and the Constitution they conceived—is through passage of a constitutional amendment. The ability of America’s Constitution to evolve—and resolve the district representation problem—is critically important. Thomas Jefferson understood the dangers inherent in an unwillingness to allow for constitutional evolution; over two hundred years ago, he provided a solemn warning—and invaluable advice—to the future United States:

Some men look at constitutions with sanctimonious reverence, and deem them like the arc of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment But I know also, that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the changes of circumstances, institutions must advance also, and keep pace with the times.²²³

If a constitution’s true worth lies in its adaptability, then today America has a rare opportunity to show that it remains worthy of the constitutional ideals on which it was founded.²²⁴ Whether the United States will prove capable of embracing Jefferson’s words—and of concurrently evolving the Founders’ original conception of representative democracy—remains to be seen.

221. *See supra* Part III.

222. Raskin, *supra* note 14, at 48.

223. Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816) (The Thomas Jefferson Papers at the Library of Congress).

224. HELEN FENWICK & GAVIN PHILLIPSON, *CASES AND MATERIALS ON PUBLIC LAW AND HUMAN RIGHTS* 8 (Cavendish Publishing, 2nd ed. 2003) (discussing the importance of constitutional malleability over time).
