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Governing the Seat, Not the City: The Constitutional Limits of Plenary Power in the District of Columbia

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Congress's authority over the District of Columbia is often described as plenary, but it is not unlimited. This Article argues that prevailing District Clause doctrine impermissibly collapses two distinct constitutional functions: protecting the federal Seat of Government and governing a permanent civilian population. The resulting jurisprudence permits Congress to regulate local affairs with minimal scrutiny, despite the absence of electoral safeguards that ordinarily justify deference.

The Article advances a textual and structural rereading of the District Clause. The Clause grants Congress authority over the "Seat of Government," not "a city," reflecting a design in which power follows function, not geography. The parallel Enclave Clause confers "like Authority" over federal enclaves, yet courts have recognized that power as functionally limited, not geographically unbounded. Recent dissents in Veneno and Vaello Madero suggest the Supreme Court is increasingly skeptical of plenary power over Tribes and Territories resting on geography alone. The same critique applies to the District.

To resolve this tension, the Article proposes a Bifurcation Test. When Congress regulates seat of government functions, such as securing federal property or ensuring the independent operation of the national government, courts apply traditional Palmore deference. But when Congress regulates purely municipal affairs, it must identify a substantial federal interest tied to seat of government functions, and the regulation must bear a meaningful relationship to that interest. This approach does not create a new tier of scrutiny; it withdraws deference where political safeguards are absent and ensures that congressional authority does not become self-validating.

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Introduction

The Constitution gives Congress broad authority over the District of Columbia, but it is not unlimited. Yet for more than a century, courts have described Congress's power under the District Clause as "plenary," subject only to express constitutional prohibitions.[1] That formulation collapses distinct constitutional functions into unbounded authority, even though District residents lack the political safeguards that ordinarily justify deference.

That is wrong. Not just as a matter of policy, but as a matter of constitutional structure. The unitary plenary power doctrine rests on three compounding errors: a misapplication of historical context, a misreading of constitutional text, and a failure to adapt doctrine to changed circumstances. Correction does not require judicial activism. Properly understood, the District Clause grants Congress functionally differentiated authority: extensive when Congress acts to protect the national seat of government, limited and judicially reviewable when Congress regulates ordinary municipal affairs.

This Article proposes a Bifurcation Test. When Congress regulates to protect the national seat of government, courts apply the traditional *Palmore* deference. But when Congress regulates the District's purely municipal affairs, it must identify a substantial federal interest tied to seat of government functions, and the regulation must bear a meaningful relationship to that interest.

The need is not theoretical. Congress has repeatedly overridden District laws on criminal sentencing, elections, health policy, drug legalization, and taxation to advance national political interests unrelated to federal operations.[2] These interventions are routinely upheld because courts assume Congress may govern the District as if it possessed the general police power of state legislatures.

The Supreme Court is increasingly skeptical. Recent dissents addressing plenary power over Native American Tribes and Territories emphasize that longstanding doctrine cannot substitute for constitutional limits, especially where populations lack political recourse.[3] The District presents this problem in starkest form: 700,000 citizens governed by a Congress of legislators they did not elect and cannot remove.

This Article has three parts. Part I examines the District Clause's text, structure, and founding context, showing the Clause was designed to secure federal independence, not to authorize general police power over a civilian population. Part II shows how modern doctrine collapsed that distinction, producing jurisprudence

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[1] *See* Palmore v. United States, 411 U.S. 389, 398 (1973) (quoting *Capital Traction Co. v. Hof*, 174 U.S. 1, 5 (1899)).

[2] *See* Pub. L. No. 118-1, 137 Stat. 10 (2023) (disapproving D.C. criminal code reform); Pub. L. No. 104-134, § 151, 110 Stat. 1321-19 (1996) (restricting abortion funding); Pub. L. No. 105-277, § 166, 112 Stat. 2681-146 (1998) (blocking marijuana decriminalization).

[3] *See* Veneno v. United States, No. 24-5191, slip op. at 1 (Nov. 10, 2025) (Gorsuch, J., dissenting from denial of certiorari); United States v. Vaello Madero, 596 U.S. 477, 497–98 (2022) (Sotomayor, J., dissenting).

without workable limits. Part III proposes the Bifurcation Test and situates it within existing practice.

This Article does not argue that Congress lacks authority, District citizens have voting rights, or the District is a state. Rather, it advances a narrow claim: Congress's authority over the District is functionally differentiated, constitutionally constrained, and judicially reviewable.

I. The District Clause: Text, Structure, and Purpose

A. The Founding Purpose: Federal Security, Not Municipal Control

The District Clause emerged from a specific problem: after the 1783 Philadelphia Mutiny, when armed Revolutionary War veterans surrounded Congress at Independence Hall demanding back pay and Pennsylvania authorities declined to intervene, the Framers designed Article I, Section 8, Clause 17 to ensure federal independence from state interference.[4] But the Clause's purpose was limited. Ratified before the location of the capital city was selected, it addressed state interference with federal operations, not municipal governance over disenfranchised residents.

Ratification debates confirm this limited purpose. Delegates at the state ratifying conventions raised concerns about federal tyranny over District residents.[5] But they assumed the states ceding the land to become the District would protect residents through conditions on the land transfer itself.[6] The Framers would have been assured by James Madison's Federalist 43, explaining that District residents "will have had their voice in the election of the government which is to exercise authority over them" and enjoy "a municipal legislature for local purposes, derived from their own suffrages."[7] Whatever Madison's precise intent, his assurance reveals the Framers understood congressional authority over the District as constrained.[8] If the Framers intended truly plenary power, state preconditions

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[4] *See generally* Kenneth R. Bowling, *The Creation of Washington, D.C.: The Idea and Location of the American Capital* (George Mason Univ. Press 1991).

[5] New York delegate Thomas Tredwell warned that the federal district "departs from every principle of freedom . . . subjecting the inhabitants of that district to the exclusive legislation of Congress, in whose appointment they have no share or vote." 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 407 (Jonathan Elliot ed., 2d ed. 1836). In Virginia, Patrick Henry declared that the District "may be the means of destroying the liberties of the people," creating a place "where [Congress] will be surrounded by their own creatures and dependents, and where they will have everything their own way," 3 *id.* at 436, while George Mason feared the District would become a sanctuary for corrupt federal officials who could "flout the laws of the States and then flee to the Capital to immunity," *id.* at 431. Alexander Hamilton proposed amending the Constitution to guarantee District residents congressional representation once the population reached a threshold. 2 Elliot's Debates, *supra*, at 407.

[6] North Carolina delegate James Iredell explained that states could "stipulate the conditions of the cession" and would naturally "take care of the liberties of its own people." 4 Elliot's Debates, *supra* note 5, at 148.

[7] The Federalist No. 43, at 287 (James Madison) (Clinton Rossiter ed., 1961).

[8] Madison's use of the future perfect tense: "will *have had* their voice" has sparked debate about whether he contemplated continued suffrage or only pre-cession voting rights. Peter Raven-

protecting voting rights would have been unenforceable under the Supremacy Clause—yet Madison never suggested they were futile.

B. "The Seat of Government": Function Over Geography

Article I, Section 8, Clause 17 of the Constitution, the District Clause:

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of 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.

One textual objection to this Article's Bifurcation Test: that the District Clause grants Congress power to "exercise exclusive Legislation in all Cases whatsoever." That phrase seems to give Congress unlimited power over the District.

It does not. The phrase modifies the nature of congressional authority, not its scope. "Exclusive" means state law cannot operate in the District: Congress's power is not shared with Maryland or Virginia. "In all cases whatsoever" reinforces that exclusivity: congressional legislation is supreme and not subject to state interference.

The District Clause contains two limiting principles courts have overlooked. First, semantic: Congress governs "the Seat" not "a city." Second, structural: authority tracks the federal function protected, power exists because of what the Seat, forts, and arsenals do, not where they are.

The operative noun is "Seat," not borough, city, town, or municipality. In founding-era usage, a "Seat of government" meant where sovereign authority was fixed and exercised, where officials convened, laws were made, and government operated.[9] Blackstone's Commentaries, studied by founding-era lawyers, used "seat" to identify where authority functioned: the seat of justice, empire, war.[10]

The definite article narrows scope: it signals a particular, identifiable thing.[11] It is not an abstract category of governance; it is the site of the national authority. The Clause grants Congress authority over a place because it is the seat of government,

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Hansen, *Congressional Representation for the District of Columbia: A Constitutional Analysis*, 12 Harv. J. on Legis. 167, 178 n.24 (1975).

[9] *See* 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1755) (defining "seat" to include place of authority); NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (defining "seat" as "the place of sitting; throne; chair of state; tribunal; post of authority").

[10] *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *110, 226, 264 (1765).

[11] U.S. CONST. art. IV, § 3, cl. 2 (The Territories Clause also uses "the" but does so before Territory, granting Congress authority over a purely geographical term. In the District Clause, the modifies a singular Seat).

not a general authority over whatever civilian population would end up living in it.[12]

The Framers knew how to write about municipalities. A “city” was a municipal corporation, a “town” a smaller settlement, a “place” a geographic location.[13]

Founding-era constitutions demonstrate precise usage. The Framers understood two decisions: what function to establish (seat) and where to locate it (place). Georgia’s Constitution authorized the legislature to “fix” the “seat of government” at a specific “place.”[14] North Carolina’s constitution also used “place” to describe a future capital.[15]

The federal Constitution is the inverse. It grants authority over a District insofar as it becomes the seat of government. The geographic reference, “not exceeding ten Miles square”, operates as a limiter, not an independent grant. It defines how much land may be set aside, not power’s scope. If authority were geographic rather than functional, there would have been no reason to anchor the grant to a seat. If power were truly unlimited within the ten square miles, the seat of Government language would be surplusage—the Framers needed no constitutional clause to draw a square on a map. They could also have authorized exclusive legislation over “such city as may be designated the capital.” They did not.

When states wanted to grant the state legislature authority over municipal governance, they did so explicitly.[16] The Pennsylvania, New York, and Massachusetts state constitutions all reference city, towns, and places including in reference to state capitals.[17]

When Pennsylvania fixed its seat in Philadelphia, the legislature gained no plenary power. When New York’s seat was New York City, the state exercised no exclusive legislation over Manhattan. No state disenfranchised its capital. Early capitals were sites of robust political engagement and city voters preserved their rights.[18]

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[12] Jessica Bulman-Pozen & Olatunde C.A. Johnson, Federalism and Equal Citizenship: The Constitutional Case for D.C. Statehood, 110 Geo. L.J. 1269, 1271–74 (2022) (describing founding-era concerns about federal dependence on states, the Philadelphia Mutiny, and the assumption that District residents would retain local self-government and political voice).
[13] NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (defining “city” as “a large town, corporate town, or an incorporated town”; “town” as “any collection of houses, larger than a village” and “the inhabitants of a town”; and “place” as “any portion of space” or “a particular portion of space”).
[14] GA. CONST. of 1777, art. XLIX.
[15] N.C. CONST. of 1776, § 7.
[16] S.C. CONST. of 1778, art. XXXIII (“The general assembly...shall have power to erect and constitute corporate towns and villages, and to grant letters of incorporation”).
[17] PA. CONST. of 1776 (“the supreme legislative power shall be vested in a house of representatives” meeting “in the city of Philadelphia.”); N.Y. CONST. of 1777 (the state legislature would meet “at the city of New York”); MASS. CONST. of 1780 (“city of Boston”).
[18] Museum of the American Revolution, The Right to Vote, https://www.amrevmuseum.org/read-the-revolution/the-right-to-vote.

The Framers made the same choice. They chose "the Seat of Government," a term of art denoting function, to secure the location where national authority would be exercised, not to grant plenary power over whoever might reside in the capital.

C. The Enclave Clause Parallel: Function Defines Scope

The second limiter is structural: the Enclave Clause appears in the same sentence with parallel structure. Article I, Section 8, Clause 17:

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of 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**.

The choice to include the two grants together was intentional and reading the entire clause is necessary to understand the separate parts. First, the term "like Authority" denotes a similarity in kind, not just degree. The authority exercised is identical, and Congress's authority over enclaves is like its authority over the District: exclusive and functionally limited. Second, the preposition "for" is an explicit limiter. The authority exists for the specific enumerated purposes, implying that where the purpose ends the plenary nature of the authority decreases. The inclusion of "needful Buildings" does not change the analysis, under the *ejusdem generis* canon, when a general term follows a list of specific terms, the general term is limited to items of the same type as those specifically enumerated before it.[19]

The Supreme Court has consistently enforced functional limitations on the Enclave Clause, holding that "exclusive legislation" does not create absolute federal sovereignty that displaces all state authority.[20] In *James*, the Court held that states may validly reserve concurrent jurisdiction over federal enclaves, retaining authority over matters "not inconsistent with the jurisdiction ceded to the United States."[21] This renders the "exclusive Legislation" text superfluous and reinforces that federal authority operates functionally, not territorially.[22] States retain jurisdiction to enforce criminal laws, adjudicate disputes, and collect taxes on federal property.[23]

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[19] Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 114–15 (2001) (invoking the statutory canon of *ejusdem generis* so as to interpret the general terms in a statute with reference to specific examples given in the statute).
[20] *See* Howard v. Comm'rs of Sinking Fund of City of Louisville, 344 U.S. 624, 627 (1953) (recognizing limits on exclusive federal jurisdiction over enclaves for matters of purely local concern).
[21] James v. Dravo Contracting Co., 302 U.S. 134 (1937).
[22] *Constitution Annotated: Analysis and Interpretation*, Library of Congress, https://constitution.congress.gov/browse/essay/artI-S8-C17-2-3/ALDE_0000008/.
[23] *See* Paul v. United States, 371 U.S. 245, 263 (1963) (state can tax private contractor on federal enclave); Penn Dairies, Inc. v. Milk Control Comm'n, 318 U.S. 261 (1943) (state can regulate milk sales on military base); Stewart & Co. v. Sadrakula, 309 U.S. 94 (1940) (state can enforce criminal laws against private persons on federal enclaves); Collins v. Yosemite Park & Curry Co.,

Military bases represent the apex of Enclave Clause authority, plenary power over property acquired "for the Erection of Forts." Yet in *Flower v. United States*, the Supreme Court pierced the plenary veil: when Congress opens enclaves to the public, it abandons any claim to regulate civilian life unrelated to federal function.[24]

Fort Sam Houston in San Antonio, Texas, is a federal enclave.[25] In 1969, John Flower walked onto Fort Sam and quietly distributed flyers promoting a debate about the Vietnam War.[26] He was arrested and charged under a federal trespassing statute and sentenced to six months in jail.[27]

The Supreme Court unanimously reversed.[28] The Court refused to collapse function into geography and did not reference the Enclave Clause.[29] Flower was arrested on New Braunfels Avenue, on-base and on federal land. But the Avenue was open to the public and used by civilians and military. No guard post, no closures.[30]

That was dispositive. "The military has abandoned any claim that it has special interests in who walks, talks, or distributes leaflets on the avenue."[31] Federal ownership did not matter. The Enclave Clause text did not matter. Function mattered.

Flower exposes the flaw in District Clause jurisprudence. Function, not geography, determines permissible regulation. Enclave doctrine reflects that, District Clause jurisprudence has not. In *Flower*, federal ownership of Fort Sam Houston was insufficient to justify restricting civilian speech unrelated to military functions. Yet in the District, federal ownership is treated as sufficient to justify any regulation of civilian life, even regulations having nothing to do with protecting federal operations. The Court applies functional analysis to enclaves but geographic analysis to the District. That inconsistency cannot be reconciled with constitutional text or structure. The result is a body of law that recognizes theoretical limits but declines to enforce them in practice. Section II addresses that problem. Section III proposes a framework for resolving it.

II. The Plenary Power Doctrine: Repetition Without Reasoning

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304 U.S. 518 (1938) (state workers' compensation law applies to private employment on federal land).

[24] Flower v. United States, 407 U.S. 197, 198–99 (1972).

[25] United States v. Hopkins, No. 17-50439, 2018 WL 4057373, at *1 (5th Cir. Aug. 24, 2018).

[26] United States v. Flower, 452 F.2d 80, 90 (5th Cir. 1972).

[27] 18 U.S.C. § 1382 (criminalizing unauthorized reentry onto military installations).

[28] Flower v. United States, 407 U.S. 197, 199 (1972) (per curiam).

[29] *Id.* at 197–99 (analyzing the case entirely under First Amendment principles without invoking Enclave Clause authority).

[30] *Id.* at 198 (quoting dissenting opinion below: "There is no sentry post or guard at either entrance or anywhere along the route. Traffic flows through the post on this and other streets 24 hours a day.... Fort Sam Houston was an open post; the street, New Braunfels Avenue, was a completely open street.").

[31] *Id.* at 198.

Modern jurisprudence emerged from judicial accommodation that hardened into doctrine through repetition, not reasoning.

Deference in cases involving federal courts became all-purpose: Congress may legislate however it chooses absent explicit prohibition. Courts stopped asking whether action served federal purpose. They stopped distinguishing between protecting the seat and governing residents. Functional analysis disappeared.

The result is a jurisprudence with no limiting principle. A zoning regulation affecting federal buildings receives the same deference as a criminal sentencing law having nothing to do with federal operations. Congress's override of locally enacted marijuana policy is treated identically to security measures protecting the Capitol complex. The doctrine collapses distinct constitutional functions into a single, undifferentiated mass of "plenary" authority, precisely what the District Clause's functional language was designed to prevent.

Modern District Clause jurisprudence rests on a missing middle between two Supreme Court cases and their progeny: plenary power deference from *Palmore* cabined only by *Bolling's* prohibition on outright constitutional violations.

A. The Doctrinal Anchors: Palmore and Bolling

In 1971, D.C. police stopped Roosevelt Palmore on T Street, spotted a gun in his car, and arrested him. Palmore was convicted in D.C. Superior Court and appealed, arguing that only Article III courts with life-tenured judges could try felonies. Congress had instead determined that local felonies in the District would be prosecuted before judges serving fifteen-year terms.[32]

The Supreme Court ruled 8-1 against Palmore. The reasoning: the District Clause grants "plenary" power, and "this has been the characteristic view."[33] That was it, *ipse dixit*.

The *Palmore* court cited six previous cases for its plenary proposition,[34] each deriving its authority by citing its predecessors, resulting in a self-reinforcing but not self-justifying doctrine. First, the *Kendall* court narrowly expanded congressional authority in the context of the power of District judges.[35] *Mattingly* then asserted that Congress legislates for the District "as may the legislature of any State over any of its subordinate municipalities."[36] *Gibbons* ratified that and added that power "has never since been doubted."[37]

But the absence of challenge is not a constitutional argument, and in any event, the premise is false. In *O'Donoghue*, the Court held that since the District was

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[32] E. Barrett Prettyman, Jr., *History of the United States Court of Appeals for the District of Columbia Circuit in the Country's Bicentennial Year* 82 (1976).
[33] *Palmore*, 411 U.S. at 397–98.
[34] *Id*. at n.7.
[35] Kendall v. United States, 37 U.S. (12 Pet.) 524, 619 (1838) (addressing power to issue mandamus); O'Donoghue v. United States, 289 U.S. 516, 545 (1933) (addressing Article III status of D.C. courts).
[36] Mattingly v. District of Columbia, 97 U.S. 687, 690 (1878).
[37] Gibbons v. District of Columbia, 116 U.S. 404, 407 (1886).

formed by portions of Maryland and Virginia it was "not reasonable to assume that the cession stripped them of" these "rights, guarantees and immunities of the Constitution."[38] The dissent in *Palmore* noted that "today we make a major retreat from *O'Donoghue,*"[39] but no matter, the damage was done.

Shoemaker described congressional authority as "full and unlimited jurisdiction," a formulation later echoed and broadened in *Atlantic Cleaners* which declared congressional power "unlimited."[40] These are not abstract disputes. The plenary power doctrine has real consequences for real people, nowhere more painfully than when Congress wields that power to diminish, rather than protect, the rights of District residents.

On the first day of school in September 1950, twelve-year-old Spottswood "Spotts" Bolling, Jr. and his parents went to enroll in the District's newly opened junior high school in Anacostia. He was denied. He was Black.[41]

Bolling sued the D.C. Board of Education alleging unconstitutional discrimination. *Bolling* and *Brown v. Board of Education* were decided the same day. In *Brown*, the Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment prohibits racially segregated public schools.[42] In *Bolling*, the Supreme Court held that the Fifth Amendment's Due Process Clause contains the same protections as the Fourteenth which on its face, only applies to the States. But the Court held they offered equivalent protections, declaring that "it would be unthinkable" that the Constitution imposes a "lesser duty on the Federal Government" than the states.[43]

B. Why State Equivalence Fails

Bolling gave constitutional teeth to *Palmore's* otherwise generic assurance that Congress must respect individual rights when legislating for the District. But that is only the floor. *Bolling* did not establish a rule of equivalence between federal and state legislatures acting locally. Instead it answers a negative: what Congress may not do in the District. The Court did not suggest that Congress inherits the full police powers of a state legislature when it acts in the District. It holds the opposite, that it is "unthinkable" that the federal government and states exercise local police power with parity.

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[38] O'Donoghue v. United States, 289 U.S. at 544.

[39] Palmore, 411 U.S. at 416. The majority held that *O'Donoghue* did not control because the courts in question only heard local matters, not local matters and federal ones.

[40] Shoemaker v. United States, 147 U.S. 282, 300 (1893); Atlantic Cleaners & Dyers v. United States, 286 U.S. 427, 435 (1932) ("[I]n passing section 3, it had unlimited power, except as restricted by other provisions of the Constitution.").

[41] History of D.C. Government, Cath. U. L. Libr., https://libguides.law.cua.edu/c.php?g=913318&p=9758590 (last visited Jan. 29, 2026).

[42] Brown v. Board of Education, 347 U.S. 483, 495 (1954).

[43] Bolling v. Sharpe, 347 U.S. 497, 499–500 (1954).

State equivalence as a doctrine, the idea the federal government can legislate in the District if a state could do the same in a city,[44] cannot be right because when Congress regulates in the District it does so as a super-legislature, exercising the combined legislative, executive, and judicial powers of the federal government in addition to those of the states.[45] And it does so unconstrained by the state constitutions that local actors must comply with. Congress possesses more authority in the District than any state does in its own capital while retaining none of the democratic accountability that state legislatures have.[46]

When the Framers wanted to authorize Congress to exercise state-like power, they said so explicitly. The Territories Clause, for instance, grants Congress power to "make all needful Rules and Regulations."[47] But as the Supreme Court instructs, the District is not a territory.[48]

The state equivalence framework's biggest failure is that the accountability mechanism that constrains state power, the vote, is absent in the District.[49] Political accountability to voters is the foundational premise of judicial review of constitutionality. In *United States v. Carolene Products Co.*, the Supreme Court established the framework that governs how courts evaluate lawsuits challenging government action.[50] It is a highly deferential one reflecting the practical reality that courts should not second-guess democratic choices made by elected representatives. The political, not judicial, process is the check on abuse. The Supreme Court has upheld local regulations that it has acknowledged are unwise, needless, wasteful, and anti-competitive.[51] It has done so reflecting a deference to state legislators who are accountable to their voters. If voters do not like a law, they can vote the bums out!

Not in the District. In 2023, House Republicans overrode the elected D.C. Council's revision of the criminal code, overturning local decisions about sentencing reform and criminal penalties.[52] In 2025, Congress prohibited D.C. from

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[44] *But see* Banner v. United States, 428 F.3d 303, 308 (D.C. Cir. 2005) ("Congress, when it legislates for the District, stands in the same relation to District residents as a state legislature does to residents of its own state.").
[45] American Insurance Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828) (Congress exercises "the combined powers of the general, and of a state government" over the District); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 76 (1982) (Congress acts with "the full authority of government, and thus, necessarily, the Executive and Judicial powers as well as the Legislative").
[46] John Payton, *Should the District of Columbia Have Responsibility for the Prosecution of Criminal Offenses Arising Under the District of Columbia Code?*, 11 U.D.C. L. Rev. 35, 35–37 (2008).
[47] *Property Clause: Power of Congress over Territories, Constitution Annotated*, https://constitution.congress.gov/browse/essay/artIV-S3-C2-3/ALDE_00013511/ (last visited Jan. 29, 2026).
[48] Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 596 n.17 (1976) (contrasting congressional authority in the District and Puerto Rico).
[49] Bulman-Pozen & Johnson, *supra* note 12, at 1271–74.
[50] United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).
[51] *See, e.g.,* Williamson v. Lee Optical of Okla., 348 U.S. 483, 488–89 (1955).
[52] 137 Stat. at 10.

spending its local tax revenues.[53] Congress has blocked the spending of local revenues on reproductive health care for low-income women.[54] And Congress has repeatedly barred D.C. from legalizing marijuana and introduced bills that would ban the city from painting slogans on its own streets.[55]

The perverse result is that members of Congress impose unpopular, punitive, and burdensome regulations on District residents to appeal to their actual constituents back home, bearing none of the costs and facing none of the accountability in the District that the courts assume constrain legislative overreach.

C. Plenary Power in Retreat

The Supreme Court has taken notice, and the foundation is crumbling for congressional plenary power over populations defined by geography.

In *Veneno*, decided in late-2025, Justices Gorsuch and Thomas dissented in a case asking the Court to reconsider *United States v. Kagama*, the basis for congressional plenary power over Native American tribes.[56] The dissenters said plenary power "is a theory that should make this Court blush. Not only does that notion lack any foundation in the Constitution; its roots lie instead only in archaic prejudices. This Court is responsible for *Kagama*, and this Court holds the power to correct it. We should not shirk from the task."[57]

The dissent of tribal plenary power mirrors and reinforces the structural defects in District Clause jurisprudence. Like *Palmore*, *Kagama* upheld sweeping congressional authority based on "little more than *ipse dixit*."[58] The *Kagama* Court rejected that the text of the Constitution's Indian Commerce Clause supports plenary power, and instead relied on "archaic colonial prejudices" in what then spawned a self-reinforcing chain of cases. The government's opposition rested on that chain, arguing that because the Court's plenary power decisions have stood for years it must continue. But the dissent, noting that the same was true of Court cases upholding racial segregation and Japanese internment, urged the Court to reconsider its plenary power decisions: "a matter so grave can[not] be settled until settled right."[59]

Justice Sotomayor's dissent in *Vaello Madero* offered an equal protection critique of plenary power. Applying rational basis review to Puerto Rico's exclusion from Supplemental Security Income (SSI), she held that geographic discrimination fails constitutional scrutiny when it lacks genuine justification and when affected

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[53] Full-Year Continuing Appropriations and Extensions Act, 2025, Pub. L. No. 119-4 (Mar. 15, 2025). (Omitting the standard provision allowing D.C. to spend its locally-generated tax revenues resulting in approximately $1.1 billion in cuts to local programs funded by D.C. tax dollars.)
[54] § 151, 110 Stat. at 1321-19.
[55] § 166, 112 Stat. at 2681-146.; H.R. 1774, 119th Cong. (2025) (proposal to withdraw federal highway funds unless the District removed "Black Lives Matter" street paint).
[56] Veneno v. United States, 607 U.S. ___, No. 24-5191, slip op. at 1 (Nov. 10, 2025) (Gorsuch, J., dissenting from denial of certiorari).
[57] *Id.* at 2.
[58] *Id.* at 6.
[59] *Id.* at 7.

residents "cannot rely on their elected representatives to remedy the punishing disparities."[60] The analysis turned on two features: (1) the rational basis offered (tax status) was pretextual because SSI recipients by definition pay no taxes, and (2) territorial residents lack political representation to check arbitrary congressional action.[61]

If the Constitution prohibits plenary power over sovereign tribes with their own governmental structures, and if equal protection principles forbid geographic discrimination against territorial residents, then surely it cannot tolerate unlimited congressional authority over disenfranchised citizens residing in the nation's capital itself. District citizens suffer a greater democratic deficit than any other American population: no voting representation in Congress, no control over local affairs, and no state constitution to constrain federal overreach. When Congress regulates D.C.'s municipal affairs neither federalism constraints nor electoral accountability justify deference. The Bifurcation Test applies *Vaello Madero's* logic: where political safeguards fail and congressional justifications are pretextual, courts must apply meaningful scrutiny.

III. The Bifurcation Test: A Functional Framework

The accountability deficit is structural, not policy. To compensate for this failure, to execute the District Clause faithfully, and to recognize the shift in jurisprudence on Equal Protection, Enclaves, and away from *Palmore*'s plenary power, this Article proposes the Bifurcation Test: Congress retains plenary deference when regulating seat of government functions but faces heightened scrutiny when regulating the District's municipal affairs.

The Test is not radical. Congress exercises two distinct roles legislating for the District, and the Constitution demands different scrutiny depending on the role. When Congress regulates Seat functions, it retains broad rational basis review from *Palmore*. This is Congress acting as the national legislature to protect unique federal interests in the nation's capital. That power is extensive: security perimeters and access control at federal buildings and monuments, traffic and parking regulations facilitating federal operations and executive motorcades, building codes for federal buildings, land use planning to ensure adequate space and flexibility for expanding federal needs.

But in the latter category, which includes municipal trash collection, business licensing, residential zoning unrelated to federal operations, Congress must satisfy heightened scrutiny. Interference in these matters is Congress acting as a super legislature for a population it does not represent, exercising authority untethered from its enumerated federal function. When Congress acts as a city council, the structural deficits justifying rational basis review, electoral accountability, political representation, federalism constraints, are entirely absent.

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[60] United States v. Vaello Madero, 596 U.S. at 497–98 (Sotomayor, J., dissenting).
[61] *Id.*

The Test does not overrule *Palmore*. It limits *Palmore* to its proper domain: cases where Congress actually regulates seat of government functions. That is not a revolution; it is a return to constitutional text and structure.

A. Equal Protection and the Accountability Gap

The Bifurcation Test follows core equal protection principles that the Court has enforced for seventy-five years. *Bolling* stands for an equality principle: the federal government cannot treat people worse than states can. But equal protection is not only about suspect classifications. It is also about arbitrary governance. The Supreme Court has repeatedly applied heightened rational basis scrutiny, "rational basis with bite" where structural deficits undermine normal political safeguards that justify deference.[62]

In *Moreno*, the Court struck down a restriction on food stamps aimed at punishing hippie communes. [63] The Court characterized its review as rational basis review, but in actuality it applied a level of stricter scrutiny, inquiring into the legislative motives to find animus, rejecting hypothetical justifications, and striking down the law. In *City of Cleburne*, the Court applied "second order rational basis review" to hold that the State's asserted interests were a pretext for prejudice against the intellectually disabled. [64] And in *Romer*, the Court struck down a constitutional amendment in Colorado that prohibited protecting gay citizens under the pretext of freedom of association.[65]

The common thread is not the subject matter but that the political process had failed to protect discrete groups lacking political power. District residents are subject to regulations imposed by legislators they did not elect and cannot remove. This is arbitrary governance and the purported justification is circular: Congress may treat you different because Congress has power over you.

This argument finds support in recent scholarship recognizing that the Reconstruction Amendments fundamentally transformed the District's constitutional status. As Professors Bulman-Pozen and Johnson demonstrate, the Fourteenth Amendment "makes state citizenship a constitutive component of equal national citizenship," requiring meaningful self-governance protections even for non-state residents.[66]

The Bifurcation Test harmonizes District and Enclave clause jurisdiction. The current Enclave Clause doctrine follows *Flower's* functional analysis. The federal government has broad authority to secure domestic military bases. But when it regulates civilian conduct unrelated to military necessity, judicial scrutiny is heightened. If federal ownership alone does not justify restricting civilian speech

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[62] *See* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 12 (1972).
[63] United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973).
[64] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).
[65] Romer v. Evans, 517 U.S. 620 (1996).
[66] Bulman-Pozen & Johnson, *supra* note 12, at 1291–1305.

on a military base, geographic location alone cannot justify regulating municipal governance in the District.

The Bifurcation Test finds support in another unlikely constitutional source: the dormant Commerce Clause. The Commerce Clause grants Congress affirmative authority to regulate interstate commerce. But the Supreme Court has long held that even where Congress has not acted, states may not exercise their otherwise plenary police powers to implicate national interests.

In *Pike*, the Court held that when a state regulation directly intrudes on national economic unity, it triggers heightened scrutiny and is presumptively invalid.[67] The inquiry, like the proposed Bifurcation Test, is functional. Just as courts ask whether a state is regulating within its proper local sphere or intruding on a national domain, courts reviewing District Clause legislation must ask whether Congress is securing the seat of Government or regulating municipal affairs.

The analogy is structural, not remedial. Dormant Commerce Clause doctrine rests on the uncontroversial premise, reaffirmed by the Court in *National Pork Producers*, that constitutional grants of power are limited by the text, structure, and purpose of the Constitution, even where those limits are not spelled out as categorical prohibitions.[68] The Commerce Clause does not expressly forbid state protectionism; courts infer that limit to preserve the federal system's design. Likewise, the District Clause distinction follows naturally from the Clause's structure and historical purpose and is fully consistent with ordinary methods of constitutional interpretation.

B. Distinguishing Federal from Local Authority

Some regulations will implicate both seat of Government and municipal functions. The size of the security permitted around the Capitol protects federal operations but has the potential to restrict residential vehicle traffic in the Capitol Hill neighborhood. In such cases, courts evaluate the action's primary purpose and effect. This functional analysis is well established and courts have conducted such analysis since *McCulloch v. Maryland*.[69] Deferring to Congress on the size of the Capitol's security perimeter seems necessary and tailored to serve federal operations. But if Congress attempted to prohibit all street vending within a mile of federal buildings in the District, courts would need to apply a heightened level of review.

What level? For seat of government regulations, courts apply traditional *Palmore* deference. Congress's judgment about what is necessary to secure federal operations receives substantial weight. This is Congress exercising enumerated constitutional authority and judicial restraint is appropriate.

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[67] Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).
[68] Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142 (2023).
[69]McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). *See* also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 535 (1993) (examining whether facially neutral regulations actually serve their purpose).

But when Congress regulates purely municipal affairs in the District, ordinary rational-basis deference is unwarranted. Because District residents lack the electoral safeguards that justify such deference under *Carolene Products*, courts must require Congress to articulate a substantial federal interest rooted in seat of government functions, and the regulation must bear a meaningful relationship to that interest. Substantial means genuine, non-pretextual, and actually related to Congress's unique role in governing the seat of government – not merely any policy Congress deems wise. As the Court has explained, "the justification must be genuine, not hypothesized or invented post hoc in response to litigation." [70] This approach is not intermediate scrutiny and does not create a new tier of scrutiny; it withdraws deference where political safeguards fail and ensures that congressional exclusivity does not become self-validating.

The Bifurcation Test does not strip Congress of authority over the District. It does not treat the District as a state. And it does not require strict scrutiny for every local regulation. Congress retains extensive power: it may regulate the Seat as broadly as necessary to protect operations and override municipal decisions threatening the same. Congress may also legislate for the District on matters within enumerated powers subject to nationwide constraints.

But Congress may not regulate purely local affairs without justification simply because of geography. The Test returns jurisprudence to first principles: text, structure, function. It asks courts to distinguish legitimate federal authority from arbitrary governance of a disenfranchised population.

C. The Test in Practice

The Test produces sensible results. In 2023, Congress overrode the District's Revised Criminal Code Act, which would have reduced sentences for assault, robbery, and theft.[71] Congress identified no federal interest beyond disagreement. Under the Test, this is municipal regulation. Criminal sentencing for ordinary offenses between local residents does not affect federal operations. Congress knows how to protect federal interests: for example, crossing the White House fence line is a federal crime.[72] That regulation, with its nexus to the literal home of the Executive, would be a clear example of proper federal function.

Other examples present closer questions. Congress imposes height restrictions downtown to preserve sight lines to federal monuments.[73] Height restrictions affect development, municipal concerns, but serve aesthetic purposes related to federal presence. The Test requires examining whether restrictions genuinely serve seat of government functions or merely preference federal aesthetics over local autonomy.

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[70] United States v. Virginia, 518 U.S. 515, 533 (1996) (rejecting Virginia's pretextual defense of VMI's male-only admissions).
[71] Disapproving the action of the District of Columbia Council in approving the Revised Criminal Code Act of 2022, Pub. L. No. 118-1, 137 Stat. 10 (2023).
[72] 18 U.S.C. § 1752.
[73] Height of Buildings Act of 1910, Pub. L. No. 61-452, 36 Stat. 452.

If height restrictions are designed to ensure helicopter access to the White House South Lawn, they serve seat functions. If they exist solely in the name of the preservation "federal character," they regulate aesthetics and require something more.

This is what courts do. They distinguish commercial from non-commercial activity, ministerial from discretionary acts, government from private speech. Functional line-drawing is adjudication. The Test requires no second-guessing. Congress retains broad discretion. The Test simply requires interests be present and identifiable, that Congress regulate the seat, not govern a city.

D. Reconciling Home Rule

The Home Rule Act alone cannot cure these structural deficits, but a bifurcated constitutional framework can by aligning the scope of congressional authority with function.

The Act, passed after decades of struggle for local representation, grants District residents "powers of local self-government" over "local District matters"[74] while reserving to Congress control over "matters of federal concern" such as legislation "concerning the functions or property of the United States."[75] This distinction mirrors the Bifurcation Test. Home Rule already recognizes that Congress's authority is functionally differentiated, the Test makes that distinction constitutionally enforceable.

Under Home Rule, Congress retains plenary override authority. The Test does not strip Congress of that authority; it requires only that when Congress exercises it to regulate purely municipal affairs or matters unrelated to seat of government functions, courts scrutinize whether a substantial federal interest justifies the override. This modest constraint addresses what Home Rule cannot: the absence of electoral accountability when Congress acts as a super-legislature for District residents.

The D.C. Council's relationship with Congress mirrors any municipal government's relationship with its state.[76] Courts do not treat Baltimore parking ordinances as "Maryland General Assembly acts." The distinction is not authority's source but its exercise and accountability. When Congress overrides the D.C. Council, it exercises federal power without electoral constraint. In contrast, District residents vote Council members in, and they can vote them out.

Conclusion

The District Clause protects a federal seat, not a fiefdom. Its purpose is to secure the independent operations of the federal government, not to subjugate its civilian

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[74] District of Columbia Home Rule Act (HRA), Pub. L. No. 93-198, 87 Stat. 774 (1973) (codified as amended at D.C. Code §§ 1-201.01 et seq.).
[75] *Id.* § 1-206.02(a)(3).
[76] *See* Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (1907) ("Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them.").

population. *Palmore*'s plenary power doctrine, untethered from constitutional purpose, has crystallized into a reflexive judicial deference enabling the continued federal disenfranchisement of more than 700,000 American citizens.

Seventy-five years ago, when Spotts Bolling was turned away from a public school in the District for being Black, the Supreme Court declared it unthinkable that the Constitution would impose a lesser duty to protect its citizens on the federal government than on the states. Contemporary District Clause doctrine inverts that principle.

The Bifurcation Test offers a modest course correction, supported by constitutional structure, historical practice, and evolving Equal Protection doctrine. The Supreme Court's increasing skepticism of plenary power claims over Territories and Tribes reflects broader recognition that geography alone cannot justify governance without representation.

The District exemplifies this democratic deficit most acutely. Its residents are not merely federal employees and tourists. They are American citizens living ordinary lives, sending their children to neighborhood schools, paying local taxes, operating businesses, and building communities. The District is not a federal outpost with incidental residents; it is a real city with real neighborhoods and real municipal needs.

The path forward does not require constitutional amendment or statehood legislation, though either would independently resolve the problem. It requires only that courts do what they have always done: interpret constitutional text in light of structure and purpose, and decline to extend deference where its justification is absent. The Constitution endures not because its commands are self-executing, but because courts have been willing to correct doctrinal drift and realign power with constitutional purpose. A nation measured by its ideals cannot treat its capital as the exception.