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MEMORANDUM

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From: Rick Bress
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File no: 501813-0000
Copies to: Gary Epstein, Jim Rogers
Subject: Analysis of Congress's Authority By Statute To Provide D.C. Residents Voting Representation in the United States House of Representatives and Senate

The United States is the only democratic nation that deprives the residents of its capital city of voting representation in the national legislature. American citizens resident in the District of Columbia are represented in Congress only by a non-voting delegate to the House of Representatives. These residents pay federal income taxes, are subject to any military draft, and are required to obey Congress' laws, but they have no say in the enactment of those laws.¹ Indeed, as Congress has the power to veto District legislation, the residents of the 50 States have more say than District residents over local District law.

District residents thus lack what has been recognized by the Supreme Court as perhaps the single most important of constitutional rights. As the Court has stated:

No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of

¹ Indeed, Congress also has authority over local District legislation; thus, without voting representation in Congress, District residents also have no voting representation in the body which controls the local budget they must adhere to and the local laws that they are required to obey.

people in a way that unnecessarily abridges this right.²

The abridgment of District residents' voting rights is hardly "necessary." It plainly could be redressed (as was the District's similar lack of representation in the electoral college) by constitutional amendment. But Congress and the States are rightly reluctant to amend the Constitution absent a demonstrated need. Here, the end may be accomplished more simply. Although the issue is not free from doubt, for the reasons explained below we conclude that Congress can by legislation extend District residents the same voting representation possessed by residents of the 50 States, under its plenary power to provide for the governance of the District and its residents.

Our analysis postulates the enactment of legislation akin to the "No Taxation Without Representation Act of 2002" introduced in the 107th Congress by Sen. Joseph I. Lieberman (D-CT).³ The official title of the bill, which passed the Governmental Affairs Committee by a 9-0 vote on October 9, 2002, was "[a] bill to provide for full voting representation in Congress for the citizens of the District of Columbia, and for other purposes." The proposed legislative findings accompanying the legislation were as follows:

- (1) The residents of the District of Columbia are the only Americans who pay Federal income taxes but are denied voting representation in the House of Representatives and the Senate.
- (2) The residents of the District of Columbia suffer the very injustice against which our Founding Fathers fought, because they do not have voting representation as other taxpaying Americans do and are nevertheless required to pay Federal income taxes unlike the Americans who live in the territories.
- (3) The principle of one person, one vote requires that residents of the District of Columbia are afforded full voting representation in the House and the Senate.
- (4) Despite the denial of voting representation, Americans in the Nation's Capital are second among residents of all States in per capita income taxes paid to the Federal Government.
- (5) Unequal voting representation in our representative democracy is inconsistent with the founding principles of the Nation and the strongly held principles of the American people today.⁴

² Wesberry v. Sanders, 376 U.S. 1, 17-18 (1964).

³ Sen. Lieberman sponsored the Act, S. 3054. The co-sponsors were Sen. Thomas A. Daschle, Sen. Richard J. Durbin, Sen. Russell D. Feingold, Sen. Tom Harkin, Sen. James M. Jeffords, Sen. Edward M. Kennedy, Sen. Mary L. Landrieu, Sen. Barbara A. Mikulski, and Sen. Charles E. Schumer.

⁴ S. 3054, 107th Cong. §2 (2002).

In relevant part, the bill provided as follows:

For the purposes of congressional representation, the District of Columbia, constituting the seat of government of the United States, shall be treated as a State, that its residents shall be entitled to elect and be represented by 2 Senators in the United States Senate, and as many Representatives in the House of Representatives as a similarly populous State would be entitled to under the law.⁵

The proposed legislation also prescribed the method by which the first Senators and Representative would be elected, at which time the current position of the District's congressional delegate would expire.⁶⁷

ANALYSIS

The starting point in analyzing Congress's authority to provide District residents voting representation, of course, is the relevant constitutional text. The voting rights of American citizens resident in the 50 States are regulated primarily by Article I, Sections 2 and 3.⁸ Section 2 states that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors of each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."⁹ Article I, Section 3 states that "[t]he Senate of the United States shall be composed of two Senators from each State, . . . for six years; and each Senator shall have one vote."¹⁰ These provisions guarantee congressional representation to state residents.¹¹

⁵ S. 3054, 107th Cong. §3 (2002).

⁶ S. 3054, 107th Cong. §4, 5 (2002).

⁷ S. 3054, 107th Cong. §5(d) (2002).

⁸ Although the Constitution originally called for the election of Senators directly by the States (as opposed to their residents), the 17th Amendment changed the Senate election process to a popular election. It states, in relevant part: "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote." U.S. Const. amend. XVII. As the Court recognized in U.S. Term Limits, Inc. v. Thornton, it is "a fundamental principle of our representative democracy....that 'the people should choose whom they please to govern them.'" 514 U.S. 779, 795 (1995), quoting Powell v. McCormack, 395 U.S. at 547 (1969).

⁹ U.S. Const. art. I, § 2.

¹⁰ U.S. Const. art. I, § 3.

¹¹ The Constitution places other qualifications on state congressional representatives as well. For example, each representative must "be an Inhabitant of that State" in which he or she is chosen (U.S. Const. art. I, § 2, cl. 2); representatives shall be "apportioned among the several States which may be included within this Union" (U.S. Const. art. I, § 2, cl. 3); "each State shall have at Least one Representative" (U.S. Const. art. I, § 2, cl. 3); the "Executive Authority" of each "State" shall fill vacancies (U.S. Const. art. I, § 2, cl. 4); and the legislature of "each State" shall

The Supreme Court has held, however, that neither these provisions nor any other in the Constitution provide for or guarantee congressional voting representation to District residents. In Alexander v. Daley, the Supreme Court affirmed the holding of the United States Court of Appeals for the District of Columbia Circuit that the Constitution does not *require* Congress to afford District residents representation in the House of Representatives.¹² The plaintiffs in Alexander argued, among other things, that the District could be treated as a State under Article I because the Supreme Court had, for some purposes, interpreted the term “State” as used in the Constitution to include the District. The Court, however, rejected the “District-as-State” theory, concluding that the Constitution does not treat the District in that way for purposes of apportioning representatives in the House of Representatives.¹³

The Alexander court did *not* hold that the Constitution prohibits Congress from extending the vote to District residents through legislative means. Rather, the Alexander Court concluded only that the judiciary could not confer the franchise. The Court stated:

Like our predecessors, we are not blind to the inequity of the situation plaintiffs seek to change. But longstanding judicial precedent, as well as the Constitution’s text and history, persuade us that this court lacks authority to grant plaintiffs the relief they seek. If they are to obtain it, they must plead their cause in other venues.¹⁴

Although the Court did not specify how the plaintiffs must proceed in “other venues” – *i.e.*, via constitutional amendment or, instead, by simple legislation – the Court expressly noted that counsel for the House of Representatives had earlier conceded Congress’ authority to extend the vote to District residents legislatively.¹⁵

Congress’s authority to extend the franchise to District residents by statute has been the subject of substantial academic and political debate.¹⁶ Those who believe that Congress lacks this power (and must therefore proceed via constitutional amendment) rely principally on a negative pregnant. Citing Article

prescribe times, places, and manner of holding elections for representatives (U.S. Const art. I, § 4, cl. 1).

¹² 90 F.Supp. 2d 35 (D.D.C. 2000), *aff’d* 531 U.S. 940 (2000).

¹³ Alexander, 90 F.Supp. 2d at 47.

¹⁴ Id. at 72.

¹⁵ Id. at 40 (*emphasis added*).

¹⁶ See e.g., Statement of Walter Smith before the Subcommittee on the District of Columbia, Committee on House Government Reform, 2002 WL 20319210 (July 19, 2002); Statement of Jamin B. Raskin before the Senate Governmental Affairs Committee, 2002 WL 20317469 (May 23, 2002); Statement of Adam H. Kurland before the Senate Governmental Affairs Committee, 2002 WL 20317468 (May 23, 2002); Jamin B. Raskin, Symposium: *Is there a Constitutional Right to Vote and Be Represented? The Case of the District of Columbia*, 48 Am.U.L.Rev. 589 (1999); Jamin B. Raskin, *Is this America? The District of Columbia and the Right to Vote*, 34 Harv. C.R.-C.L. L.Rev. 39 (1999); Peter Raven-Hansen, Congressional Representation for the District of Columbia: A Constitutional Analysis, 12 Harv. J. on Legis. 167, 172 (1975).

P's detailed provisions for the congressional voting representation of State residents and the maxim *expressio unius est exclusio alterius*, they assert that the Constitution purposefully withholds voting representation from those (like District residents) who do not reside in a State. This argument is not without force. *Exclusio unius* is a longstanding and oft-used canon of statutory and constitutional construction. But it is not a "binding rule of law."¹⁷ At bottom, whether the mention of one thing (here, congressional voting representation for state residents) implies the exclusion of another (here, congressional voting representation for District residents) depends on a contextual analysis of whether the draftsmen likely "considered the alternatives that are arguably precluded."¹⁸ We see little to support such a negative inference here. As explained below, the history of and policies behind the Framers' creation of the District, the purpose of the Framers' enumeration of "States" in the Constitution's provisions for congressional representation, and the fundamental importance of the franchise argue powerfully that those who drafted the Constitution did not, by guaranteeing the vote to state residents, intend to withhold the vote from District residents. Moreover, the Framers gave Congress plenary power over the District, including the power for most purposes to treat the District as though it were a State and District residents as though they were state residents. Historical application and judicial interpretation suggest that this authority is sufficiently broad to extend to District residents the voting rights taken for granted by other American citizens. For these reasons, further explained below, we conclude that, although the Constitution does not expressly provide for or guarantee voting representation to District residents, it permits such representation to be extended through congressional legislation.

A. The History Of The District Clause Demonstrates That The Framers Had No Affirmative Intent To Deprive District Residents Of Voting Representation

The Framers viewed the right to vote as the single most important of the inalienable rights that would be guaranteed to the citizens of their Nation.¹⁹ The right was extended universally, as at the time of the framing every eligible American citizen lived in a State. There is no evidence that the Framers intended that those resident in areas that would later be ceded to form the national capital would forfeit upon its formation the voting rights they had previously possessed and exercised.

Article I, Section 8, Clause 17 of the Constitution, also known as the "District Clause," gives Congress the power to "exercise exclusive Legislation in all Cases, whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the Seat of the Government of the United States." This clause and its "exclusive legislation" authority were included in the Constitution to ensure that the seat of the federal government would not be beholden to or unduly influenced by the state in which it might be located.²⁰ The Framers' insistence on a

¹⁷ Martini v. Federal Nat'l Mortgage Ass'n, 178 F.3d 1336, 1342 (D.C. Cir. 1999).

¹⁸ Id. at 1343.

¹⁹ Wesberry, 376 U.S. at 9-19.

²⁰ Kenneth R. Bowling, The Creation of Washington, D.C.: The Idea and Location of the American Capital, at 30-34 (1991).

separated and insulated federal district arose from incident that took place in 1783 while the Continental Congress was in session in Philadelphia. When a crowd of Revolutionary War soldiers who had not been paid gathered in protest outside the building, the Congress requested protection from the Pennsylvania militia, but the State refused and the Congress was forced to adjourn and reconvene in New Jersey. This incident convinced the Framers that the seat of the national government should be under exclusive federal control, for its own protection and the integrity of the capital.²¹ Thus, the Framers gave Congress broad authority to create and legislate for the protection and administration of a distinctly federal District.

There is no affirmative mandate in the Constitution for the congressional disenfranchisement of District residents, and no reason to believe the Framers desired that result. When the District Clause was drafted, the eligible citizens of every State possessed the same voting rights. The continuation of these voting rights for citizens resident in the lands that would be ceded to create the federal District received little attention and does not appear to have been widely considered until after the Constitution was ratified and the District had been established.²² As one commentator has explained:

First, given the emphasis on federal police authority at the capital and freedom from dependence on the states, it is unlikely that the representation of future residents in the District occurred to most of the men who considered the “exclusive legislation” power. As long as the geographic location of the District was undecided, representation of the District’s residents seemed a trivial question. Second, it was widely assumed that the land-donating states would make appropriate provision in their acts of cession to protect the residents of the ceded land...Finally, it was assumed that the residents of the District would have acquiesced in the cession to federal authority.²³

It is doubtful even at the time of the District’s creation, moreover, that many would have adverted to the issue, as few could have foreseen that the ten mile square home to 10,000 residents would evolve into the vibrant demographic and political entity it is today. Some appear to have recognized that the unique

²¹ See James Madison, Federalist No. 43 (“Without it, not only the public authority might be insulted and its proceedings be interrupted, with impunity; but a dependence of the members of the general Government, on the State comprehending the seat of the Government for protection in the exercise of their duty, might bring on the national councils an imputation of awe or influence, equally dishonorable to the Government, and dissatisfactory to the other members of the confederacy.”).

²² Peter Raven-Hansen, Congressional Representation for the District of Columbia: A Constitutional Analysis, 12 Harv. J. on Legis. 167, 172 (1975).

²³ Id. See also National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 587 (1949) (“There is no evidence that the Founders, pressed by more general and immediate anxieties, thought of the special problems of the District of Columbia....This is not strange, for the District was then only a contemplated entity.”).

treatment of the District within a constitution of united States could leave its residents disenfranchised, but there is no indication that the Framers affirmatively desired that result.²⁴

To the contrary, based on everything we know of the Framers, it is inconceivable that they would have purposefully intended to deprive the residents of their capital city of this most basic right. The Framers' express intent was to create a republican form of government for all citizens of the United States. The exclusion of District residents from the political process is directly contrary to that vision. History suggests that, while the Constitution fails to guaranty or provide for voting representation to district residents, this was an inadvertent omission that can be remedied by congressional action.

B. The Supreme Court Has Validated Congress' Broad Authority To Treat The District As A State, And Its Residents As State Residents, Under The District Clause

Congress has long exercised its authority under the District Clause to treat the district as if it were a "State" and provide District residents many of the same privileges and rights that the Constitution guarantees residents of the 50 States. In Loughborough v. Blake, for example, the Supreme Court upheld legislation that imposed direct federal taxes on D.C. residents.²⁵ Article I, Section 2, Clause 3 of the Constitution stated that "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union."²⁶ Despite the absence of mention of the District in this clause, the Court held that direct taxation of the District was constitutionally permissible. The Court stated that even if the language in Article I, Section 2, Clause 3 were not read to include the District, "[i]f the general language of the constitution should be confined to the States, still the [District Clause] gives to Congress the power of exercising 'exclusive legislation in all cases whatsoever within this district,'" including the power to assess the same direct tax on the District as it could assess on a state.²⁷

Congress also treated the District as a state when it extended to District residents the right to sue under 42 U.S.C. § 1983. In District of Columbia v. Carter, the Supreme Court had held that Section 1983

²⁴ For example, Alexander Hamilton supported an express provision in the Constitution for voting representation for the future Seat of Government. During the New York ratifying convention he proposed an amendment stating that "[w]hen the Number of Persons in the District of Territory to be laid out for the Seat of Government of the United States, shall according to the Rule for the Apportionment of Representatives and direct Taxes amount to _____ such District shall cease to be parcel of the State granting the Same, and Provision shall be made by Congress for their having a District Representation in the Body." 5 The Papers of Alexander Hamilton 189 (Harold C. Sybett & Jacob E. Cooke eds., Columbia University Press 1962). Although this provision was not adopted, as there is no evidence of any opposition to it, it was likely discarded as unnecessary.

²⁵ 18 U.S. 317 (1820).

²⁶ U.S. Const. art. I, § 2, cl. 3.

²⁷ Loughborough, 18 U.S. at 322-4.

did not apply of its own accord because the 14th Amendment does not apply to the District of Columbia.²⁸ The Court stated that “the commands of the Fourteenth Amendment are addressed only to the State or to those acting under color of its authority....since the District of Columbia is not a ‘State’ within the meaning of the Fourteenth Amendment...neither the District nor its officers are subject to its restrictions.”²⁹ The Court noted, however, that Congress has the power to extend the same protection to District residents by using its power under the District Clause.³⁰ Congress subsequently followed this route and enacted legislation that expressly applied Section 1983 to the District.³¹ Its power to do so pursuant to the District Clause has never been challenged.

Most notably for present purposes, the Supreme Court has affirmed Congress’s enactment under the District Clause of legislation extending Article III diversity jurisdiction to citizens of the District. Initially in Hepburn v. Ellzey, the Court had refused to allow District residents to bring diversity suits in federal court because Article III provides federal jurisdiction only to disputes “between Citizens of the several States.”³² The plaintiffs, District residents, had argued that the District was “a distinct political society, and is therefore ‘a state’ according to the definitions of writers on general law.”³³ The Court disagreed. It held that insofar as the Constitution is concerned the term “state” means a member of the union.³⁴ The Court acknowledged, however, that “it is extraordinary that the courts of the United States, which are open to aliens, and to the citizens of every state in the union, should be closed” to District residents, who are also “citizens of the United States, and of that particular district which is subject to the jurisdiction of congress.”³⁵ The Court also expressly suggested that this inequity was within Congress’ power to resolve, stating that “this is a subject for legislative, not for judicial consideration.”³⁶

²⁸ In some contexts, the Supreme Court has treated the District directly as a State for constitutional purposes. In Loughran v. Loughran, 292 U.S. 216, 228 (1934), for example, the Court held that the Full Faith and Credit Clause in Article IV of the Constitution binds the courts of the district equally with the courts of the States.

²⁹ 409 U.S. 418, 423-24 (1973).

³⁰ Id. at 424 n.9 (“inclusion of the District of Columbia in Section 1983 can not be subsumed under Congress’ power to enforce the Fourteenth Amendment but, rather, would necessitate a wholly separate exercise of Congress’ power to legislate for the District under Art. I, 8, cl. 17”).

³¹ The 1979 Amendments added language related to the District of Columbia to Section 1983. Pub. L. No. 96-170 (codified as amended at 42 U.S.C.A. § 1983).

³² 6 U.S. 445 (1805).

³³ Id. at 452.

³⁴ Id.

³⁵ Id. at 453.

³⁶ Id.

In 1940, Congress took up that gauntlet and enacted legislation extending federal diversity jurisdiction to District residents.³⁷ In National Mutual Ins. Co. v. Tidewater Transfer Co. the Supreme Court upheld that statute against constitutional challenge.³⁸ Five justices concurring in that result agreed that Congress had the power to extend to the District “state” status for purposes of federal diversity jurisdiction, even though Hepburn had held that Article III itself only affords this protection to “citizens of the several States.”³⁹

Writing for the plurality, Justice Jackson read Hepburn to suggest that the District Clause gives Congress the power to treat the District as a state.⁴⁰ He noted Chief Justice Marshall’s comment that it was “extraordinary” that citizens of the District, which is subject to the jurisdiction of Congress,” do not have the same rights as “citizens of every state in the union.”⁴¹ Justice Jackson recognized that the reference to “legislative...consideration” was somewhat ambiguous, because it could also connote a constitutional amendment, but interpreted it to mean that “Congress had the requisite power under [the District Clause]” to address this inequity as “this is a subject for legislative, not for judicial consideration.”⁴² Justice Jackson also noted that “Congress had acted on the belief that it possesses that power” under the District Clause and that Congress’ determination is entitled to great deference.⁴³

The plurality noted Congress’s unquestioned authority under Article I to make the defendant “suable by a District citizen” in the federal “courts of the District of Columbia or perhaps to a special statutory court sitting outside of it.”⁴⁴ It further observed that, in the bankruptcy context, Congress has used its Article I power to provide Article III courts jurisdiction over non-diverse cases that do not arise under the laws of the United States. Hence, the plurality reasoned that Congress must also possess the authority under Article I to extend diversity jurisdiction to District residents.⁴⁵ In particular, it reasoned that, “[i]f Congress has the power to bring the defendant from his home all the way to a forum within the

³⁷ Act of April 20, 1940, 54 Stat. 143 (1940). The effect of the Act was to amend 28 U.S.C. § 41(1) so that it read in pertinent part: “The district courts shall have original jurisdiction as follows: Of all suits of a civil nature, at common law or in equity...where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000 and...(b) Is between citizens of different States, or citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any State or Territory....”

³⁸ 337 U.S. 582 (1949).

³⁹ Id.

⁴⁰ The two concurring justices thought that Hepburn should be overruled and the District treated directly as a state under Article III. See id. at 626.

⁴¹ Id. at 589.

⁴² Id. at 587, quoting Hepburn, 6 U.S. at 453.

⁴³ Tidewater, 337 U.S. at 589.

⁴⁴ Id. at 602.

⁴⁵ Id. at 600.

District, there seems little basis for denying it power to require him to meet the plaintiff part way in another forum.”⁴⁶ In other words, the greater authority, at the behest of a District resident, to subpoena a defendant to a special District of Columbia Article I court must necessarily encompass the lesser ability to allow a District resident to bring a diversity suit in an Article III court.

To be sure, the Tidewater plurality did not hold that the District could be treated as a state for all purposes. It emphasized that the extension of diversity jurisdiction did not invade “fundamental freedoms” or “reach for powers that would substantially disturb the balance between the Union and its component states” but rather involved a “constitutional issue [that] affects only the mechanics of administering justice in our federation.”⁴⁷ It noted that, “[i]n mere mechanics of government and administration we should, so far as the language of the great Charter fairly will permit, give Congress freedom to adapt its machinery to the needs of changing times.”⁴⁸ In this regard, the plurality emphasized that Congress’s determination regarding the scope of its powers under the District Clause is entitled to great deference.⁴⁹

Congress has used this same power to enact hundreds of other statutes affecting the “mechanics of government and administration” under which the District is treated like a state. These statutes range from the Federal Election Campaign Act,⁵⁰ the federal copyright statute,⁵¹ the Racketeer Influenced and Corrupt Organizations Act,⁵² to the federal civil rights and equal employment opportunity statute,⁵³ and the federal crime victim compensation and assistance statute.⁵⁴

C. Congress’s Statutory Provision Of Voting Rights To District Residents Would Be Permissible Under Tidewater And Would Not Impermissibly Disturb The Constitution’s Structural Framework

In Hepburn, the Court stated that the extension of diversity jurisdiction to District residents was a matter for legislative consideration, not that of the courts, and Congress legislated accordingly.⁵⁵ Congress likewise extended the protections of § 1983 to District residents after the Court in Carter held that these residents were not protected by the text of the 14th Amendment. In Alexander, the Court similarly held that the Constitution does not extend voting representation to District residents, but

⁴⁶ Id. at 602.

⁴⁷ Id. at 585.

⁴⁸ Id. at 585-6.

⁴⁹ Id. at 589.

⁵⁰ 2 U.S.C. § 431(12) (1994).

⁵¹ 17 U.S.C. § 101 (1994).

⁵² 18 U.S.C. § 1961(2) (1994).

⁵³ 42 U.S.C. § 2000(e)(i).

⁵⁴ 42 U.S.C. § 10603(d)(1) (1998).

⁵⁵ Hepburn, 6 U.S. at 453.

suggested that the plaintiffs should plead their case in “other venues.”⁵⁶ Just as Congress responded to the Court’s suggestions in Hepburn and Carter that legislation was appropriate, so should Congress act on the suggestion in Alexander that legislation is the proper and valid means to extend voting representation to District residents.

1. Congress’s Statutory Provision Of Voting Rights to District Residents Would Be Permissible Under Tidewater

“It is beyond cavil that ‘voting is of the most fundamental significance under our constitutional structure.’” Burdick v. Takushi, 504 U.S. 428, 433 (1992) (quoting Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979)). Consistent with Tidewater, Congress should have the authority to provide this “most fundamental” right to District residents, on par with that of State residents, so long as the extension of the franchise does not (i) invade “fundamental freedoms” or (ii) “reach for powers that would substantially disturb the balance between the Union and its component states.”⁵⁷

Neither limit would be threatened here. First, the extension of basic voting representation to District residents unquestionably *advances* the “fundamental freedoms” of District residents. It would accomplish that goal, moreover, without impinging upon the fundamental freedoms of other United States citizens. To the extent that the addition of the additional voting representative to the House and two to the Senate would dilute the voting power of citizens of other States, it does so in the very same way that voting power has routinely been diluted by the addition of new States to the Union (and, for that matter, by increases in the Nation’s population), and trenches on no vested rights.

Second, like their State counterparts, the District’s representatives would represent their constituencies. They would be expected to represent the District’s residents *vis a vis* the federal government in the same way a State’s representatives represent that State *vis a vis* the federal government. There is no reason to suppose that this representation would at all (much less “substantially”) “disturb the balance between the Union and its component states.”

2. Congress’s Statutory Provision Of Voting Rights To District Residents Would Not Impermissibly Disturb The Constitution’s Structural Framework

Extension of the franchise to District residents would pose no threat to the balance of powers among the States or between Congress and the other federal branches. While the Constitution structures individuals’ representational voting rights in terms of their States and intrastate districts, it is now well established that the right is a personal one belonging to each citizen as an individual. As the Supreme Court has explained, “the Framers envisioned a uniform national system, rejecting the notion that the Nation was a collection of States, and instead creating a direct link between the National Government and

⁵⁶ Alexander, 90 F.Supp. 2d at 72.

⁵⁷ Tidewater, 337 U.S. at 585.

the people of the United States.”⁵⁸ The role of the States within this federal representational structure is essentially functional; they were the “obvious and, actually, only political subdivisions capable together of conducting national elections.”⁵⁹ (As Chief Justice Marshall noted in reference to the respective roles of States and the people in the ratification of the Constitution, “[i]t is true, [the people] assembled in their several states – and where else should they have assembled?”⁶⁰) The District is now similarly capable of undertaking that role. Because the right to vote belongs to the individual, and not to the States, it should not trench upon any right of the States *qua* States to extend the right to citizens of the District.

To the extent that it may affect the balance of power among the States, the extension of the franchise to District residents would accomplish nothing that Congress could not equally accomplish by admitting the populated areas of the District as a new State, a change Congress could effect through a simple majority vote of both Houses.⁶¹ As the Supreme Court concluded in Tidewater, Congress’s unquestioned ability to accomplish a desired result by another means argues strongly for its power to accomplish that result directly: if Congress could admit the District as a State, there is no substantial reason to preclude it from exercising a lesser power to extend state-like congressional voting rights to district residents.⁶²

Indeed, residents of entities less similar to States have been granted voting representation, although it is also is not guaranteed by Article I. In Evans v. Cornman the Supreme Court held that residents of federal enclaves within States have a constitutional right to congressional representation, ruling that Maryland had denied its “citizen[s]’ link to his laws and government” by disenfranchising residents on the campus of the National Institutes of Health.⁶³ And through the Overseas Voting Act, Congress afforded Americans living abroad the right to vote in federal elections as though they were present in their last place of residence in the United States.⁶⁴ If residents of federal enclaves and Americans living abroad can thus be afforded voting representation, Congress should be able to extend the same to District residents.

⁵⁸ Term Limits, 514 U.S. at 803.

⁵⁹ Alexander, 90 F.Supp. 2d at 89 (Oberdorfer, J., dissenting).

⁶⁰ McCulloch v. Maryland, 17 U.S. 316, 403 (1819).

⁶¹ U.S. Const. art I, § 3.

⁶² While residents of territories lack the right to vote, the District’s residents are more akin to those of the fifty states than of the territories. Unlike residents of territories, District residents pay federal taxes, cast votes in presidential elections, and can be drafted into the military. Residents of territories have never been a part of the “people of the several states” and neither they nor their predecessors have ever possessed a constitutionally protected right to vote.

⁶³ 398 U.S. 419, 422 (1970).

⁶⁴ 42 U.S.C. § 1973ff-1 (1988).

D. Other Reasons That Have Been Advanced To Dispute Congress’s Authority To Provide District Residents Congressional Voting Representation Are Insubstantial

Certain commentators who believe that an amendment to the Constitution is required to provide District residents congressional voting representation emphasize that the District obtained a vote in the electoral college by way of a constitutional amendment and that Congress previously attempted unsuccessfully to provide the District congressional voting representation by the same route. Neither fact stands as a substantial barrier to a purely legislative solution.

In 1961, the Twenty-third Amendment extended representation in the Electoral College to District residents.⁶⁵ Congress’s resort to a constitutional amendment in that context does not demonstrate its inability to provide District residents congressional voting representation by statute. Even if Congress’s authority were the same in both contexts (a point that is not at all clear), Congress’s determination in 1961 to proceed by constitutional amendment casts no substantial light on the understanding of the Framers in 1787 whether an amendment would be necessary to affect such a change.

In 1978, a two-thirds majority approved a proposed constitutional amendment extending voting congressional representation to the District. The decision to pursue a constitutional amendment rather than simple legislation in these instances was a policy choice based on the consensus that an amendment would provide a quick and permanent solution to the disenfranchisement of District residents.⁶⁶ To the extent that some in Congress believed an amendment necessary to achieve the desired end, several other members of Congress believed that simple legislation was a valid alternative to a constitutional amendment.⁶⁷ In any event, Congress’s decision to proceed via a constitutional amendment has no bearing on Congress’ authority to achieve the same result legislatively, as “a failed constitutional amendment does not alter the meaning of the Constitution, and the views of a failed amendment’s congressional supporters have no well-established significance.”⁶⁸

II. CONCLUSION

The Supreme Court has stated that “[o]ur Constitution leaves no room for classification of people in a way that unnecessarily abridges [the right to vote].”⁶⁹ The exclusion of District residents from full voting congressional representation is unnecessary given Congress’ broad ability to legislate for the District pursuant to the District Clause. Congress has exercised this power to impose upon the District

⁶⁵ 25 U.S.C.A. § 25a (1994).

⁶⁶ Statement of Walter Smith before the Subcommittee on the District of Columbia, Committee on House Government Reform, 2002 WL 20319210 (July 19, 2002).

⁶⁷ Statement of Walter Smith before the Subcommittee on the District of Columbia, Committee on House Government Reform, 2002 WL 20319210 (July 19, 2002).

⁶⁸ Alexander v. Daley, 26 F.Supp. 2d 156, 160 (D.D.C. 1998); see also Alexander v. Daley, 90 F.Supp. 2d at 97-99 (D.D.C. 2000) (Oberdorfer, J., dissenting).

⁶⁹ Wesberry, 376 U.S. at 17.

both burdens and benefits shared by the 50 States. The Supreme Court has validated the extension of state-like treatment to the District, and emphasized that Congress's exercise of authority under the District Clause is entitled to great deference. For the reasons stated above, we conclude that Congress has the authority under the District Clause to extend congressional voting representation to the District's residents.