TWENTY-THIRD AMENDMENT PROBLEMS CONFRONTING DISTRICT OF COLUMBIA STATEHOOD

DEREK T. MULLER

TWENTY-THIRD AMENDMENT PROBLEMS CONFRONTING DISTRICT OF COLUMBIA STATEHOOD

Derek T. Muller[*]

The 117th Congress is the latest to consider statehood for the District of Columbia, and prospects of statehood grow ever closer after the House of Representatives approved H.R. 51.[1] The Senate is evenly divided, but a Democratic Vice President holds the potential tie-breaking vote, and filibuster reform remains a possibility. But there remains a problem facing statehood: the Twenty-Third Amendment.

If the legislation succeeds, the District of Columbia becomes a new state and leaves behind a new, substantially smaller District named "Capital." The Twenty-Third Amendment guarantees that the new District would have three electoral votes, no matter how few people reside in it. Proposals like H.R. 51 do not adequately address this issue. Statehood, if it proceeds, should be conditioned on repeal of the Twenty-Third Amendment. Potential alternative statutory solutions to the Twenty-Third Amendment—which do not exist in the present bill—present constitutional, legal, and practical problems.[2]

In one sense, the scope of this Article is modest. It does not weigh in on the constitutionality of admitting the District of Columbia as a state. It does not address the policy question of whether it ought to become a state. It only addresses the Twenty-Third Amendment and related, practical voting rights problems. But these problems are serious and vexing; problems that present legislation is inadequate to address.

I. The Twenty-Third Amendment guarantees that the new District would have three electoral votes, no matter how few people reside in it.

The text of the Twenty-Third Amendment states:

Section 1. The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

---

[*] Bouma Fellow in Law and Professor of Law, University of Iowa College of Law. Special thanks to Kevin Kim and Mark McDermed for their help on this piece. This Article is based upon testimony given to the U.S. Senate Committee on Homeland Security & Governmental Affairs, "Examining D.C. Statehood," June 22, 2021.

[1] H.R. 51, 117th Cong. (2021). An identical bill was introduced in the Senate, S. 51, 117th Cong. (2021).

[2] For example, if retrocession is considered as an alternative proposal, the same analysis applies.

This Amendment guarantees the District three presidential electors. Congress directed the "manner" of appointing electors after the Amendment was ratified in 1961.[3] It provided a popular election for slates of electors, and the presidential ticket receiving the most votes would have all three of its electors chosen on behalf of the District.[4]

Under proposed legislation, the new "District constituting the seat of Government of the United States" would be known as "Capital."[5] Capital would be entitled to three electoral votes.

The boundaries of Capital are set out in H.R. 51.[6] They roughly—but not exactly—map onto Census Tract 62.02. That tract had 33 inhabitants in the 2010 census.[7] Per the 2019 American Community Survey, the tract had 58 inhabitants.[8] The actual population of a future Capital will likely differ. A subset of that population is of voting age. The President typically does not change residency to the White House, but the President and family members might do so, which would heavily influence this new federal enclave.[9]

A small group of prospective voters who happen to reside in this federal enclave would now have three electoral votes all to themselves. Critics of the Electoral College point to disproportionate voting power in states such as Vermont and Wyoming, each guaranteed three electoral votes despite having disproportionately smaller populations than states such as Texas and California. But such disparities would be dwarfed by an enclave about 1/20,000th the size of Vermont, an enclave entitled to receive three electoral votes.

This is a serious problem. In the event the District becomes a state, there would be 541 electoral votes.[10] Three electoral votes would be about 0.5% of the total

---

[3] Act of Oct. 4, 1961, Pub. L. 87-389, 75 Stat. 817 (amending Act of August 12, 1955, relating to elections in the District of Columbia).

[4] *See id. See also* D.C. CODE § 1-1001.10(a)(2) (2021).

[5] H.R. 51, 117th Cong. § 111 (2021).

[6] H.R. 51, 117th Cong. § 112 (2021).

[7] *See Population by Race and Hispanic or Latino Origin in the District of Columbia – Census Tracts: 2010*, DC OFFICE OF PLANNING, https://plandc.dc.gov/sites/default/files/dc/sites/op/publication/attachments/DC%2520Census%25202010%2520Population%2520by%2520Census%2520Tract.pdf [https://perma.cc/74B5-AUT7].

[8] *ACS Demographic and Housing Estimates, Census Tract 62.02, District of Columbia, DC*, UNITED STATES CENSUS BUREAU (2019), https://data.census.gov/cedsci/table?g=1400000US11001006202&tid=ACSDP5Y2019.DP05 [https://perma.cc/M2WX-9R2P].

[9] *See* Charlie Savage and Emily Cochrane, *White House Is Said to Quietly Push Change to D.C. Statehood Bill*, N.Y. TIMES (May 13, 2021), https://www.nytimes.com/2021/05/13/us/politics/biden-dc-statehood.html ("It is not clear how many, if any, potential voters would be left there. The only residence in the rump federal enclave would be the White House; presidential families traditionally choose to vote in their home states, but nothing forces them to do so. In theory, homeless people might also claim residency in the envisioned enclave.").

[10] One aside—if an objective of H.R. 51 is to oversee the ultimate repeal of the Twenty-Third Amendment, it should also ensure that the size of the House is an odd

number of electors. Exceedingly narrow Electoral College margins are not unheard of, and three votes may make the difference in an election.[11] Presidential elections should not turn on a handful of Capital residents.

The new District, then, will have a handful of inhabitants and be entitled to three electoral votes. The next question asks how to resolve the issue.

II. Proposed statehood legislation does not adequately address the Twenty-Third Amendment and related voting issues.

H.R. 51 addresses problems concerning new District voting rights in Sections 221–24.[12] First, it would allow Capital inhabitants to vote in their last state of domicile; second, it would repeal the Office of District of Columbia Delegate; third, it would repeal a federal law relating to timing, transmission, and counting of electoral votes; and finally, it would allow for expedited repeal of the Twenty-Third Amendment.[13] These provisions are inadequate.

First, there is no guarantee of repeal of the Twenty-Third Amendment. The expedited procedures would allow swift floor action on an amendment to repeal the Twenty-Third Amendment.[14] But there is no assurance that the required two-thirds of each chamber of Congress would vote to repeal.[15] Nor is there any guarantee that the legislatures of three-fourths of the states would approve the repeal before the next election, if ever.[16]

---

number, not an even number, in part to prevent the possibility of a tie in the Electoral College. At present, the potential for a tie exists in the Electoral College because there are 538 votes, which evenly divides in half into 269. In the event no candidate wins a *majority* of the Electoral College, the election is sent to the House of Representatives to select a president between the tied candidates, and each state receives one vote. *See* U.S. CONST. amend. XII. There are 538 votes because there are 100 senators (always an even number, as there are two senators in each state); 435 members of the House (presently fixed by statute); and the District of Columbia is guaranteed the smallest state's allotment of electors, which, since the Twenty-Third Amendment's ratification, has been three. An even number plus an odd number plus an odd number always yields an even number. H.R. 51 would permanently increase the size of the House by one. *See* H.R. 51, 117th Cong. § 102(d) (2021). That would yield 102 senators, 436 members of the House, and three new District electors, for a total of 541, an odd number. If the Twenty-Third Amendment is repealed, that figure would drop back down to 102 plus 436, or 538, an even number. Increasing the size of the House to 437—or to some other odd number—would be preferable, because it would eliminate the remote possibility of a tie.

[11] In 2000, George W. Bush received 271 votes in the Electoral College, needing 270 votes to secure a majority. In 1876, Rutherford Hayes received 185 votes in the Electoral College, the minimum number of votes to secure a majority.

[12] H.R. 51, 117th Cong. §§ 221–24 (2021).

[13] *Id.*

[14] *Id.* § 224.

[15] *See* U.S. CONST. art. V.

[16] If the District were to become a state, it would take 39 states to ratify an amendment, for there would be 51 states and it takes three-fourths of the states to ratify an amendment. *Id.* But if there is a dispute about whether the new District were

Why might Members of Congress or state legislatures choose not to ratify the repeal? If there is a genuine legal controversy about whether the District could become a state,[17] both supporters and opponents of statehood have an incentive to wait for the legal process to play out. If a federal court finds that statehood is unconstitutional, then District residents would prefer to retain the Twenty-Third Amendment. Litigation takes time.[18]

Amending the Constitution is a hard thing to do, and it has been happening with increasing rarity. The Constitution has been amended once in the last 50 years, and that was to ratify an amendment approved by Congress in 1789.[19] Before that, an amendment was ratified 50 years ago, when the Twenty-Sixth Amendment was ratified on July 1, 1971.[20] Only one amendment has ever been repealed.[21] While past performance is no indication of future success, the United States has been in a lull period of amending the Constitution. Merely wishing for future events to occur is not an adequate legislative solution. Enacting a statute, then hoping for Congress and the states to ratify a constitutional amendment, is unwise. Increased uncertainty for even one presidential election would be problematic.

Second, Section 223 of H.R. 51 is misleading in its scope. It is entitled, "Repeal of law providing for participation of seat of government in election of president and vice-president."[22] But this amendment does not "repeal" the law "providing for participation" in the presidential election. It repeals 3 U.S.C. § 21, a provision added to clarify the Electoral Count Act of 1887 after the enactment of the Twenty-Third Amendment.[23]

The Electoral Count Act provides the rules for participation in presidential elections, such as the day on which "states" participate in presidential elections, the manner in which states send their electoral votes to Congress, and the manner in which Congress counts the electoral votes. 3 U.S.C. § 21 was added to clarify that "state" in the Electoral Count Act included the District of Columbia. It solely regulates the timing, transmission, and counting of electoral votes.

The District of Columbia's participation in presidential elections is currently codified elsewhere.[24] That law is unchanged in H.R. 51 and would remain in effect

---

a state, one might wonder whether there were just 50 states requiring 38 legislatures' approval. Or, if the new District's legislature approved the amendment, there might be disputes about whether it could validly approve an amendment in the first place while a dispute remained pending.

[17] This testimony takes no position on merits or the likelihood of the outcome of that litigation. It simply notes that it is a non-trivial possibility.

[18] *But see* Letter from Law Professors to Congressional Leaders 4 (May 22, 2021), https://www.scribd.com/document/509015647/Letter-to-Congressional-Leaders-on-Constitutionality-of-Statehood-for-Washington-D-C-May-2021 [hereinafter *May 22 Letter*] (Re: Washington, D.C. Admission Act and the likelihood of a constitutional challenge) ("None of the other 50 States has reason to seek to retain three electors for a largely unoccupied seat of government.").

[19] U.S. CONST. amend. XXVII.

[20] U.S. CONST. amend. XXVI.

[21] U.S. CONST. amend. XXI, § 1 (repealing U.S. CONST. amend. XVIII).

[22] H.R. 51, 117th Cong. § 223 (2021).

[23] *See id.*

[24] *See* D.C. CODE § 1-1001.10(a).

in Capital upon its admission.[25] H.R. 51 does not change presidential elections in Capital. Indeed, H.R. 51 goes out of its way to amend some portions of the Elections Code *without* abolishing the rules pertaining to presidential elections.[26] In other words, the title of Section 223 does not do what it purports to do.

In contrast to the claim, the section repeals what is principally a conforming amendment to the Electoral Count Act. Among other things, the Electoral Count Act instructs Congress on the method of counting electoral votes, the circumstances in which members of Congress may object to counting of votes, and the procedures for handling objections.[27] The Twenty-Third Amendment entitles the District to three electoral votes, regardless of what federal law says. Capital would still hold a presidential election, choose three electors, and send those electors to Congress. The Electoral Count Act would no longer instruct Congress how to count them.

But on January 6, Congress would still have three electoral votes from Capital when it convenes to count electoral votes—votes constitutionally authorized for the District to select. Congress might then ignore the Electoral Count Act, as it would confront a circumstance falling outside its scope. A situation encouraging Congress to create new mechanisms in counting electoral votes seems unwise.[28]

---

[25] *See* H.R. 51, 117th Cong. § 114 (2021)

[26] *See id*. at § 222 (amending portions of the District of Columbia Elections Code of 1955 to strike the election of a "delegate" to the House of Representatives, but not the remainder of the Code).

[27] 3 U.S.C. § 15.

[28] *See May 22 Letter, supra* note 15, which argues that Section 223 "provid[es] for the repeal of the provision of federal law that establishes the current mechanism for District residents to participate in presidential elections." Signed by a cohort of law professors, this is inaccurate and confuses 3 U.S.C. § 21, D.C. Code § 1-1001.10(a) with the Twenty-Third Amendment. Section 223 repeals the provision making the District a "state" for purposes of the timing, transmission, and counting of electoral votes. It does not "repeal" the "mechanism" for "participat[ion]," which is codified at D.C. Code § 1-1001.10(a), and which is not altered by H.R. 51.

See also id, where the letter inaccurately states that 3 U.S.C. § 21 "provid[es] that the District residents may select presidential electors." Again, 3 U.S.C. § 21 relates to the timing, transmission, and counting of electoral votes, while D.C. Code § 1-1001.10(a) provides for the participation of District residents in presidential elections.

The May 22 letter confuses 3 U.S.C. § 21 as linked to the Twenty-Third Amendment, instead of Congress's related power under the Twelfth Amendment (amending Article II of the Constitution) to count electoral votes. Repealing 3 U.S.C. § 21 would still entitle Capital, under D.C. Code § 1-1001.10(a), to elect presidential electors. Capital would no longer be obligated to vote on the "Tuesday next after the first Monday in November," Electoral Count Act, 3 U.S.C. § 1, but it would still be required to do so under D.C. law, D.C. Code § 1-1001.10(a)(2). Some provisions of federal law would necessarily apply to Capital's electors. First, Capital's electors would be required to vote on the "first Monday after the second Wednesday in December." 3 U.S.C. § 7. Even with the repeal of 3 U.S.C. § 21, the Constitution mandates that Congress determines "the day on which [electors] shall give their votes," and that "day shall be the same throughout the United States." U.S. CONST.

Third, Section 221 may be unconstitutional. Section 221 is designed to reduce the likelihood that there would be any voters in Capital. It compels states to permit "absent Capital voters"—eligible voters in Capital who were previously domiciled in another state—to register in their former states and request absentee ballots for federal elections.

As mentioned earlier, it is likely that 30 to 60 people would reside in Capital, and only some of them would be eligible voters. In a way, it is negligible to try to press those voters back to their former states.

Congress likely lacks the power to create voter qualifications, but states have broad power over the qualifications of voters, including "reasonable citizenship, age, and residency requirements."[29] Congress's power to dictate qualifications for eligible voters, even in federal elections, is much more contested.

Congress has the power to "make or alter" regulations pertaining to the "times, places and manner of holding elections for Senators and Representatives."[30] But states determine who is eligible to vote in those elections. For the House, "the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature."[31] The same is true for the Senate.[32] There is no federal power to fix voter qualifications.

Congress's power in presidential elections is ostensibly even less. There is no analogous "times, places and manner" clause, although "Congress may determine the time of choosing the electors."[33] Instead, "Each state shall appoint, in such manner as the Legislature thereof may direct, a number of electors . . . ."[34] All states currently hold popular elections for the selection of presidential electors, and these states define who is eligible to vote in those elections.

The Supreme Court has held that Congress's authority to regulate presidential elections might be broader than the Constitution's language suggests.[35] And the Constitution does forbid states from denying or abridging the right to vote on account

---

art. II, § 1, cl. 4. The Constitution also requires that "the votes shall then be counted" "in the presence of the Senate and House of Representatives." U.S. CONST. amend. XII. This power requires no implementing legislation. *Contra* 1 ANNALS OF CONG. 486, 16-18 (1789) (Joseph Gales ed., 1834) (reporting on the convening of Congress to count electoral votes). Congress can, of course, act pursuant to implementing legislation, and it has acted pursuant not simply to the Electoral Count Act, but also pursuant to a concurrent resolution. *See, e.g.*, S. Con. Res. 1, 117th Cong. (Jan. 3, 2021).

Respectfully, the May 22 letter appears to defend a hypothetical bill that does not exist in H.R. 51. Media commentary makes the same mistake, too. *See* Savage & Cochrane, *supra* note 9 (noting that in the bill, "legal procedures for appointing any electors would be rescinded").

[29] Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 625 (1969).

[30] U.S. CONST. art. I, § 4, cl. 1.

[31] U.S. CONST. art. I, § 2, cl. 1.

[32] U.S. CONST. amend. XVII.

[33] U.S. CONST. art. II, § 1, cl. 4.

[34] U.S. CONST. art. II, § 1, cl. 2.

[35] *See* Burroughs v. United States, 290 U.S. 534, 544–45 (1934).

of race, color, or previous condition of servitude;[36] sex;[37] failure to pay a tax;[38] or age, for those over the age of 18.[39]

So where is Congress's power to establish voter qualifications—that is, to compel a state to allow people who moved out of the state and into Capital to vote back in their former state? Supreme Court precedent on weak footing supplies some hints.

In 1970, Congress amended the Voting Rights Act with, *inter alia*, two provisions. First, it established the minimum age of voters in federal elections at 18 (in most states at the time, it was 21).[40] Second, it effectively reduced residency requirements in presidential elections to 30 days before the election; and if a resident moves elsewhere within those 30 days, the resident may cast a vote in the presidential election in her former state.[41]

In *Oregon v. Mitchell*, the Supreme Court upheld these regulations. The age requirement in federal election was upheld.[42] A similar age requirement in state election was found unconstitutional, which was the impetus for enacting the Twenty-Sixth Amendment.[43] The *reason* for upholding the law was elusive. No single reason commanded a majority of the Court—indeed, a majority of the Court affirmatively rejected each constitutional basis for the law. One arguable basis was the Elections Clause;[44] another, the Fourteenth Amendment.[45] But the Supreme Court concluded in 2013 when weighing a claim under the Elections Clause: "That result, which lacked a majority rationale, is of minimal precedential value here."[46]

The Court in *Oregon v. Mitchell* also upheld Congress's authority to set minimum residency requirements on the basis of the right to travel.[47] A strong majority of the Court endorsed Congress's power to help address the right to travel across parts of the country, here prohibiting states from treating new arrivals from other states differently.[48]

In 2013, in *Arizona v. Inter Tribal Council of Arizona, Inc.*,[49] a seven-justice majority of the Court endorsed a more limited understanding of congressional power: "Prescribing voting qualifications, therefore, 'forms no part of the power to be

---

[36] U.S. CONST. amend. XV.

[37] U.S. CONST. amend. XIX.

[38] U.S. CONST. amend. XXIV, § 1.

[39] U.S. CONST. amend. XXVI, § 1.

[40] Voting Rights Act Amendments of 1970, Pub. L. No. 91–285, 84 Stat. 314 (codified as amended at 52 U.S.C. § 10701 (1975)); *see also* Oregon v. Mitchell, 400 U.S. 112, 117 (1970).

[41] Voting Rights Act Amendments of 1970, Pub. L. No. 91–285, 84 Stat. 314 (codified as amended at 52 U.S.C. § 10502 (1970)); *see also Mitchell*, 400 U.S. at 147–50.

[42] *See* Mitchell, 400 U.S. at 118.

[43] *See id.*

[44] *See id.* at 119–24.

[45] *See id.* at 126–28.

[46] Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 16 n.8 (2013).

[47] *See* Brian C. Kalt, *Unconstitutional but Entrenched: Putting UOCAVA and Voting Rights for Permanent Expatriates on a Sound Constitutional Footing*, 81 BROOKLYN L. REV. 441, 475–77 (2016).

[48] *Id.*

[49] 570 U.S. 1 (2013).

conferred upon the national government' by the Elections Clause, which is 'expressly restricted to the regulation of the times, the places, and the manner of elections.' The Federalist No. 60, at 371 (A. Hamilton)."[50] A strong majority of the Supreme Court has pressed back on *Oregon v. Mitchell*. It opens questions about whether Congress has much authority, if any, to dictate voter qualifications to states in federal elections.

Furthermore, Section 221 may threaten the votes of tens of thousands of military and overseas voters. Section 221 language tracks identical language in the Uniformed and Overseas Citizens Voting Act of 1986 ("UOCAVA").[51] UOCAVA has never faced a serious legal challenge, no doubt in part due to the politically-fraught position of a plaintiff requesting the federal courts to strip military and overseas voters of federal voting opportunities.[52] Section 221, if enacted, would assuredly be challenged by some state that, under Section 221, would resist voter registration of an absentee Capital voter. An "absentee Capital voter" might attempt to register to vote in a former state, be denied, and sue for the right to register. Or a state, facing an absentee Capital voter, might seek injunctive relief to prevent enforcement of Section 221. A federal court—perhaps ultimately the Supreme Court—might repudiate Congress's power to enact Section 221.[53] And with an on-point precedent, a litigant or a state might be emboldened to challenge UOCAVA.[54]

I use "may threaten" deliberately. It is possible, of course, that this litigation fails for a myriad of reasons. Perhaps no one sues. Perhaps federal courts and the Supreme Court ultimately conclude that Congress *does* have the authority to compel states to keep voters, who moved out of the state into Capital long ago. Perhaps no one would try to apply a holding of Section 221 to UOCAVA. And it is also possible that states would each voluntarily accede to UOCAVA's rules even after it were found unconstitutional.

Simply put, these are, in my judgment, legitimate areas of uncertainty. H.R. 51 inadequately addresses them.

III. Statehood for the District of Columbia should be conditioned on repeal of the Twenty-Third Amendment.

Requiring repeal before statehood is hardly a new concern.[55] But the existing repeal mechanisms are inadequate, and a repeal could take different forms. One

---

[50] *Id.* at 17 (emphasis removed).

[51] *Compare* 52 U.S.C. § 20302(a)(1) & (2) (2017) *with* H.R. 51, 117th Cong. § 221(a)(1)(A) & (B) (2021).

[52] *See* Kalt, *supra* note 47, at 500–01 (2016).

[53] *See id.* (describing constitutional problems with UOCAVA).

[54] The May 22 letter claims, "no potential litigant would suffer the constitutionally cognizable injury required to establish standing to bring a court challenge to such legislative action" that might require District electors to cast votes for the candidate who receives the most electoral votes. *See* May 22 letter, *supra* note 18, at 5–6 n.11. Part of the justification is that Capital residents would be able to vote elsewhere under Section 221. But the May 22 letter elides over whether there are any infirmities with Section 221 and how litigation might proceed.

[55] *See, e.g.*, Mike DeBonis, *Is the D.C. statehood bill constitutional?*, WASH. POST (Sept. 15, 2014), https://www.washingtonpost.com/blogs/mike-debonis/wp/2014/09/15/is-the-d-c-statehood-bill-constitutional/

might be a straight repeal of the Twenty-Third Amendment, similar to the text of the Twenty-First Amendment: "The twenty-third article of amendment to the Constitution of the United States is hereby repealed." But repealing, then awaiting statehood, seems like a suboptimal solution for District residents.

An alternative amendment might condition repeal of the Twenty-Third Amendment in the event the number of inhabitants in the District, constituting the seat of government, falls below 10,000. If the bulk of the present District of Columbia becomes a state or is retroceded, the conditional repeal would take effect, and the Twenty-Third Amendment would cease to apply to the remaining federal enclave.

Relatedly, a constitutional amendment could expressly authorize Congress to establish voter qualifications for inhabitants in the District constituting the seat of government in federal elections after repeal. This provision would obviate concerns that Section 221 might be unconstitutional.

In its current form, H.R. 51 allows for an expedited consideration of a repeal of the Twenty-Third Amendment, but only if the text of that amendment is "solely" dedicated to repealing the Twenty-Third Amendment.[56] Alternative amendments like those described would not benefit from any expedited consideration. And as mentioned, there is no guarantee of a repeal.

IV. Potential alternative statutory solutions to the Twenty-Third Amendment present constitutional, legal, and practical problems.

It is worth noting that none of the alternatives discussed below exists in H.R. 51. They are merely the stuff of conjecture. And because there are an unlimited number of alternative proposals that might arise, this Article addresses three that have received material attention.[57] First, Congress could award the electoral votes to nobody. Second, Congress could award them to the winner of the Electoral College. Third, Congress could award them to the winner of the "national popular vote," the aggregation of the vote across the states. Each faces problems.

First, if Congress decided not to appoint electors by, say, repealing relevant provisions of the D.C. Code, Congress would be derelict in its duty. The Court has repeatedly noted that, in the context of elections, "shall" places a duty upon states.[58] The Constitution provides that "Each state *shall* appoint . . . a number of electors"[59] and that "The District . . . *shall* appoint" electors.[60] One construction of these mandates is that the District has a duty to appoint electors. Congress's power—to "direct" the "manner" of appointing electors—is to provide the framework for how

---

[https://perma.cc/DB49-4N8D] (citing comments of Roger Pilon "that the 23rd Amendment would need to be repealed, lest the tiny number of residents left in the federal enclave stand entitled to three presidential electoral votes").

[56] H.R. 51, 117th Cong. § 224 (2021).

[57] *See, e.g.*, the May 22 letter, *supra* note 18; Savage & Cochran, *supra* note 9.

[58] *See, e.g.*, Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 8 (2013); U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 804–05 (1995). *See also* Chiafalo v. Washington, 140 S. Ct. 2316, 2329 (2020) (Thomas, J., concurring in the judgment).

[59] U.S. CONST. art. II, § 1, cl. 2 (emphasis added).

[60] U.S. CONST. amend. XXIII, § 1 (emphasis added).

the District goes about that appointment.[61] And even if Congress decided not to award electors in the next presidential elections, Capital's three electoral votes would be waiting for the next Congress. Congress could at any time change its mind and decide that the federal enclave should appoint electors. It would be a significant temptation and hardly an optimal solution.

Second, Congress might enact a new law awarding Capital's electors to the winner of the Electoral College. But this is unconstitutional because it is impossible to comply with the Constitution's terms. Presidential electors must give their votes on the "same" day "throughout the United States."[62] To award a slate of presidential electors to the winner of the Electoral College would require waiting until after all the electors cast votes. Even then, controversies might arise in Congress if a state submitted multiple slates, or in the event a controversy arose over the legitimacy of the appointment of an elector in the first place.[63]

A more generous reading of this alternative proposal might be that sometime after Election Day, the apparent winner of the Electoral College would be awarded Capital's electors. But that date, used to determine presidential transitions, is uncertain and in recent years yielded controversy.[64] And it would incentivize states to drag their feet or offer competing slates of electors to influence the outcome of Capital's electors.

This proposal, and the proposal that Congress award Capital's electors to the winner of the national popular vote, suffer from another problem. The proposals emphasize Congress's power to "direct" the "manner" of appointing presidential electors. That power is undoubtedly broad.[65] But it is only one clause of a two-clause directive. The Twenty-Third Amendment provides, "The District . . . shall appoint," and "Congress" "may direct" the "manner."[66] The first is the who. The second is the how.

If Congress directs that it will award Capital's electors based on the popular vote of the inhabitants of France, it would be hard to say that "the District" has appointed the electors. In the same way, if Congress chooses a manner that awards electors based on what happens in the rest of the United States, it is hard to say that "the District" has appointed anyone. Every choice of presidential electors in American

---

[61] For arguments surrounding Congress's duty, consider Peter Raven-Hansen, *The Constitutionality of D.C. Statehood*, 60 G.W. L. REV. 160, 184–89 (1991) (weighing the "close" debate).

[62] U.S. CONST. art. II, § 1, cl. 4.

[63] *See* 3 U.S.C. § 15 (1948).

[64] *See, e.g.*, Andy Card and John Podesta, *The life-threatening costs of a delayed transition*, WASH. POST (Nov. 10, 2020), https://www.washingtonpost.com/opinions/podesta-card-bush-gore-transition-trump/2020/11/10/ae1a960a-239f-11eb-8672-c281c7a2c96e_story.html [https://perma.cc/L4VL-VV8X]; Letter from Emily W. Murphy, Administrator, U.S. General Services Administration, to the Honorable Joseph R. Biden, Jr. (Nov. 23, 2020), https://www.gsa.gov/cdnstatic/2020-11-23_Hon_Murphy_to_Hon_Biden_0.pdf [https://perma.cc/EXR6-RSR6].

[65] *See, e.g.*, McPherson v. Blacker, 146 U.S. 1, 35 (1892) (describing the power as "plenary").

[66] U.S. CONST. amend. XXIII, § 1.

history has been based on some sort of election *within* the state, not outside the state.[67]

Supporters of these alternative proposals have cited the Supreme Court's recent opinion in *Chiafalo v. Washington*.[68] In *Chiafalo*, the Court approved a fine levied by the State of Washington on electors who cast votes inconsistent with state law, which required electors to vote for the candidate they had pledged to support.[69] The electors' candidate had won the statewide popular vote. The Court emphasized that Washington had broad discretion over how to handle electors' discretion, and the Constitution did not take away the power to do what Washington did.[70]

Chiafalo certainly speaks broadly about how states may control electors. But it says nothing about the predicate question: the selection of electors in the first place. Once a state holds a popular election, and the people choose a presidential candidate who carries the popular vote in a state, electors can be bound to vote for that candidate. But *Chiafalo* does not authorize legislatures to compel electors to vote for anything the legislature wants. The legislature cannot violate the Equal Protection Clause or add qualifications to presidential candidates.[71] The power to compel electors may not extend to compelling electors to vote for a dead candidate.[72] Likewise, if Congress cannot direct the power of appointment outside the District, then *Chiafalo* is simply inapplicable.

The third proposal, awarding Capital's electors to the winner of the "national popular vote," suffers from many legal and practical problems, written about extensively elsewhere in the context of the National Popular Vote Compact.[73] To start: how and when does Congress determine the winner of the "national popular vote"? How does it handle litigation and recounts—or a state that refuses to recount because the margin in the home state is wide but the margin nationwide is narrow?

There are major Equal Protection problems, too. Voter eligibility rules vary (or may vary in the future) from state to state—incarcerated felons can vote in some

---

[67] *See* Norman R. Williams, *Why the National Popular Vote Compact Is Unconstitutional*, 2012 B.Y.U. L. REV. 1523, 1540, 1572–73, 1581–83 (2012).

[68] 140 S. Ct. 2316 (2020). *See, e.g.*, Jessica Bulman-Pozen & Olatunde Johnson, *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/368D-YDC3].

[69] *Chiafalo*, 140 S. Ct. at 2322.

[70] *Id.* at 2324–25.

[71] *Id.* at 2324 n.4.

[72] *Id.* at 2328 n.8.

[73] Much analysis in this section draws from Derek T. Muller, *The Electoral College and the Federal Popular Vote*, 15 HARV. L. & POL'Y REV. 129 (2020), https://harvardlpr.com/wp-content/uploads/sites/20/2021/08/HLP103.pdf [https://perma.cc/9HML-ZKGE]; Michael Morley, *The Framers' Inadvertent Gift: The Electoral College and the Constitutional Infirmities of the National Popular Vote Compact*, 15 HARV. L. & POL'Y REV. 81 (2020), https://harvardlpr.com/wp-content/uploads/sites/20/2021/08/HLP109.pdf [https://perma.cc/XQ3K-GMPD]; Derek T. Muller, *Invisible Federalism and the Electoral College*, 44 ARIZ. ST. L.J. 1237 (2012); Norman R. Williams, *Reforming the Electoral College: Federalism, Majoritarianism, and the Perils of Subconstitutional Change*, 100 GEO. L.J. 173 (2011).

states, but ex-felons are prohibited in others. Voting procedures vary, from strict photo voter identification laws to no identification laws at all. Polling places are open in Hawaii well after the polls close in Kentucky. While some variance of election procedures is inevitable, other variations are so broad that they implicate the Equal Protection Clause.[74]

Ballot access standards vary from state to state. For instance, 2016 Green Party nominee Jill Stein and 2020 independent candidate Kanye West, among others, appeared on the ballot in only some states. How can we assemble a "national popular vote" when Americans aren't even looking at the same ballot?

If it's a single constituency election—like a nationwide popular election for president—we have to have a uniform set of rules. A system that creates a "national popular vote" is really just adding up the votes from 51 separate presidential elections. It may well violate the Equal Protection Clause, and it certainly presents significant practical problems.

Again, none of these proposals has been introduced in Congress, and they are not in the text of H.R. 51 as it has been presented before you today. But even these proposals, presented as "solutions" to the Twenty-Third Amendment dilemma, are wanting.

* * *

The Twenty-Third Amendment problems facing H.R. 51 are significant. Anomalies will exist. If statehood (or retrocession) is the goal, the best path forward is a constitutional amendment that would repeal the Twenty-Third Amendment contingent on future statehood. That amendment should also expressly empower Congress to address the voting status of inhabitants of any federal enclave. Alternative solutions—both in the bill and in ideas floated about in the public domain—are inadequate to address constitutional, legal, and practical problems.

In a way, it may seem odd that the Twenty-Third Amendment, which empowered the electoral power of the District of Columbia, is now a barrier to statehood via ordinary legislation. But constitutionalizing a subject crystalizes it. The Constitution limits ordinary legislation. The only way to undo what the Constitution has done is through an amendment.

---

[74] *See* Morley, *supra* note 73 (discussing Equal Protection Clause concerns); *see also* Bush v. Gore, 531 U.S. 98 (2000) (per curiam).