TAKE BACK THE COURT

SUPREME COURT MAY INVALIDATE D.C. STATEHOOD

February 2, 2019

Take Back the Court is a national initiative urging Congress to add justices to the Supreme Court.
Please visit **www.takebackthecourt.today** for more information.

SUMMARY

The current right-wing Supreme Court has been increasingly emboldened to embrace radical theories for partisan reasons.[1] If Congress passed legislation granting statehood to Washington, D.C.--thus giving D.C. residents their rightful representation--the Court would be poised to strike down the law. The Court could use its now signature radical originalism to claim that D.C. statehood violates the Constitution's unwritten intent and, if that is not enough, that such legislation is prohibited by the Twenty-third Amendment.

Our point is not to criticize the idea of D.C. statehood, which we endorse as one of the critical social justice issues of this era, or to suggest that activists should cease advocating for statehood. Rather, our point is to underscore the Supreme Court's likely reaction to D.C. statehood, and to point out that court packing may be the only option to ensure that a statehood law survives judicial review.

BACKGROUND

This month, Delegate Eleanor Holmes Norton introduced legislation with strong support in Congress to make Washington, D.C., a state. To comply with the Constitution, the proposal would leave federal buildings like the U.S. Capitol under federal control while creating the new state around them.[2] Speaker Nancy Pelosi has endorsed the legislation, and Senator Elizabeth Warren announced her support for D.C. statehood in the early days of her presidential campaign.

However, even if Democrats retake the presidency and Senate, the right-wing Supreme Court is poised to strike down a D.C. statehood statute. For decades, conservatives have recognized that representation for D.C. would threaten their agenda. In 1987, the Reagan Administration's Department of Justice released a seventy-page report to support its tenuous claim that D.C. statehood would require a constitutional amendment rather than ordinary congressional legislation.[3] At the same time, the Justice Department was developing a series of reports that outlined a conservative constitutional agenda often counter to Supreme Court precedent.[4] The Reagan Administration's appointment of conservative judges to the federal bench set the stage for that agenda to become reality.[5]

The report on D.C. statehood was one prong in that agenda. Its unambiguous first sentence reveals its true purpose, indicating that even the hurdle of a constitutional amendment would not be enough to satisfy its authors: "Efforts to admit the District of Columbia to the Union as a state should be vigorously opposed."[6] The report's arguments have since been parroted by the Heritage Foundation.[7] The Supreme Court could invoke those arguments, outlined below, to preserve the Republican stranglehold on our democracy.

1 See, e.g., Janus v. AFSCME, 138 S. Ct. 2448 (2018) (striking down a law that required non-union public employees to pay union dues, in the process eviscerating a key protection for unions).
2 Norton Introduces D.C. Statehood Bill with Record Number of Original Cosponsors, Announces House Oversight Committee Will Hold Hearing and Markup this Year, Congresswoman Eleanor Norton Holmes (Jan. 3, 2019), https://norton.house.gov/media-center/press-releases/norton-introduces-dc-statehood-bill-with-record-number-of-original.
3 Report to the Attorney General: The Question of Statehood for the District of Columbia, Department of Justice (April 3, 1987), https://www.ncjrs.gov/pdffiles1/digitization/115093ncjrs.pdf.
4 Dawn E. Johnsen, Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change, 78 Ind. L.J. 363, 389 (2003).
5 Id. at 392.
6 Report to the Attorney General, supra note 3, at i.
7 R. Hewitt Pate, D.C. Statehood: Not Without a Constitutional Amendment, Heritage Foundation (Aug. 27, 1993), https://www.heritage.org/political-process/report/dc-statehood-not-without-constitutional-amendment.

ARGUMENTS

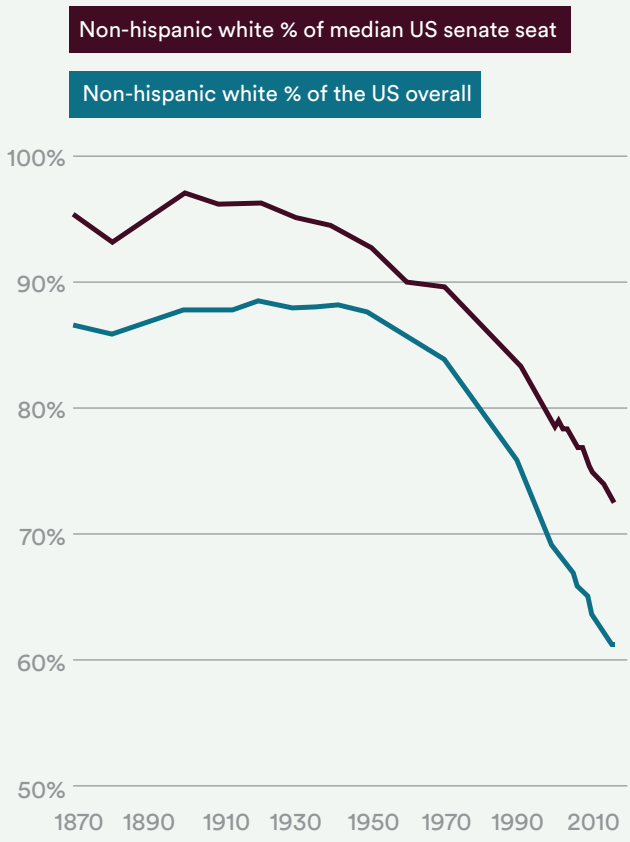
1. The Court could strike down a statute granting D.C. statehood on the grounds that such a law departs from the Framers' original intent to create an independent seat of government.

Conservative judges generally believe that the way the Framers of the Constitution thought and acted more than two hundred years ago should continue to govern modern interpretations of the Constitution. They continue to cling to this theory, known as originalism, despite the fact that Americans want the Constitution interpreted as it "means in current times" by a margin of 55 to 41 percent.[8] The five-justice majority of the Court subscribes to originalism and would rely on tenuous originalist reasoning to invalidate a D.C. statehood statute.

Based on a forced interpretation of constitutional text and the Framers' supposed intent in creating the District, the Court likely would find that creating a D.C. state presents an unconstitutional transfer of power from Congress to a state. To govern the interpretation of other relevant laws, the Court would read the legislative text extremely narrowly to determine the legislature's intent.

First, the Court could declare D.C.'s legislative admission as a state to be a violation of Article I, § 8 of the Constitution. That provision grants Congress the vast power to "exercise exclusive Legislation in all Cases whatsoever" over the District of Columbia. Conservative groups such as the Heritage Foundation have argued that D.C. statehood conflicts with the exclusive control that Article I, § 8 gives Congress over the District, and that Congress cannot surrender this exclusive control through mere legislation.[9] Constitutional challenges seeking to limit Congress's exclusive plenary authority over D.C. have failed multiple times, and the Court does not seemed poised to limit this authority in the near future.

FIGURE 1 | The US Senate dilutes the voting power of non-white voters more and more every year



Source: David Shor

Granting D.C. statehood requires giving D.C. independent powers of state governance, as enjoyed by all other states in our Union. Since the

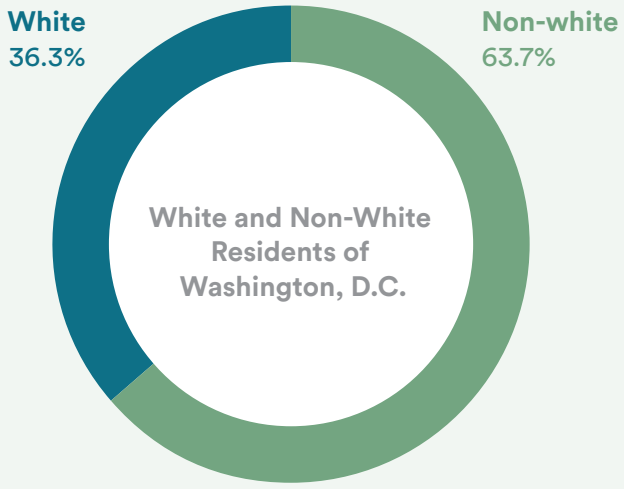
8 Kristin Bialik, Growing Share of Americans Say Supreme Court Should Base its Rulings on What Constitution Means Today (May 11, 2018), http://www.pewresearch.org/fact-tank/2018/05/11/growing-share-of-americans-say-supreme-court-should-base-its-rulings-on-what-constitution-means-today.
9 Hewitt Pate, supra note 7.

Supreme Court has ruled that granting statehood is permanent and irrevocable,[10] conservative groups argue that granting D.C. statehood through legislation would confer upon it permanent powers that the Constitution reserves for Congress alone. To that end, the Court may find that any compromise whereby the new state and Congress would somehow share or divide municipal power and responsibilities violates the Framers' intent in creating a federal enclave independent of the states.[11]

Relatedly, Article I, § 8 provides that the District should not "exceed[] ten Miles square." Conservatives have argued that this initial limitation, coupled with the subsequent creation in 1790 of a District of that exact size, evinces a clear original intent for a seat of government separate and apart from a state.[12] Reducing the size of D.C. to only encompass a small enclave of federal buildings, the argument goes, would directly contravene that understanding.[13] Of course, Congress has in fact reduced the size of D.C. before: it retroceded land to Virginia in 1846. While the Supreme Court never ruled on the merits of that retrocession, the Court is faced with a blatant contradiction to its potential argument that the intent of Article I, § 8 prevents shrinking the District.[14]

The Court would also use the Federalist Papers—a collection of writings from the time of the Founding and a favorite conservative tool for originalist insights on the Framers' thoughts—to strike down D.C. statehood. James Madison wrote in Federalist No. 43, for example, of the "indispensable necessity of compleat [sic] authority at the seat of Government" to prevent a state from wielding undue influence over the federal government.[15] He also wrote of "the multiplicity of interests" necessary for a functioning democratic system in Federalist No. 51—a multiplicity that this Court might find lacking in a "one-industry town" like D.C., thereby weighing against its admission as a state.[16]

FIGURE 2 |



Second, the Court could rely on the Constitution's Article IV, § 3 to strike down a D.C. statehood law. That Section provides that "no new State . . . shall be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress." Based on this provision, the Court would declare that the Maryland legislature must approve the creation of a new state from the current District of Columbia. When Maryland in 1791 ceded the land that would become D.C., the act of cession explicitly linked its purpose "to the tenor and effect of the eighth section of the first article of the constitution of the government of the United States," which provides for Congress's exclusive control over the seat of government. In the same vein as the originalist doctrine, which seeks to hew to the Framers' initial understanding in writing constitutional language, conservative jurisprudence generally

10 See Texas v. White, 74 U.S. 700, 725 (1868) ("The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States.").
11 See, e.g., James Madison, Federalist No. 43 ("[D]ependence . . . on the State comprehending the seat of the Government for protection in the exercise of their duty, might bring on the national councils an imputation of awe or influence . . . .").
12 Roger Pilon, D.C. Statehood Is a Fool's Errand, CATO Institute (June 5, 2016), https://www.cato.org/publications/commentary/dc-statehood-fools-errand.
13 Id.
14 Phillips v. Payne, 92 U.S. 130 (1875) (holding that plaintiff's late challenge to the validity of the 1846 retrocession was estopped).
15 Federalist No. 43, supra note 11.
16 Pilon, supra note 12.

construes statutory text strictly—a doctrine known as textualism. Under this framework, a conservative Court would read Maryland's act of cession as directly and exclusively tied to the "effect" of Article I, § 8, which discusses a seat of government and not a new state. In other words, a textualist reading would conclude that Maryland ceded its land only for the specific objective of creating a seat of government, not for any other purpose—including creating a new state.

Accordingly, because Maryland's prior land would be used to establish a new state, some commentators have argued that "[i]f Maryland's permission is needed at all, it is needed for this."[17] The Court could rely on the same arguments of textualism and original understanding to require the Maryland legislature to approve any law granting statehood to D.C. In the absence of such permission pursuant to Article IV, § 3, the Court would strike down the law.

However, this narrow reading of Maryland's act of cession cuts both ways: the act also says that Maryland's land is "forever ceded and relinquished to the Congress and government of the United States, in full and absolute right and exclusive jurisdiction." A clear reading of this text suggests that Maryland relinquished its rights over the land totally in 1791. In any case, if Maryland's permission were in fact needed, the majority-Democrat Maryland legislature would be poised to support statehood. Maryland's Congressional delegation also supports statehood overwhelmingly: six of eight Congressmen from Maryland are co-sponsors to Delegate Norton's bill, and an important seventh (Steny Hoyer) supports statehood and has committed to putting the statehood bill on the House floor.[18]

2. The Court could claim that the Twenty-third Amendment must be repealed before D.C. can become a state.

The Twenty-third Amendment of the Constitution grants citizens of D.C. the right to vote in presidential elections by giving them representatives in the electoral college "equal to the whole number of

> If Congress passed legislation granting statehood to Washington, D.C.--thus giving D.C. residents their rightful representation--the Court would be poised to strike down the law.

Senators and Representatives in Congress to which the District would be entitled if it were a State . . . ." Currently, D.C. has three electoral votes.

Certain scholars claim that this amendment prevents D.C. from becoming a state, meaning that it must be repealed before statehood can be granted.[19] These scholars believe that the amendment cannot be sidestepped by shrinking the size of D.C. to encompass only a few federal buildings because it would still require that the small number of people in that District (including perhaps the residents of the White House) be given three votes in the electoral college, thereby producing an undemocratic and unacceptable outcome.

If Congress proceeded with statehood by simply repealing the laws giving D.C. representation in the electoral college, such scholars believe that the move would undermine the constitutional rights protected in other amendments. The Twenty-third Amendment, they claim, is self-executing, meaning that not only does it grant Congress the ability to pass laws enfranchising D.C., it requires Congress to do so. If Congress passes legislation removing the enfranchising laws, it violates the rights of citizens explicitly guaranteed in an amendment to the Constitution.

Conservative scholars claim that, in order to get around the Twenty-Third Amendment, D. C. statehood proponents would have to rely on section two of the amendment, which states that "The

17 Hewitt Pate, supra note 7.
18 Jenna Portnoy, What Democratic Control of the House Means for D.C. Statehood, Wash. Post (January 18, 2019), https://www.washingtonpost.com/local/dc-politics/what-democratic-control-of-the-house-means-for-dc-statehood/2018/12/28/f6a3f780-0471-11e9-b5df-5d3874f1ac36_story.html.
19 Adam H. Kurland, Partisan Rhetoric, Constitutional Reality, and Political Responsibility: The Troubling Constitutional Consequences of Achieving D.C. Statehood by Simple Legislation, 60 Geo. Wash. L. Rev. 475 (1992).

Congress shall have the power to enforce this article by appropriate legislation." By their reasoning, for Congress to choose not to employ this enforcement power, one would have to interpret the second section as lessening the effect of the first section. In other words, D.C's right to appoint electors in section one of the amendment would be contingent upon whether Congress decided to pass legislation to that effect. This would mean that the rights conferred by important amendments, like the Thirteenth, Fourteenth, and Fifteenth Amendments, are also contingent upon whether Congress decides to enforce them.

But the Twenty-Third Amendment is distinguishable from these other amendments because it is not in fact self-executing. The text of section one of the amendment grants the District the right to appoint

> [T]he Court likely would find that creating a D.C. state presents an unconstitutional transfer of power from Congress to a state.

electors "in such a manner as the Congress may direct."[20] The phrase "Congress may" highlights two key implications: first, that Congress holds the power to direct how D.C. electors would be appointed; and second, that Congress's power to do so is discretionary. In other words, the amendment "on its face only empowers Congress, not the District."[21] The other amendments do not have this type of language or intention. The right of D.C. to have representation is expressly limited to the discretion of Congress not by the enforcement clause of the second section (as conservatives claim), but by the plain language of the first section. Using this discretion, Congress could effectively moot the Twenty-third Amendment by passing legislation that allows residents of the shrunken District to vote as if they were citizens of the new state (as is standard practice for residents of federally-controlled land in other states).

CONCLUSION

At the end of the last Supreme Court term, the Court "weaponiz[ed] the First Amendment" to strike a blow at public-sector unions in Janus v. AFSCME.[22] One report called the decision "a potentially crippling blow to the labor movement and the Democratic Party, with which it is aligned."[23] This case did not suddenly appear before the Court but instead reflected a long-term conservative goal. According to The New York Times' Editorial Board, "conservatives on the Supreme Court have been signaling for years that they would like to destroy public-sector unions."[24] The Court seemingly had no qualms with a decision that would be so clearly interpreted as an attack on Democrats. And just as Janus was the culmination of a concerted conservative strategy to attack the labor movement, so too would a Court decision striking down D.C. statehood serve a right-wing agenda dating back to the Reagan Administration.

The Court's Republican majority does not shy away from positions that they know will benefit the party that installed them. If given the opportunity, they could deny statehood to D.C. We fully endorse D.C. statehood as a critical social justice issue that is central to the revitalization of democracy, and we are grateful to statehood activists for their decades of advocacy. Our point is not to critique advocacy for statehood, but to emphasize that because of the Supreme Court's likely reaction, court packing may be the only option to ensure that a statehood law survives judicial review.

20 Peter Raven-Hansen, Constitutionality of D.C. Statehood, 60 Geo. Wash. L. Rev 160, 187 (1991) (emphasis added).
21 Id.
22 Janus v. AFSCME, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting).
23 John Cassidy, As Kennedy Retires, the Supreme Court's Attack on Labor Unions is a Sign of Things to Come, The New Yorker (June 27, 2018), https://www.newyorker.com/news/our-columnists/as-kennedy-retires-the-supreme-courts-attack-on-labor-unions-is-a-sign-of-things-to-come.
24 Editorial, After Janus, Unions Must Save Themselves, N. Y. Times (June 27, 2018), https://www.nytimes.com/2018/06/27/opinion/janus-supreme-court-unions.html.

TAKE BACK THE COURT

BOARD

Professor Mark Tushnet, *Chair*
Harvard University Law School

Professor Carol Anderson
Emory University

W. Kamau Bell
CNN Host and ACLU Ambassador for Racial Justice

Professor Annelien de Dijn
Utrecht University

Alicia Garza
Black Lives Matter (co-Founder)

Paul Henderson
San Francisco Department of Police Accountability

Professor Shauna Marshall
University of California, Hastings

Professor Samuel Moyn
Yale University Law School

Professor Aziz Rana
Cornell University Law School

Ann M. Ravel
Federal Election Commission (Former Chair)

Professor Stephanie Rose Spaulding
University of Colorado, Colorado Springs

Evan Wolfson
Freedom to Marry (Founder and President)

STAFF

Aaron Belkin, *Director*

Kate Kendell, *Campaign Manager*

Sean McElwee, *Director of Research and Polling*

Alicia Barnes, *Digital Media Manager*

Jameson Casentini, *Administrative Assistant*