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Representation to Citizens of the District of Columbia:  
The Constitutionality of H.R. 1905**

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# **Congressional Authority to Extend Voting Representation to Citizens of the District of Columbia: The Constitutionality of H.R. 1905**

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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.<sup>1</sup>

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's laws, but they have no say in the enactment of those laws. Because Congress also has authority over local District legislation, District residents have no voting representation in the body that controls the local budget to which they must adhere and the local laws that they are required to obey. District residents thus lack what has been recognized by the Supreme Court as perhaps the single most important of constitutional rights.

Congress is presently considering legislation that would eliminate this longstanding anomaly. The House recently approved H.R. 1905, The District of Columbia House Voting Rights Act of 2007 ("D.C. Voting Rights bill"), which would give District residents a voting representative in the House.<sup>2</sup> The voting-rights bill, sponsored in various forms by Delegate Eleanor Holmes Norton (D-District of Columbia) and Representative Thomas M. Davis III (R-Virginia),<sup>3</sup> would permanently increase the size of the House by two members: one for the District and one for Utah, the state next in line for an additional seat.

Although the D.C. Voting Rights bill has garnered considerable bipartisan support, it raises legitimate constitutional questions and has been the subject of a lively academic and political debate. This issue brief considers the questions raised in that debate, including those raised in a recent Congressional Research Service ("CRS") report, and concludes that the proposed legislation is within Congress's authority.

Those who argue that Congress lacks the power to enact the proposed legislation (and must therefore proceed via retrocession or constitutional amendment) rely principally on the fact that the plain text of the Constitution provides voting representation to citizens of "States". That

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<sup>1</sup> *Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964).

<sup>2</sup> On May 1, 2007, Senator Lieberman (I-Conn.) introduced in the Senate a similar bill co-sponsored by Senator Hatch (R-Utah). See S. 1257, District of Columbia House Voting Rights Act of 2007.

<sup>3</sup> Previous versions of the D.C. Voting Rights Act were introduced in the 110<sup>th</sup> Congress as H.R. 328 (Jan. 9, 2007) and H.R. 1433 (Mar. 9, 2007).

is not, however, the end of the constitutional story. Congress and the federal courts have on a number of occasions treated the District as if it were a state within the meaning of particular constitutional provisions.<sup>4</sup>

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 support the view that those who drafted the Constitution did not, by guaranteeing the vote to state residents, intend to withhold the vote from District residents. 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. The relevant legal precedents suggest that this authority is sufficiently broad to give the District a voting representative in the House via simple legislation.

## I. The Framers' Intent

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.<sup>5</sup> There is no evidence that the Framers intended that those residents in areas that would later be ceded to form the national capital would forfeit their voting rights—much less that they intended to prohibit Congress from taking steps to ensure that those living in the capital would retain their right to vote.

When the District Clause was drafted, the eligible citizens of every state possessed the same voting rights. The problem of ensuring the continuation of these voting rights for citizens resident in the lands that would be ceded to create the federal district received little attention until after the Constitution was ratified and the District had been established.<sup>6</sup> As one commentator has explained, given the purpose of the District—"freedom from dependence on the states"—it is unlikely that the representation of future residents in the District was on the Framers' minds: "As long as the geographic location of the District was undecided, representation of the District's residents seemed a trivial question."<sup>7</sup> And "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 . . . ."<sup>8</sup>

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<sup>4</sup> See, e.g., *Loughran v. Loughran*, 292 U.S. 216, 228 (1934) (District is a state for purposes of Full Faith and Credit Clause, which provides that "[f]ull faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State"); *Stoutenburgh v. Hennick*, 129 U.S. 141 (1889) (constitutional prohibition against state laws that interfere with commerce "among the several States" applies equally to D.C. municipal statutes that interfere with commerce between the District and states); *Kronheim & Co. v. District of Columbia*, 91 F.3d 193, 198-99 (D.C. Cir. 1996) (although "D.C. is not a state," Commerce Clause and Twenty-first Amendment apply to the District).

<sup>5</sup> *Wesberry*, 376 U.S. at 9-19.

<sup>6</sup> Peter Raven-Hansen, *Congressional Representation for the District of Columbia: A Constitutional Analysis*, 12 *Harv. J. on Legis.* 167, 172 (1975).

<sup>7</sup> *Id.*

<sup>8</sup> *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.").

Moreover, it is doubtful that many would have adverted to the issue, even at the time of the District's creation, as few could have foreseen that the ten-square-mile home to 10,000 residents would evolve into the vibrant demographic and political entity it is today.<sup>9</sup>

Based on everything we know about the Framers, it seems quite implausible that they would have purposefully deprived the residents of their capital city of this most basic right. History suggests that the Constitution's failure to provide explicitly for District residents' voting representation in the House is the result of an inadvertent omission that can be remedied by congressional action. And the relevant legal precedents confirm that Congress may take such action pursuant to its District Clause power.

## II. The District Clause

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."<sup>10</sup> 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. The Framers' insistence on a separated and insulated federal district has been attributed to an incident that took place in 1783 while the Continental Congress was in session in Philadelphia.<sup>11</sup> 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. The State refused, and the Congress was forced to adjourn and reconvene in New Jersey. The episode 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.<sup>12</sup>

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<sup>9</sup> It appears that Alexander Hamilton may be a notable exception. During the New York ratifying convention, he proposed an amendment that would have explicitly provided representation in Congress if and when the District achieved a specified population. *See* 5 *The Papers of Alexander Hamilton* 189 (Harold C. Syrett & Jacob E. Cooke eds., Columbia Univ. Press 1962). Although Hamilton's proposed amendment was not adopted, there is no evidence of any opposition to it.

As one court has noted, the District's first urban planner, Pierre Charles L'Enfant—a friend of Alexander Hamilton—designed the city so that it could accommodate 800,000. *See Adams v. Clinton*, 90 F. Supp. 2d 35, 49 n. 24 (D.D.C. 2000) (citing *Home Rule: Hearings Before Subcomm. No. 6 of the Comm. on the District of Columbia*, 88th Cong. 347 (1963) (statement of Robert F. Kennedy, Attorney General)). L'Enfant was appointed by President George Washington in 1791, after the Constitution was ratified and after the land that is now the District had been chosen as the site for the nation's capital and ceded to the United States by Maryland and Virginia.

<sup>10</sup> U.S. Const. art. I, § 8, cl. 17.

<sup>11</sup> Kenneth R. Bowling, *The Creation of Washington, D.C.: The Idea and Location of the American Capital*, at 30-34 (1991).

<sup>12</sup> *See id.* at 34; *see also* *The Federalist* No. 43 (James Madison), at 289 (Jacob E. Cooke, ed. 1961) ("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

The District Clause grants Congress broad authority to create and legislate for the protection and administration of a distinctly federal district. Congressional power is at its zenith when it legislates for the District, surpassing both the authority a state legislature has over state affairs and Congress’s authority to enact legislation affecting the fifty states.<sup>13</sup> Although no case specifically addresses its authority to provide the District voting representation in the House, existing case law confirms the plenary nature of Congress’s power to see to the welfare of the District and its residents.

Two related Supreme Court cases confirm the breadth of Congress’s authority under the District Clause. In the first, *Hepburn v. Ellzey*,<sup>14</sup> the Court held that Article III, Section 2 of the U.S. Constitution—providing for diversity jurisdiction “between citizens of different States”—did not extend to suits between state residents and residents of the District of Columbia.<sup>15</sup> The Court found it “extraordinary,” however, that residents of the District should be denied access to federal courts that were open to aliens and residents in other states,<sup>16</sup> and invited Congress to craft a solution, noting that the matter was “a subject for legislative, not judicial consideration.”<sup>17</sup>

Nearly 145 years later, Congress accepted the *Hepburn* Court’s invitation, enacting legislation that explicitly granted District residents access to federal courts on diversity grounds. That legislation was upheld by the Court in *National Mutual Insurance Company v. Tidewater Transfer Company*. In *Tidewater*, a plurality held that, although the District is not a “state” for purposes of Article III, Congress could nonetheless provide the same diversity jurisdiction to District residents pursuant to its authority under the District Clause.<sup>18</sup> The two concurring justices went even further, arguing that *Hepburn* should be overruled and that the District should be considered a state for purposes of Article III.<sup>19</sup>

#### A. Significance of *Tidewater*

A recent report from the Congressional Research Service (“CRS report”) discusses *Tidewater* at length and adopts an unduly narrow view of the decision’s value as precedent for

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influence, equally dishonorable to the Government, and dissatisfactory to the other members of the confederacy.”).

<sup>13</sup> See *Palmore v. United States*, 411 U.S. 389, 397-98 (1973); *Nat’l Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 592 (1949) (District Clause grants Congress power over the District that is “plenary in every respect”); *Gibbons v. District of Columbia*, 116 U.S. 404, 408 (1886); see also Testimony of Hon. Kenneth W. Starr, House Government Reform Committee (Jun. 23, 2004); Viet Dinh and Adam H. Charnes, *The Authority of Congress to Enact Legislation to Provide the District of Columbia with Voting Representation in the House of Representatives* (2004), available at <http://www.dcvote.org/pdfs/congress/vietdinh112004.pdf>.

<sup>14</sup> 6 U.S. 445 (1805).

<sup>15</sup> *Id.* at 453.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> See 337 U.S. at 601-02.

<sup>19</sup> See *id.* at 604-06.

Congress's authority to enact voting-rights legislation.<sup>20</sup> The report emphasizes that no one opinion earned the votes of a majority of the Court. For present purposes, however, the fundamental import of *Tidewater* is that a majority found that Congress had the authority to accomplish an outcome that mirrors the goal and effect of the D.C. Voting Rights bill. The decision thus provides strong support for the position that Congress has authority to grant the District a House Representative via simple legislation.

Because Congress unquestionably had the greater power to provide District residents diversity jurisdiction in new Article I courts, the *Tidewater* plurality explained, it surely could accomplish the more limited result of granting District citizens diversity-based access to existing Article III courts.<sup>21</sup> Similarly, Congress's authority to grant the District full rights of statehood<sup>22</sup> (or grant its residents voting rights through retrocession) by simple legislation suggests that it may by legislation take the more modest step of providing citizens of the District with a voice in the House of Representatives.<sup>23</sup>

It is likely that the two concurring justices, who found the District was a "state" for purposes of diversity jurisdiction, would also have concluded that the District is a "state" for purposes of voting representation. Observing that the Constitution had failed explicitly to accord District residents access to federal courts through diversity jurisdiction, Justice Rutledge remarked: "I cannot believe that the Framers intended to impose so purposeless and indefensible a discrimination, although they may have been guilty of understandable oversight in not providing explicitly against it."<sup>24</sup> Having concluded that the Framers did not intend to deprive District residents of access to the federal courts, Justice Rutledge reasoned that the term "state" should include the District of Columbia where it is used with regard to "the civil rights of citizens."<sup>25</sup> Access to the federal courts via diversity jurisdiction, he concluded, fell within that category of usage. Contrary to the view expressed in the CRS report,<sup>26</sup> the same is of course true

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<sup>20</sup> See CRS Report for Congress: The Constitutionality of Awarding the Delegate for the District of Columbia a Vote in the House of Representatives or the Committee of the Whole (Jan. 24, 2007) ("CRS Report") 10-17, available at [http://openers.cdt.org/rpts/RL33824\\_20070124.pdf](http://openers.cdt.org/rpts/RL33824_20070124.pdf).

<sup>21</sup> 337 U.S. at 597-99.

<sup>22</sup> See U.S. Const. art. IV, § 3, cl. 1.

<sup>23</sup> Indeed, Congress has granted voting representation to other categories of citizens who do not reside in a "state". 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. 398 U.S. 419, 422 (1970). 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. See 42 U.S.C. § 1973ff-1.

<sup>24</sup> 337 U.S. at 625.

<sup>25</sup> *Id.* at 623.

<sup>26</sup> See CRS Report at 13-14. We note that CRS takes contradictory positions as to whether voting representation in the House involves a "fundamental right" to support its thesis that Congress lacks the power to provide District residents voting representation. CRS first asserts that the D.C. Voting Rights bill concerns not the rights of individual citizens, but the "distribution of power among political structures." Based on that characterization, CRS concludes that the concurring justices would not have thought that the district was a "state" for purposes of representation. CRS then contends that the bill does involve a "fundamental right," a characterization that serves

with respect to the right conferred by the D.C. Voting Rights bill, as the right to vote is among the most fundamental of civil rights; in the context of congressional elections, it is a right not of the States, but of the people “in their individual capacities.”<sup>27</sup> Based on Justice Rutledge’s reasoning, the *Tidewater* concurring justices surely would have upheld Congress’s determination to redress the denial of voting representation to District residents.<sup>28</sup>

Finally, it is not clear that the *dissenters* would have rejected the D.C. Voting Rights bill as exceeding Congress’s authority. The four dissenting justices, although divided between two separate opinions, emphasized the same point as central to their analyses: As Justice Frankfurter put it, “[t]here was a deep distrust of a federal judicial system, as against the State judiciaries, in the Constitutional Convention.”<sup>29</sup> It was that distrust of federal power that engendered fierce debates about the scope of the federal judiciary, and resulted in its careful enumeration in Article III. In view of the fact, made clear by the debates, that the Constitution’s defenders had to “justify[] every particle of power given to federal courts,”<sup>30</sup> the four dissenting justices thought it inconceivable that the Framers would have bestowed upon Congress in Article I a supplemental power to expand the federal judiciary “whenever it was thought necessary to effectuate one of [Congress’s] powers.”<sup>31</sup>

Thus, the driving force behind the dissenters’ conclusion that the District Clause did not permit an expansion of federal jurisdiction had little to do with the scope of the District Clause and everything to do with the character of the Article III power at stake. Those concerns are not present in the context of voting representation for citizens of the District. As noted above, voting representation is a right belonging to the individual citizens of the District, not to the District as seat of the federal government. The federalism concerns triggered by congressional expansion of the federal judiciary are not implicated by legislation that effects the modest, but important,

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its argument that the *Tidewater* plurality might have thought such legislation to be beyond Congress’s authority under the District Clause.

We think that these characterizations miss the point and ascribe an unintended meaning to the plurality’s passing observation about fundamental rights. Although the plurality noted that the dispute over diversity jurisdiction in *Tidewater* did not “involve” fundamental rights, it explained in the next paragraph that the critical distinction was between congressional enactments that do and do not “*invade* fundamental freedoms or *substantially* disturb the balance between the Union and its component states.” 337 U.S., at 585-86 (emphasis added). The plurality indicated that congressional enactments that invade fundamental freedoms or substantially disturb the federal-state balance of power would not be entitled to judicial deference. The D.C. Voting Rights bill triggers neither of those concerns. If the grant of voting representation involves a “fundamental right,” then the bill would effect an expansion, not an invasion, of that right. And the addition of the single additional seat by the consent of the House and Senate would not “substantially disturb” the relationship between the states and the federal government.

<sup>27</sup> *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 839, 844 (1995) (Kennedy, J., concurring) (quoting The Federalist No. 2 (James Madison), at 38-39 (C. Rossiter ed. 1961)) (internal quotation marks omitted).

<sup>28</sup> Indeed, because interpreting the term “state” to include the District for purposes of *voting representation* would not have required overruling *Hepburn*, Justice Rutledge’s opinion might have garnered additional votes if that issue had been presented to the *Tidewater* Court.

<sup>29</sup> *Tidewater*, 337 U.S. at 647 (Frankfurter, J., dissenting).

<sup>30</sup> *Id.* at 635 (Vinson, J., dissenting).

<sup>31</sup> *Id.*

result of meaningful House representation for the citizens of the United States who reside in the District of Columbia.

### B. *Adams v. Clinton*

In 2000, a three-judge panel of the United States District Court for the District of Columbia addressed D.C. voting representation in *Adams v. Clinton*.<sup>32</sup> Opponents of the D.C. Voting Rights bill have made much of a statement in the *Adams* opinion to the effect that the District is not “a state for purposes of the apportionment of congressional representatives.”<sup>33</sup> But the question whether *Congress* could affirmatively provide for such representation through legislation was not before the *Adams* court. That case involved D.C. residents’ claim that the Constitution *requires* that the District be treated as a state for purposes of representation in the House and Senate.<sup>34</sup> And, in a passage strikingly similar to that in *Hepburn*, the *Adams* court invited the plaintiffs to seek congressional representation through “other venues,” suggesting (as *Hepburn* did) that Congress may provide the right legislatively.<sup>35</sup>

### III. Other Concerns

The CRS report identifies two concerns unrelated to Congress’s constitutional authority to enact the D.C. Voting Rights bill, which have also been raised by opponents of the bill. First, the report suggests that granting the District voting representation in the House would open the door to claims by residents of the various federal territories for their own Representatives.<sup>36</sup> It also contends that “holding that the District could be treated as a state for purposes of representation would arguably also support a finding that the District could be treated as a state for the places in the Constitution [that] deal with other aspects of the national political structure.”<sup>37</sup> These concerns are unfounded. Passage of the D.C. Voting Rights Act would not have any effect on federal territories or their residents. Nor would it necessarily support an argument that the District is a “state” in the context of constitutional provisions governing the national political structure.

#### A. Granting the District a House Representative Would Not Affect the Territories

As a constitutional and historical matter, territories occupy a position fundamentally different from the District in the overall schema of American Federalism and have long enjoyed disparate rights and privileges. Congress’s authority over the territories stems from an entirely

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<sup>32</sup> 90 F. Supp. 2d 35 (D.D.C. 2000). The Supreme Court summarily affirmed without opinion. *Alexander v. Mineta*, 531 U.S. 941 (2000).

<sup>33</sup> See, e.g., Senate Republican Policy Committee, *D.C. Voting Rights: H.R. 1433 Presents More Problems Than It Resolves* 4, available at [http://rpc.senate.gov/\\_files/032007DCVotingRightsSN.pdf](http://rpc.senate.gov/_files/032007DCVotingRightsSN.pdf) (quoting *Adams*, 90 F. Supp. at 50); see also CRS Report at 4-5, 11.

<sup>34</sup> 90 F. Supp at 47.

<sup>35</sup> *Id.* at 72.

<sup>36</sup> CRS Report at 17.

<sup>37</sup> *Id.*

different constitutional provision, which empowers Congress to “dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.”<sup>38</sup> Although this provision unquestionably grants Congress broad authority to manage and legislate over federal lands, the Framers’ use of two different clauses suggests that they intended the District and the various territories to be constitutionally distinct.<sup>39</sup> The Supreme Court has recognized as much, specifically noting that, “[u]nlike either the States or Territories, the District is truly *sui generis* in our governmental structure.”<sup>40</sup> Accordingly, the case law that supports Congress’s power to provide District residents congressional voting representation cannot be applied uncritically to support the same argument for the territories.

Moreover, unlike territorial residents, but like the residents of the several states, District residents bear the full burden of federal taxation and military conscription. Granting the District a House Representative readily flows from these obligations; it is both incongruous and constitutionally significant that District residents lack an equal voice in the legislative body that can spend their tax dollars and send them off to war. Further, while birth in the District accords a person the same right to automatic U.S. citizenship that attaches to birth in the 50 states, those born in some territories are allotted only U.S. *nationality*, requiring only basic fealty to the United States, and not U.S. citizenship.<sup>41</sup> And unlike the territories, the District was part of the original 13 states; until the Capital was established in 1801, residents of what is now the District did enjoy full voting representation in the Congress.

Finally, unlike residents of the District, territorial residents do not vote in U.S. Presidential elections. Although we do not think a constitutional amendment is necessary to secure voting representation for the District in the House, the enactment of the 23rd Amendment demonstrates the several states’ clear and unequivocal agreement that they share a historical and cultural identity with residents of the District, which occupies a unique position in the federal system. This is plainly a tradition the states do not share with the territories. Congress’s plenary authority to take broad action for the District’s welfare, including and up to granting it a seat in the House of Representatives, is part of this shared tradition.

Taken together, these differences between the territories and the District render highly unlikely the suggestion that granting voting rights to District residents would lead, as a legal or policy matter, to granting similar privileges to residents of the U.S. territories.

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<sup>38</sup> U.S. Const. art. IV, § 3, cl. 2.

<sup>39</sup> See Samuel B. Johnson, *The District of Columbia and the Republican Form of Government Guarantee*, 37 *How. L.J.* 333, 349-50 (1994) (“The Territories Clause is minimally relevant to the District. The existence of a separate District Clause strongly suggests that the District is not among the territories covered by the Territories Clause. Moreover, courts generally have agreed that the Territories Clause does not apply to the District.”) (citing *O’Donoghue v. United States*, 289 U.S. 516, 543 -51 (1939) and *Dist. of Columbia v. Murphy*, 314 U.S. 441, 452 (1941)). Cf. *Dist. of Columbia v. Carter*, 409 U.S. 418, 430-31 (1973) (comparing Congress’s exercise of power over the District and territories, noting federal control of territories was “virtually impossible” and had little practical effect).

<sup>40</sup> *Carter*, 409 U.S. at 432.

<sup>41</sup> See 8 U.S.C. §§ 1102(a)(29) and 1408 (those born in the “outlying territories” of American Samoa and Swain Island are eligible for U.S. nationality but not U.S. citizenship).

B. Granting the District a House Representative Would Not Lead to a Grant of Other Privileges Inhering in Statehood

The CRS report offers in passing another “slippery slope” argument, suggesting that legislative creation of a House Representative for the District would provide support for an argument that “Congress could . . . authorize the District to have Senators, Presidential Electors, and perhaps even the power to ratify [a]mendments to the Constitution.” The report does not dwell on these concerns, with good reason. Regardless of whether Congress could have enacted legislation to provide the District representation in the Electoral College, District residents already have that representation by virtue of the 23rd Amendment.<sup>42</sup> Any impetus to providing the District the power to ratify amendments would face grave constitutional hurdles, as that is a power of the states *qua* states, not a right of their individual citizens.<sup>43</sup> And the question whether Congress might ever attempt to provide District residents representation in the Senate is entirely speculative.

IV. Constitutionality of the “At-Large” Provision

The D.C. Voting Rights Act would increase the size of the House by two members: One would go to the District and the other to the state identified as next entitled to an additional Representative. The next-entitled state is directed to elect its additional Representative at large, rather than creating an additional single-member district. Certain members of Congress have questioned whether this provision would violate the “one person, one vote” principle set forth by the Supreme Court in *Wesberry v. Sanders*.<sup>44</sup> In our view, it would not.<sup>45</sup>

In *Sanders*, the Court struck down a Georgia apportionment statute that created a congressional district that had two-to-three times as many residents as Georgia’s nine other congressional districts. The Court held that “the command of Article I, Section 2 [of the Constitution], that Representatives be chosen ‘by the People of the Several States’ means that as nearly as is practicable one man’s vote in a congressional election is to be worth as much as another’s.”<sup>46</sup> Because “[a] single Congressman represents from two to three times as many Fifth District voters as are represented by each of the Congressmen from the other Georgia congressional districts,” the Court explained, the statute “contracts the value of some votes and

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<sup>42</sup> That the District obtained a vote in the electoral college by way of a constitutional amendment 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), *see, e.g.*, Dinh and Charnes, *supra* note 13, at 20-21, Congress’s determination in 1961 to proceed by constitutional amendment casts no substantial light on the Framers’ understanding as to whether an amendment would be necessary to affect such a change.

<sup>43</sup> *See* U.S. Const. art. V.

<sup>44</sup> 376 U.S. 1 (1964).

<sup>45</sup> The Congressional Research Service recently weighed in on this aspect of the bill. *See* L. Paige Whitaker, CRS Report for Congress, Congressional Redistricting: The Constitutionality of Creating an At-Large District (Mar. 20, 2007), *available at* [http://openocrs.cdt.org/rpts/RS22628\\_20070320.pdf](http://openocrs.cdt.org/rpts/RS22628_20070320.pdf). It too concludes there is no constitutional problem with the at-large provision.

<sup>46</sup> 376 U.S. at 7-8.

expands that of others.”<sup>47</sup> An apportionment plan thus triggers “one person, one vote” concerns when congressional districts within a state contain different numbers of residents, diluting the voting power of residents in the more populous district or districts.<sup>48</sup>

Applying those principles, the proposed temporary “at large” district in the next-entitled state would not violate the “one person, one vote” requirement. Suppose, for example, that Utah is the state entitled to the additional seat. Utah currently has three congressional districts. If Utah were to hold an at-large election for a new fourth seat, voters could cast a vote in their existing district *and* in the state-wide election for the fourth seat. Although the proposed state-wide “at large” district would necessarily contain more residents than the other districts, the establishment of that “at large” district would create no constitutional dilution concerns: Each person’s vote in the “at large” district would have equal influence, and the opportunity to cast that vote would not alter in any way the value of that person’s vote in her own smaller district.<sup>49</sup>

Nor should it matter, for constitutional purposes, that each Utah resident would vote in two elections, while residents of other states with single-member districts would vote in one. Although the Supreme Court has left open the possibility that the “one person, one vote” principle could be applied to the apportionment process, the Court has held that Congress is entitled to substantial deference when it makes apportionment decisions.<sup>50</sup> This is so at least in part because of the relative difficulty of Congress’s task. As the Court explained in *Department of Commerce v. Montana*, Congress’s “apparently good-faith choice of a method of apportionment of Representatives among the several States ‘according to their respective Numbers’ commands far more deference than a state districting decision that is capable of being reviewed under a relatively rigid mathematical standard.”<sup>51</sup> In a later case, the Court revisited its decision in *Montana* and noted that “the Constitution itself, by guaranteeing a minimum of one representative for each State, made it virtually impossible in interstate apportionment to achieve

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<sup>47</sup> *Id.* at 7.

<sup>48</sup> See also *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (“an individual’s right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State”); *Vieth v. Jubelirer*, 541 U.S. 267, 343 (2004) (“For 40 years, we have recognized that lines dividing a State into voting districts must produce divisions with equal populations: one person, one vote. Otherwise, a vote in a less populous district than others carries more clout.”) (Souter, J., dissenting) (internal citation omitted).

<sup>49</sup> The use of an at-large or multimember district may, of course, raise constitutional concerns where its purpose is to “minimize or cancel out the voting strength of racial or political elements of the voting population.” *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965). In such cases, minority vote dilution may be the result of multimember districting combined with other characteristics of the particular election structure at issue—for example, a requirement that candidates run for a specific designated position (a “post” requirement) or a requirement that voters select a full slate of candidates. See generally Katharine I. Butler, *Constitutional and Statutory Challenges to Election Structures: Dilution and the Value of the Right to Vote*, 42 La. L. Rev. 851, 863-69 (1982). It does not appear that the creation of one temporary at-large voting district in Utah would raise any such minority-vote-dilution concern.

<sup>50</sup> See *Dep’t of Commerce v. Montana*, 503 U.S. 442, 464 (1992).

<sup>51</sup> *Id.*

the standard imposed by *Wesberry*.<sup>52</sup> Accordingly, the one-person-one-vote principle is arguably inapplicable to interstate voting comparisons.

Second, and in any case, the proposed at-large election would not give residents of the state more or less voting power than the residents of states with single-member districts. A simple example illustrates why this is so. Suppose that State A and State B have roughly the same population and are each entitled to four Representatives. State A holds an at-large election for all four of its representatives, while State B divides its Representatives and voters into four districts. State A's state-wide district would have a population four times the size of each district in State B. As compared to the single-district voter in State B, the "at-large" voter in State A has a one-fourth interest in each of four representatives. The single-district voter in State B has a whole interest in one representative. But in both scenarios, each voter has, in the aggregate, one whole voting interest. Similarly, as compared to a state with four single-member districts, the voters in Utah's existing three districts would have proportionately less influence in the election of the representative from their own district, but would gain a fractional interest in the state's at-large representative. In the aggregate, Utah residents would have no more (and no less) voting power than residents of any other state.

## V. Conclusion

As the Court noted in *Tidewater*, the District was little more than a "contemplated entity" at the time the Constitution was ratified, and "[t]here is no evidence that the Founders, pressed by more general and immediate anxieties, thought of the special problems of the District of Columbia...."<sup>53</sup> But the District now has a population of nearly 600,000 people—greater than the population of all of the thirteen original states. Congress may and should act to ensure those residents the same substantive representation that the Framers assured their fellow citizens. Far from being prohibited by the Constitution, the D.C. Voting Rights bill is legislative action that the Framers would have expected and embraced as fulfilling their democratic vision for the Nation.

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<sup>52</sup> See *Wisconsin v. City of New York*, 517 U.S. 1, 14-15 (1996).

<sup>53</sup> *Tidewater*, 337 U.S. at 587. See also Raven-Hansen, *supra* note 6, at 172 (noting that "[t]he question of the representation of the District received little express attention during the course of drafting [the District clause], or in subsequent ratification debates....").